The Evolution of Devolution
Reflections on the Operation of Our Legislative System

Daran Hill, Huw Edwards and Leigh Jeffes

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Introduction

The aim of this Platform pamphlet is to offer an assessment of the first year of the National Assembly for Wales’ new legislative powers under the Government of Wales Act 2006. Our reflections are based on an arms-length critique of the Act as it has been and is being implemented. In part it is a response to criticisms that the National Assembly’s new law-making process is “a mess” and in urgent need of reform.

The Archbishop of Wales has implied that the new legislative process following the Government of Wales Act 2006 is complex, confusing and unworkable.¹ This seemed to reflect the general media coverage of the new system fashioned since the Act. Respected bloggers and commentators have also shared that view, including the pro-devolution former Conservative AM Glyn Davies who said recently that: “Ever since the Government of Wales Act 2006 was passed, I warned that it is ‘a constitutional crisis waiting to happen’.”² Quite clearly, if the effectiveness of the new system was measured in external comment alone, the new legislative process of Wales would be found very wanting indeed.

We feel there is surely more to be said in favour of the current settlement and it is important to highlight the strengths and successes of the Act. That is not to say the system is flawless, but rather that there is more to it than flaws. While we agree that the new process is not yet widely understood, we do not agree that it is unworkable or that there is a “constitutional crisis”. We aim to draw on the evidence of the National Assembly’s first year of being a legislature to argue that it has most of the characteristics of a Parliament and has passed, and is passing, primary legislation for Wales that is contributing to a divergence of policy from other parts of the UK. From our perspective, politicians, officials and those in wider civic society in Wales are cautiously coming to terms with the new legislative process.

We are united with the Archbishop of Wales, Glyn Davies and others in our desire to see devolution succeed. We support the aim of a Parliament for Wales with full legislative powers but recognise the legal requirement under the Act that this must be approved in referendum of the Welsh electorate. In the meantime, our focus lies on what is achievable now.
The Government of Wales Act 2006

The Government of Wales Act was the culmination of a series of policy discussions that included the Report of the Richard Commission on to the operation and powers of the Assembly; the report of the Assembly Legislation Committee and UK Government’s White Paper “Better Governance for Wales” in 2005.

The cross party Richard Commission was appointed during the Labour-Liberal Democrat Coalition Government of 2000-03. The major weakness identified by Richard Commission was the lack of legislative powers. It recommended full legislative powers by 2011. The UK Government recognised the need for greater powers but sought to avoid another referendum for a full Parliament fearing the vote would be lost. Secretary of State for Wales Peter Hain in collaboration with Rhodri Morgan agreed on a novel way forward that was outlined in the White Paper Better Governance for Wales. They proposed a fast track process of giving the Assembly the power to make primary legislation to be called ‘Assembly Measures’ through passing Orders in Council in Parliament. The crucial passage in the White Paper stated:

“The Government proposes the creation of a wider power which would allow Her Majesty to make Orders in Council to give the Assembly powers, in specified areas of policy, to modify – i.e., amend, repeal or extend – the provisions of Acts of Parliament in their application to Wales, or to make new provision.”

This power was arguably far more extensive than many commentators have anticipated. In practice it would allow for the passing of primary legislation, Measures, in any devolved area provided the Assembly had a legislative competence to do so. The Matters which the Assembly has competence are listed under Schedule 5 of the Government of Wales Act.

That competence should come directly from Acts of Parliament (Framework Powers’) or it could be conferred through an Order in Council or Legislative Competence Order (LCO) as it would be known as. LCOs would have to be approved by both the Assembly and by both Houses of Parliament before being approved by ‘Her Most Excellent Majesty in Council’ i.e. the Privy Council – which remains the oldest legislative forum in the UK.

For some critics this was seen as the Assembly ‘having to go cap in
hand to Westminster’ for permission to pass law for Wales; for others it was a 'cunning constitutional device’ giving Wales a Parliament ‘through the back door’ or an 'interim stage' before Wales had a Parliament on the Scottish model. For observers of the Northern Ireland situation, however, the Order in Council process was not novel as it had been regularly used by the UK Government in order to pass legislation during the suspension of the Northern Ireland Assembly.

The new constitutional arrangements were formalised in the Government of Wales Act 2006 which essentially replaced and extended the Act of 1998. The main changes were:

- Legal separation of the National Assembly from the Welsh Assembly Government (WAG) (Parts 1 and 2)
- Limited legislative powers to the National Assembly (Part 3)
- Changes to the voting system to prevent constituency candidates also standing as regional list candidates (Part 1)
- Provision for a Parliament subject to a referendum (Part 4)

The Act is a comprehensive piece of legislation that outlines the respective composition and roles of the Assembly and the Welsh Assembly Government (WAG) and the new legislative process and also prescribes the conditions for a future Parliament with full lawmaking powers. It could be argued that the Act is the nearest Wales has come to having a Written Constitution.

In terms of legislative powers, there are two key parts to the Government of Wales Act 2006, known as Part 3 and Part 4 respectively. It is the former Part which captures our attention in this pamphlet.

The Government of Wales Act 2006 Part 3 has already given legal competence to the Welsh Assembly Government to pass laws through the National Assembly on almost 40 different types of issue, including the boundaries of local authorities, the school curriculum, redress against the NHS and the provision of education and training to pupils with additional needs. After just eighteen months or so of operation, these are real steps forward which merit measured consideration. We are in agreement with First Minister Rhodri Morgan who said: “For the first time in 500 years the people of Wales are now able to create laws to help improve their day-to-day lives.” Even those who criticise the
nature of the law-making powers conferred cannot deny that.

A Parliamentary System?

First we should consider whether the National Assembly has the characteristics of a parliamentary system. How does the Assembly compare with Westminster?

In the table below we compare the two institutions against six key parliamentary functions - legislation, scrutiny, providing personnel for government, control of tax and expenditure, forum for national debate and the redress of grievances.

<table>
<thead>
<tr>
<th>Functions</th>
<th>National Assembly</th>
<th>UK Parliament</th>
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<tr>
<td>Legislation</td>
<td>Passes Assembly Measures</td>
<td>Passes Acts of Parliament</td>
</tr>
<tr>
<td></td>
<td>Approves certain secondary legislation</td>
<td>Approves certain secondary legislation</td>
</tr>
<tr>
<td>Scrutiny of the Executive</td>
<td>Scrutiny Committees + Assembly Questions (AQs)</td>
<td>Select Committees + Parliamentary Questions (PQs)</td>
</tr>
<tr>
<td>Provide Personnel for</td>
<td>Minsters appointed from AMs</td>
<td>Ministers appointed from MPs and Peers</td>
</tr>
<tr>
<td>Government</td>
<td>Approves Budget</td>
<td>Approves expenditure</td>
</tr>
<tr>
<td></td>
<td>No tax making powers</td>
<td>Tax making powers</td>
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<tr>
<td>Control of Tax and</td>
<td>Forum for debates on Wales</td>
<td>Forum for national debate</td>
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<tr>
<td>Expenditure</td>
<td></td>
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<tr>
<td>Forum for National Debate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Redress of Grievances</td>
<td>Redress through AMs</td>
<td>Redress through MPs</td>
</tr>
</tbody>
</table>

A comparison of the two systems shows that the similarities are far greater than the differences. The Assembly performs most of the key functions of a parliamentary system. It passes primary legislation - Assembly Measures - in devolved areas provided the competence has been given through LCOs or UK Bills. When passed, Assembly Measures have all the force of Acts of Parliament. Measures can amend, extend or repeal Acts of Parliament relating to Wales or make new provision.
Before the Government of Wales Act 2006 the Assembly dealt only with secondary legislation. That function, as in London, is now in the hands of Ministers, though the Assembly may approve certain pieces of secondary legislation under the ‘affirmative or negative resolution procedure’.

With respect to the scrutiny function, the Assembly has adopted a new system of committees which are more akin to the Westminster model. Unlike the previous Assembly subject committees, the new Scrutiny Committees act much more like Westminster’s Select Committees. A key difference is that Ministers are now excluded from being members of the Scrutiny Committees. Holding government to account through Written and Oral questions to Ministers is similar in Wales to the process found in Westminster.

Other similarities between Wales and Westminster are that Government Ministers have to be appointed from the elected Members (except in the case of Counsel General who may be appointed externally). Although the Assembly does not have tax making powers it does approve the Budget, currently £14bn distributed from the Treasury via the Wales Office. The Assembly also acts as a forum for debate on matters relating to Wales. Members also act in support of constituents’ grievances just as MPs do in Westminster.

The other key difference is that the Assembly exists as a unicameral system i.e. just one “House”, compared to the bicameral system of Westminster where the Commons is regarded as the elected preeminent House with the House of Lords acting as a revising chamber. In practice this means that the Assembly is more similar to the Scottish Parliament and Northern Ireland Assembly in that Measures will have all their stages considered by the Assembly alone.

**Utilising and scrutinising “Framework Powers”**

Framework Powers are the lesser known but more often used way by which the Assembly has accrued legislative powers under Schedule 5. The Guidance on Devolution suggests that Framework Powers should be the first consideration for conferring new powers. We call this Route 1. If no convenient Parliamentary Bill is available, then the LCO process should be used – Route 2.
The way the Assembly has accrued powers or Matters for Schedule 5 over the past couple of years illuminates this issue of complexity too. There are now approximately 30 “live” Matters in Schedule 5. Of particular relevance is that of these only 2 have come through the LCO process (Route 2). The others have mainly been conferred by “Framework Powers” in Acts of Parliament (Route 1). Although The White Paper “The Governance of Wales” dealt in some detail with the proposed LCO process, little reference was made to the ability to add to Schedule 5 via Route 1.

It seems now that “Framework Powers” or “Measure Making clauses in UK Bills” (whichever terminology you prefer), has now become the standard procedure for devolving power. Indeed, the UK Government has stated this is the preferred method of devolving legislative competence. This has been another clear example of how things have not necessarily panned out as anticipated – though arguably for the better since it has meant Wales has until now accrued powers at a much faster rate through Acts of Parliament than by LCOs alone. Such a method of accruing powers is, nevertheless, limited by not only the need for successful negotiation between the UK Government and the Welsh Assembly Government; but also by the long title of the Bill in question, which sets parameters for the devolution which is possible. In some cases, it could be argued, the use of Bills to confer powers has been more straightforward because it could be argued that a clause containing framework powers in a Bill is constrained by the long title of the Bill and therefore more tightly drawn. As a result, such a clause seems to get the agreement of the UK Government reasonably quickly and has proven to be a relatively speedy method of transferring defined powers.

However, there is a key issue which has arisen due to the use of the “Framework powers” process. The Subordinate Legislation Committee of the Assembly pinpoints it in its current review of how it discharges its responsibilities. Some of these relate to the “liaison between the Welsh Assembly Government and the UK government in relation to UK Bills”
and “how to ensure effective and timely consideration of UK Bills by the Committee.”

With so many new Matters being added to Schedule 5 through this method, the processes of engagement at the National Assembly must perhaps be improved in respect of “Measure Making powers”. This approach would not seek to duplicate the role of MPs (some of them from Wales), who sit on Committees considering Bills which confer such powers, but to provide a clearer avenue for dialogue between Parliament with the Assembly on UK Bill clauses which seek to confer power on them.

Without much more clarity in terms of identifying the content of such clauses in UK Bills, it will be very difficult for the Assembly to engage properly. As Marie Navarro argues in her latest legislative report:

“There is no machinery available whereby the Assembly can liaise directly with either the Wales Office, Whitehall or Parliament in the formulation of proposals in draft Bills giving powers to WAG.”

This is an area where urgent attention is needed to make sure the process matches the promise of the system.

**Stages of an LCO**

The number of stages an LCO must pass through has evolved as time has progressed. There has also been an elongation of the time spent at some stages, particularly the early ones. A valuable contribution to analysing the system was produced in July 2008 when Devolution Guidance Note 16: Orders in Council was issued under section 95 of the Government of Wales Act 2006 by the Ministry of Justice. DGN 16, as it is called, classifies six stages in the process:

- Stage 1: Agreeing the proposed Order
- Stage 2: Pre-Legislative Scrutiny
- Stage 3: UK Government and Welsh Assembly Government clearance of the draft Order
- Stage 4: Formal approval by the National Assembly for Wales
- Stage 5: Parliamentary approval
- Stage 6: Approval by Her Majesty in Council and coming into force

Within this six Stage approach it could also be argued that some of the Stages are subject to sub-stages too, such as Stage 1 which could cover the formal process of introducing the LCO in concept form or as a
first draft in the Assembly; and also the process of negotiation with relevant Whitehall departments (which has been termed Whitehall clearance).

While this new legislative process was still in concept stage, it is perhaps true that nobody expected the first three Stages to take so long. Indeed, the extent of pre-legislative scrutiny can seem to be endless even for an LCO such as the one on Additional Educational Needs, which began slowly but speeded up through the latter Stages of its consideration. This first LCO has seemed to set the path and pace for others. DGN 16 also states in paragraph 31 that: “UK Government Departments are most closely engaged in the first three Stages of this process.” It is perhaps no coincidence therefore that these Stages have been the most difficult for an LCO to navigate. After all, the often simultaneous involvement of Governments, legislatures and officials at both ends of the M4 corridor is bound to be the most complex and time consuming part of the process.

The Interim System?

Much has also been said and written about the supposedly transient nature of the current legislative system. One of the most elegant and loaded descriptions of it comes from Marie Navarro of Cardiff Law School and the Editor of Wales Legislation Online, who describes it in her work as the “interim system”, borrowing a phrase first used in the White Paper in 2005. That phrase seems to sum up one of the big issues around the current legislative system. To some this may indeed be a staging post (interim), to others it might be the end point. But other aspects are clearer to assess.

When it comes to devolution, “the arrow of history” is clearly pointing in the direction of more powers exercised for Wales in Wales. The story of the last fifty years has been one of increasing capability for policy divergence between Wales and England. When Ron Davies said famously that devolution was “a process not an event”, he was of course right. But it is not true to say that that process began with the Government of Wales Act 1998 or the referendum of 1997. In reality power through executive responsibilities had been devolved to Wales decades earlier. The story of the last decade is more one of the development of a democratic and stronger civic context for those powers. It is a process, and a dynamic one at that.
Some people may prefer no Assembly at all. Thankfully for those of us who have authored this pamphlet, they seem, according to the most recent research, to be a dwindling breed. The National Assembly’s recent Survey “Public Attitudes”\(^8\) showed that those who wished to see the Assembly abolished as a percentage of the Welsh public had fallen from 36.9\% in 1997 to just 15.0\%. Since the Survey was, by its own methodology, “the largest survey on public attitudes to politics ever conducted in Wales”, its findings cannot be ignored.

Others of course may prefer a more powerful Assembly, either on the Richard Commission model or in parallel with Scotland or on some other constitutional footing. Once again, the National Assembly’s “Public Attitudes” Survey is helpful here in illustrating the range of options chosen by the electorate. But ultimately the speed of movement to the next phase of devolution may be a matter that won’t be resolved quickly. The referendum promised in the Government of Wales Act 2006 before we might move to fuller powers may or may not happen before 2011 (depending on who you speak to). Equally importantly, the referendum may or may not be won when it is held. Again, this seems to be reflected in the less than unassailable lead for stronger powers shown in the “Public Attitudes” survey.

The current constitutional arrangements might therefore be with us for some time to come. The potential durability is therefore hard to predict. For that reason alone, the current system merits proper analysis and cannot be dismissed.

**Number and Range of LCOs**

It is perhaps appropriate to reflect on the number of legislative items passing through the new system, which should give a clue perhaps as to its fitness of purpose. Having discounted any LCOs that have not received permission to proceed beyond concept stage, we see the following:
<table>
<thead>
<tr>
<th>No.</th>
<th>Source</th>
<th>Purpose</th>
<th>Status</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>WAG</td>
<td>Additional Learning Needs</td>
<td>Made on the 9th of April. In Force SI. 2008/1036</td>
</tr>
<tr>
<td>2</td>
<td>WAG</td>
<td>Environmental Protection &amp; Waste Management</td>
<td>Pre-legislative scrutiny by Committee in Cardiff – completed – but report not laid. It is currently being redrafted. At Stage 3</td>
</tr>
<tr>
<td>3</td>
<td>WAG</td>
<td>Vulnerable Children</td>
<td>Has completed all pre-legislative scrutiny and been passed by the National Assembly. It now awaits formal approval at Westminster. At Stage 5</td>
</tr>
<tr>
<td>4</td>
<td>WAG</td>
<td>Domiciliary Care</td>
<td>Made on the 10th of July In Force SI. 2008/1875</td>
</tr>
<tr>
<td>5</td>
<td>WAG</td>
<td>Affordable Housing</td>
<td>Pre-legislative Scrutiny Committee; awaiting formal approval by the National Assembly then Westminster. At Stage 4</td>
</tr>
<tr>
<td></td>
<td>WAG</td>
<td>Welsh Language</td>
<td>Being negotiated with Whitehall – To be drafted. At Stage 1</td>
</tr>
<tr>
<td>7</td>
<td>Ballot 1 Ann Jones</td>
<td>Domestic fire safety.</td>
<td>Pre-legislative Scrutiny Committee completed in Assembly; awaiting referral to the Secretary of State for Wales for pre-legislative scrutiny in Westminster. At Stage 2</td>
</tr>
<tr>
<td>6</td>
<td>Ballot 2 Jonathan Morgan</td>
<td>Mental Health reform</td>
<td>Pre-legislative Scrutiny Committee completed in Assembly; awaiting referral to the Secretary of State for Wales for pre-legislative scrutiny in Westminster. Possible redraft needed to broaden scope. At Stage 2</td>
</tr>
<tr>
<td></td>
<td>Helen Mary Jones</td>
<td>Carers.</td>
<td>Leave to introduce draft granted and currently being drafted. This may be withdrawn depending on the content of the WAG LCO promised on Carers for this legislative session. At Stage 1</td>
</tr>
<tr>
<td></td>
<td>Huw Lewis</td>
<td>Bus &amp; Coach Services</td>
<td>Leave to introduce draft granted and currently being drafted. At Stage 1</td>
</tr>
<tr>
<td></td>
<td>Janet Ryder</td>
<td>Flags &amp; motifs on vehicle registration plates</td>
<td>Leave to introduce draft granted and currently being drafted. At Stage 1</td>
</tr>
<tr>
<td>8</td>
<td>Ballot 7 David Melding WAG</td>
<td>Welsh Language</td>
<td>Laid and being considered in pre-legislative scrutiny by an Assembly Committee and the Welsh Affairs Select Committee</td>
</tr>
<tr>
<td></td>
<td>Ballot 7</td>
<td>Welsh Language</td>
<td>Waiting leave to introduce the LCO Not yet at Stage 1</td>
</tr>
<tr>
<td></td>
<td>WAG</td>
<td>Foundation degree powers to FE</td>
<td>To be drafted. Not yet at Stage 1</td>
</tr>
<tr>
<td></td>
<td>WAG</td>
<td>Culture &amp; local government</td>
<td>To be drafted. Not yet at Stage 1</td>
</tr>
<tr>
<td></td>
<td>WAG</td>
<td>Carers</td>
<td>To be drafted Not yet at Stage 1</td>
</tr>
</tbody>
</table>
This offers a very mixed picture of the number of LCOs passing through the system. To date only two have passed all stages (Additional Educational Needs and Domiciliary Care). They have both done so at variable speeds, though the Domiciliary Care LCO was only a little over six months between being laid and fully approved. On the positive side, the new Red Meat LCO is also moving at a rapid pace and is likely to accelerate through. As the first of the “second wave” of WAG LCOs, the Red Meat LCO seems to be demonstrating that improvements in the system are paying dividends in the speed of legislative passage.

On the other hand, some LCOs are moving at a painfully slow pace. The Environmental Protection LCO made a strong start but has now been “missing in action” for almost a year, having not obtained full Whitehall clearance before it began its process. The Welsh Language LCO has yet to be laid at all and is stuck at Stage 1, despite being promised back in June 2007 (though at least there seems to be a legitimate reason for that, WAG having elected to ensure that all the necessary Whitehall clearances have been obtained before the passage begins). Neither of these examples sheds a particularly positive light on the efficacy of the system.

But LCOs have at least proven to be popular. As Marie Navarro reflects, “The Presiding Officer’s predictions as to the amount of legislation initiated in Wales each year under GOWA 2006 of up to 18 have been accurate. So far in the first year there have been a total of 20 proposals for LCOs and Measures (12 and 8 respectively).” This enthusiasm of ideas has also been apparent in the number of LCO proposals submitted for the backbencher ballot, which is discussed in more detail in the next section. At the most recent ballot on 15th October 2008, 15 AMs put forward an idea for an LCO. This is approximately one third of all AMs. However, there are some signs of a diminishing of interest. At the first LCO ballot on 26th June 2007, for example, over 30 AMs entered their names and ideas. Even with the automatic exclusion of Members who have already been drawn in previous ballots, this does demonstrate a certain falling away of interest. This could be a matter of concern if it continues.

“We are all learning the game”

With a new process come new conventions and new challenges to make a system work to optimum effect. The First Minister made this
point well in Assembly Plenary session when he introduced the Welsh Assembly Government legislative programme for 2008-09:

“I think that we, as an Assembly—as a scrutiny and legislative body—and as a Government, and civil servants, stakeholders out there who will be directly affected by the legislation and the lawyers who are going to be advising us on how to write these laws, all need to learn the game. That is why I emphasised that we are in our apprenticeship or foundation-degree stage, as an Assembly. We are completing year 1 and, today, we are kicking off year 2 and we are learning the game. We are still in our infancy as a legislative body.”

It has been particularly notable that many of the stakeholders in the LCO process in particular have sought, one year in, to draw conclusions from the operation of the system and reflect on how things can be made better. In this respect, DGN 16 seeks to assist UK Government officials involved with Orders in Council by: “setting out the new legislative arrangements in Wales; setting out the principles to be applied when considering requests for enhanced legislative competence; and, explaining the procedures governing this process.”

Additionally, we have also seen the Welsh Affairs Select Committee produce the Memorandum on the Review by the Secretary of State of the procedure for Legislative Competence Orders in Council, which also appeared in July 2008.

It is true that much has changed since the UK Government released its 2005 White Paper “Better Governance for Wales”. The White Paper set out the parameters upon which the 2006 Act was ultimately based. But it did not provide a conclusive explanation of every stage of the new process. This has led to complications.

Probably the most uneven application of the new legislative system has been the order and inter-relationship of the pre-legislative scrutiny function carried out in both Westminster and Cardiff Bay. Some LCOs have been considered by both the Assembly Committee and the Welsh Affairs Select Committee almost simultaneously. At the start of the process this seemed the desirable outcome for all parties concerned. In its report on the first LCO, the Welsh Affairs Select Committee made the following points of concern:
“We regret that the Assembly Committee appointed to conduct pre legislative scrutiny on the proposed Order on environmental protection and waste management has completed its inquiry and published its report before the proposed Order has been referred to Parliament by the Secretary of State. We further regret that the publication of the proposed Order on affordable housing and its referral for pre legislative scrutiny before its clearance in Whitehall is another example of how this process is not working as anticipated.”

The Committee also argued that:

“The Welsh Affairs Committee would wish to explore the possibility of working more closely with Assembly committees in the pre-legislative scrutiny of proposals for draft Legislative Competence Orders. We would wish to consider experimenting with some degree of joint scrutiny where practicable.”

On some LCOs this objective of joint scrutiny was achieved, such as the Domiciliary Care LCO, which was one to date the fastest one through the system. However, this approach has not emerged as a popular course of action, and is specifically now rejected in the Welsh Affairs Select Committee, whose recent Memorandum says:

“6. We do not consider that there will normally be any benefit of having joint scrutiny meetings in the sense of taking evidence jointly, but we do consider that there may well be LCOs where the subject matter would make it appropriate for holding a joint meeting of the two committees at the end of their separate scrutiny, to consider their respective recommendations. (Paragraph 14).”

The Welsh Affairs Select Committee Memorandum also reflects particularly on the issue of the sequence of scrutiny and recommends, based on the first year and a half of operation of the system, that the previous convention of examining the same LCO at the same time as the Assembly Committee be abandoned. It suggests instead:

“9. It is not clear that there is any real advantage in having a proposed LCO referred to an Assembly Committee and to the Welsh Affairs Committee simultaneously. (Paragraph 18)

“10. Our considered view now is that scrutiny by the Welsh Affairs
Select Committee should normally take place after the Assembly committee has completed its scrutiny. (Paragraph 19).”

This seems at variance, however, with DGN16, which suggests in paragraph 55 that: “It is anticipated that the WAC and the relevant National Assembly ad-hoc Committee may work together on pre-legislative scrutiny, conducting joint evidence sessions but reporting separately to their respective legislatures.”

If this suggestion of concurrent scrutiny is adopted it would provide a clear, albeit probably longer, process of LCO consideration. However, the Welsh Affairs Select Committee does not seem to have implemented its own suggestion yet. At its meeting on 14 October the Welsh Affairs Committee decided formally to accept the Secretary of State’s invitation to the Committee to conduct pre-legislative scrutiny of the proposed National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2008, dealing with the red meat industry. This same LCO began its passage through the Assembly only at the end of September 2008. The Welsh Affairs Committee has already issued its call for evidence. It is likely, therefore, that in this instance the two Committees will continue to conduct their enquiries at the same time rather than in sequence.

Further inter-relationship points remain to be resolved but need urgent attention, especially if the convention of adopting consecutive rather than parallel scrutiny is adopted as routine. For example, Nerys Evans AM captured a particular problem that has affected some LCOs when she spoke in the Assembly debate to approve the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 in July 2008. She reflected on the way in which the proposed LCO had been radically redrafted without a chance for proper Assembly Committee scrutiny of the final version:

“As the [Assembly] committee agreed that we were unable to comment on the new LCO, which was changed from the vulnerable children LCO to one on social welfare and other fields, and we did not feel that it was fair to ask organisations, charities, and so on to submit more evidence and recommendations within the tight deadlines... Therefore, the only scrutiny that has been carried out on this LCO has been in one meeting of the Welsh Affairs Committee. That is totally unacceptable and is a reflection of the inadequacies of the current situation.”
The Welsh Affairs Select Committee in its Memorandum is also concerned with this aspect, and identifies a key problem:

“The Welsh Affairs Committee has examined proposals for Orders after the Assembly Committee has completed its consideration. We have also considered revised proposals for Orders which have differed from the proposal on which the Assembly Committee has reported.”

This is a particular problem which seems to be acknowledged by all players and by expert analysts such as Marie Navarro, and must be addressed as a matter of urgency if all the scrutiny stages in the LCO are to be considered meaningful.

Finally in relation to the learning curve, anyone who has ever tried to create a flowchart to illustrate the LCO system will have had to redraw it at regular intervals. As we have seen the process working, we have learnt more about the shape and pace of the system. For example, the notion of Whitehall departmental clearance has assumed an ever greater significance in the process than many anticipated. There is plenty of anecdotal and written evidence available to suggest that the reason the first three LCOs produced by the Welsh Assembly Government faced such slow progress was because they appeared without full prior discussion with the UK Government. We might anticipate that this will always happen in the first legislative programme after an Assembly election as there will not be an opportunity to discuss and negotiate beforehand and, of course, it is also to be expected that an incoming Government would want to hit the ground running. Hopefully, with DGN16 now in place, future confusion between Governments might be eliminated.

There are nevertheless some clear indicators that action is being taken to resolve some of the problems in the system. In her latest legislation monitoring report, Marie Navarro praises DGN 16 for looking to standardise the procedures and reduce the angle of the learning curve. She argues:

“So far, part of the problem has been that there has been no structured path or order in which the different bodies undertake the pre-legislative scrutiny of the proposed LCOs. DGN 16 has now set out a formal procedure summarised in Annex 1 of the DGN which should ensure that the process is coherent and that
everybody is aware of everybody else's views."

This seems to offer hope of an even clearer process in future, shaped by experience and negotiation. Though, as this pamphlet suggests later, there remain differences in interpretation within the system which do not cement stability.

New Opportunities

The Government of Wales Act 2006 states that four ‘bodies’ can introduce legislation: the Welsh Assembly Government; individual AMs; Assembly Committees; and the Assembly Commission.

While it can be expected that Government proposed legislation will form most of Assembly’s legislative time, the scope for AMs remains quite significant. Compared to MPs, Assembly Members have far more chance of introducing legislation for a number of numerical and procedural reasons. In the Assembly there are only around forty AMs eligible to enter the ballot for Member’s legislation compared to over four hundred backbenchers in Westminster. Whereas in the House of Commons the ballot is held once a year, in the Assembly there have been around two per term and there have been seven ballots for LCOs and Measures since the system started.

The legislative path is also in some ways easier to navigate in the Assembly compared to Westminster where Private Members’ legislation is marginalised to a Friday when MPs will generally have returned to their constituencies. At the Assembly, Members legislation is considered in normal business. However, as all published and anecdotal evidence makes clear, there remains a strong similarity to the UK legislative system in that Government support will still be essential for Members to succeed in the Assembly as in Westminster. The extent of this power was also illustrated in the first year of the operation of Part 3 by the larger number of proposed Measures which came before the Assembly from Assembly Members rather than from the Executive. Such a situation would be inconceivable in Westminster.

However, one challenge to the power of backbench AMs in this process was contained in the Welsh Affairs Committee Memorandum on the LCO process (paragraphs 21 to 25) which referred directly to the possible number of proposed Orders. It recommended:
“13. We urge the Assembly and the Wales Office to find ways of giving a proper focus to legislative work, aiming at producing a reasonable number of high-quality Orders each year rather than allowing volume to swamp the system here and in the Assembly as seems to be happening at the moment. (Paragraph 23)

“14. If the level of LCOs coming forward from the Assembly settles down at something of the order of the four or five per year originally envisaged, this will enhance scrutiny, facilitate better planning and avoid the danger that issues over capacity could become an obstacle to effective working. (Paragraph 25)"

This desire to limit the number of LCOs by the Welsh Affairs Select Committee is an especially serious challenge to the new found power of AMs outside the Welsh Assembly Government to propose LCOs. This has not been lost on the AMs themselves, who have drawn attention to the fact that WAG’s own legislative programme is ordinarily “four or five per year”. If the number were curtailed then the chances are it would be LCOs arising from outside WAG which would fall aside. This point – along with a differing assessment of the number of LCOs in the system in the first year of legislative powers – was taken up with some vigour by the Presiding Officer of the National Assembly, Lord Dafydd Elis Thomas AM. In a letter to the Welsh Affairs Select Committee, he wrote there was: “no suggestion that [the number of LCOs] has imposed an excessive strain on the Assembly’s more limited resources and certainly no claim that the system is being ’swamped‘. It seems the Presiding Officer on this issue is, like the Speaker of the Commons, defending the rights of backbenchers in the Assembly.

In other aspects too Assembly procedures can claim, with some justification, to be more progressive than Westminster in terms of public participation. For example, consultation is embedded in the legislative process with interested stakeholders being invited to give evidence and make recommendations on all proposed LCOs and Measures. Sometimes, as in the case of the Learning and Skills Measure currently being considered in Committee in the Assembly, there has been more than one consultation exercise. It should also be noted that the Welsh Affairs Select Committee has also provided another outlet for consultation in its deliberations on individual LCOs. There can be no doubt that the new LCO process is notable for its openness to external input.
The Petitions Process

Another advance, compared with the Westminster model, is the Assembly’s Petitions process. A Petition is a way of asking the National Assembly to consider any issue, problem or proposal that the Assembly has the power to do something about. The Assembly’s rules mean that any petition that the Presiding Officer decides is admissible must be considered by the Assembly. The Assembly has set up a Petitions Committee to consider admissible petitions and to decide what action should be taken. A petition can submitted if signed by ten individuals or can be submitted on behalf of an organisation. As the Standing Orders allow a draft Measure to be submitted attached to a petition, there is considerable scope for outside organisations and individuals to propose legislation.

On two occasions external organisations have used this system to directly relate to the legislative process with varying success. The first of these, Petition by Kidney Wales Foundation to Increase the number of Organ Donors in Wales, led directly to an enquiry by the Health, Wellbeing and Local Government Committee of the Assembly into the feasibility of an LCO to draw down powers on organ donation to the National Assembly for Wales. Although the Committee ultimately concluded that “We recommend that the Assembly should not at this stage seek a Legislative Competence Order, to allow the introduction of a system of presumed consent in Wales”, this still stands as the first example of innovatively linking together new systems, petitions and LCOs, to achieve a legislative goal.

The second example is still under consideration. Back in November 2007, Sustrans led a coalition of supportive organisations in tabling a petition named “Sustrans Call on The National Assembly for Wales to Develop and Maintain a Network of Traffic Free Shared Use Paths.” This petition was even more explicit in its legislative demands and called for the “National Assembly for Wales to seek powers to place a duty on the Welsh Assembly Government to develop and maintain a network of traffic-free shared-use paths for walkers, cyclists and disabled people across Wales. The petition includes a proposed Legislative Competence Order, which would provide the powers.” This too is now in the hands of another Assembly Committee, as the Enterprise and Learning Committee has now decided to take evidence on the LCO. It remains to be seen whether this suggested LCO will end up being put forward formally by the Committee. But, like the issue of Presumed
Consent, it has prompted wide debate.

It is also worth noting in closing this section that to date only on two occasions have Assembly Committees considered bringing forward LCOs, and in both cases these have arisen directly from the petitions process. Were the suggestions of the Welsh Affairs Select Committee to reduce the number of LCOs in the system to be taken into effect, however, this would undoubtedly affect the ability of Committees to take advantage of this innovative approach and bring LCOs forward.

The Shape of LCOs

As the system has developed, the biggest cause of debate and concern has been in respect of the shape of LCOs. This has been a major sticking point in negotiations between the two ends of the M4 in considering individual LCOs. In DGN 16 paragraph 12 the UK Government offers the following boundaries for LCOs:

“The 2005 White Paper ‘Better Governance for Wales’ made clear that the Government favours an incremental approach to conferring enhanced legislative competence on the National Assembly. This will both permit the National Assembly to develop the capacity to deal with enhanced powers and allow Parliament and the National Assembly to develop a balance between them which provides the best possible legislative framework for Wales and the UK.”

The italicisation here is ours, but it is important to bear in mind when working out the politics of the passage of an LCO.

The scope of individual LCOs has thus been a major stumbling block for the rapid devolution of more powers. Because Whitehall clearance or pre-approval in principle is required for the process, this has become the first real “hurdle” an LCO must pass before it can begin its passage in a meaningful way. The salutary tale of not having full Whitehall clearance is best reflected in the troubles which haunt the Environmental Protection and Waste Management LCO, which was laid in the Assembly in June 2007. It completed pre-legislative scrutiny through the relevant Assembly Committee last autumn but has not been seen in public since. The problem here is focussed on the principle set out in DGN 16 at paragraph 24 which states:
“Orders should not give the National Assembly powers over the whole of any of the fields listed in Schedule 5 in one go, nor should subjects normally be imported wholesale from Schedule 7 into Schedule 5 unless a clear case for doing so is made. Defining Matters to be added to Schedule 5 should be approached on a case by case basis, from the standpoint of what the Matter is intended to cover.”

As Marie Navarro reflects in her legislative monitoring report of August 2008, “This interpretation has meant that the Assembly’s bid for an LCO for ‘Environmental Protection’ has been lost somewhere within the Whitehall machinery.” (For the record, Section 7 of the Government of Wales Act refers to the defined set of powers within which the National Assembly could legislate following a successful referendum to increase its legislative competence with popular consent).

DGN 16 also provides a series of checks against which each LCO should be measured to gain Whitehall (and, later, Parliamentary) approval. These are that each LCO should:

i. Deepen not broaden the settlement
ii. Allow scope for policy divergence
iii. Ensure the case for powers is made
iv. Clearly defined scope
v. Appropriate Breadth of Matters
vi. Ensure coherence of law
vii. Respect UK powers and interests

This list of seven principles shines a clear light on where the system has not worked in the past. It is the yardstick against which all LCOs are to be measured and its application can be lethal to any LCO which has not taken account of these rules – rules which, incidentally, have seemed to grow alongside the process rather than being in place before it was first tried out. These are new principles created in 2008 after an assessment of the working of the system during the first year carried out by the Wales Office. It is worth remembering therefore that the first year’s LCOs were not subject to these principles – at least certainly not explicitly.

Rather than examine each of these principles in turn, it is perhaps useful to hone in on three which have been problematic and revealed striking differences of opinion between Cardiff Bay and Westminster.
Deepen not broaden the settlement

DGN 16 sets out in paragraph 13 that: “The policy of enhancing the National Assembly's legislative competence is to deepen devolution in Wales rather than to broaden it. In other words, proposals for legislative competence must relate to one or more of the 'fields' listed in Schedule 5 to the 2006 Act, which correspond to policy areas where Welsh Ministers already have executive powers... Proposals for a Section 95 Order to create a new field in Schedule 5 would be a significant broadening of the devolution settlement in Wales.”

This may seem like sensible guidance, but from an Assembly end it has not always been well received. One example particularly reflects this, and that is the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 – or as it is more commonly known, the Vulnerable Children LCO. Lesley Griffiths AM, a Labour member who became temporary Chair of the Assembly Committee set up to scrutinise the LCO, set out her concerns during the Plenary debate at which the Assembly approved the Order:19

“The committee was disappointed that so few of the recommendations of our first report were taken on board in the draft Order. Of particular concern was the issue of banning the physical punishment of children, particularly, as the Deputy Minister stated, as there is long-standing cross-party support for that in the Assembly. I believe that it is the will of the Assembly. I put on record that I sincerely hope that the Assembly will return to that issue at an appropriate time. I believe that we were right to ask for it and I hope that the matter is not over with. The committee was disappointed that the request for a general competence to be conferred in the area of vulnerable children and child poverty came down to what the Assembly might wish to do with that competence by way of a future Measure, and that that request was therefore turned down by the UK Government.”

In short, the UK Government had argued that the Assembly’s original intention with this Order to ban smacking children was a criminal justice matter and, since criminal justice was not a Field under Schedule 5, that this was not permissible. This issue of criminal justice has been a perpetual theme of those arguing that LCOs are too limited, since they contend that without criminal sanction that huge swathes of action are unavailable to the Welsh Assembly Government to enforce policy.
Ensure the case for powers is made

The aspect of ensuring a case has been made has indeed been a thorny issue for the negotiation of LCOs. Once more, DGN 16 is illustrative and makes clear in paragraph 16 that: “When considering a proposal, UK Departments will want to have an indication of the purpose for which the competence is being sought. This will help officials determine whether the scope of the proposed Order is appropriate and advise Ministers on the suitability of devolving competence. One key element is that the Welsh Assembly Government should be able to make the case for the legislative competence it is seeking.”

Right from the start this has been the case in the perspective taken by the Welsh Affairs Select Committee. In their Report on the first LCO referred to earlier, which dealt with Additional Educational Needs, the Committee made the following points:

“20. We were keen to establish the purpose for which the Welsh Assembly Government might use the additional competence being sought - not in any great detail, but to gain at least some indication of its intentions in the immediate to medium term. Such an understanding is key to this Committee’s role in being able to scrutinise the appropriateness of the powers sought under the terms of a proposed Order.”

The Committee went on to substantiate this point as follows:

“22. In our earlier inquiry into the LCO process, we were told that the expectation was that proposed Orders would be introduced with specific Measures to be made under them in mind.[19] The Parliamentary Under-Secretary of State told us during that inquiry:

‘... we would hope that we are not looking at a generality, a sort of broad brush of Orders in Council, but ... at quite focused Orders in Council.’

“The whole purpose of the Order in Council process is to allow the Assembly to pass laws and make Measures with a specific purpose in mind ... so no, this idea that there would be a sort of portmanteau of Orders in Council where things could be slotted in in the future, we do not envisage that.”
The most graphic demonstration of this tension was perhaps when the Welsh Select Committee discussed the first LCO back in November 2007. At that meeting Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, appeared alongside officials to argue for the Additional Educational Needs LCO and at points was grilled particularly for examples of how her LCO would be used in future. In short, she was pressed to divulge the contents of Measures as well as the LCO itself. Ensuring the case for powers is made has remained a theme of the operation of the Welsh Affairs Select Committee in examining LCOs ever since.

In exercising this role the Welsh Affairs Select Committee has behaved markedly differently from the Constitution Committee of the House of Lords, which undertakes pre-legislative scrutiny in that House. It has been shown to be far “softer” in approach than the Welsh Affairs Select Committee, its equivalent body in the Commons. The Constitution Committee have concerned themselves with a far more “constitutional” approach to individual LCOs without discussing policy merits in the same way as seems to have become the norm in the Welsh Affairs Select Committee. This fact has not gone unnoticed by the Presiding Officer of the Assembly, who has placed on record his support for the Lords approach and urged a similar outlook from the Welsh Affairs Select Committee.

**Clearly defined scope**

The issue of scope has been recently reflected in the rather frosty exchanges which have happened around the Welsh Affairs Select Committee report on “The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008.” The Report made the following observations at paragraph 23:

“We conclude that the Welsh Assembly Government has identified a need for additional legislative competence to achieve its policy objectives. We also conclude that the proposed legislation to be made by the Assembly under its extended competence is reasonably clear. We further conclude that the scope of the proposed Order is consistent with Welsh Assembly Government policy, and its existing powers. *We also consider that there should be a limit on the period of suspension, and a requirement for periodic review of any such suspension.*"
32. The proposed Order would grant to the National Assembly for Wales in perpetuity the power to abolish the Right to Buy, although this is not Welsh Assembly Government policy.

35. The full scope of the power to be transferred under a proposed Order, rather than just the current policy intention, should be clearly expressed in the Explanatory Memorandum. Proposed Orders should be drafted so as to transfer only those powers which are required and for which a clear purpose has been established. The same considerations apply to granting to the National Assembly for Wales the ability to abolish the Right to Buy/Right to Acquire. We recommend that the proposed Order be revised so that this power is specifically excluded from its scope. We further recommend that the proposed Order should not proceed unless this proposed revision is made.

36. We are concerned that the proposed Order as drafted would enable the Welsh Assembly Government to suspend the Right to Buy/Right to Acquire across a whole local authority area or across the whole of Wales. We recommend that it be amended so as to apply only in areas of extreme housing pressure, better to reflect the underlying policy intention.

Taken together these statements caused the Presiding Officer of the Assembly to fire a letter to Welsh Secretary Paul Murphy MP disagreeing with the interpretation of the Welsh Affairs Select Committee of the process as it stands. He wrote: "It seems to me the MPs on this committee are seeking to limit the ability of Assembly members to legislate. In that sense I believe their move to be contrary to the spirit of devolution."

In his letter the Presiding Officer shows that a disagreement of some significance has opened up over a central principle of the new legislative system. Betsan Powys, Political Editor of BBC Wales, expressed it well on her blog post of 20th October 2008 when she paraphrased the Welsh Affairs Select Committee as thinking:
“You do have the right to do both but you only discussed suspension of the right to buy when you talked to us about it, so we believe you should stick to that. In fact you only seem to want to suspend the right to buy in certain areas in extreme circumstances so sticking to that narrower request really shouldn't bother you.”

This does seem to have enflamed a particular tension between the appropriate legislative scrutiny Committees of the two legislatures. Tensions are clearly running high over a fundamentally different appraisal of the way LCOs should be scoped and framed. Seeking to pour oil on troubled waters, Assembly Business Minister and Counsel General Carwyn Jones AM said to the National Assembly Plenary Session on 21st October 2008\textsuperscript{23} that:

“We must remember that Assembly LCO committees are free to express their views on an LCO, in the same way as the Welsh Affairs Committee in London is free to express its views on what an LCO should look like. Those views form part of the consideration of the future of an LCO on the part of both Governments, but they are not binding on both Governments. Nevertheless, we and our partners in the UK Government will look at the recommendations that are included in the report that emanated from the Assembly and the report that emanated from Westminster in order to see how the matter would be taken forward.”

Somehow, it seems unlikely that the Welsh Affairs Select Committee will find any sort of agreement with its equivalent Assembly Committee on this point. In the same Plenary discussion Leanne Wood AM, who chaired the Affordable Housing LCO Committee, complained:

“I think that it is very sad that the LCO system is not working. This is not what was envisaged in the White Paper or the guidance. Perhaps you will agree that this demonstrates that is now time for a more robust devolution settlement.”

Whether or not this row will blow over remains to be seen. Ultimately it ties into the point of the entire scope of LCOs. Drafting examples demonstrate a wide variation in potential “size” of Matter or Matters to be conferred. As with so many other aspects of the LCO process, there is clearly no “one size fits all” approach here.
There are other aspects of scoping LCOs which are contentious too. Some people have openly criticized the scope and breadth of LCOs in their first year. Marie Navarro cites an allegedly broken promise from the White Paper when she argues:

“With some exceptions, the Matters which are either in operation or which are provisional in Schedule 5 do not seek to give the Assembly subject areas whether specific, wider or very wide powers to make law and which therefore do not reflect the intentions in the White Paper. Nonetheless more recent examples are getting closer to such aspirations (see the LCO relating to the “Welfare of Children”)."

With regard to some issues around LCOs it is possible to explain away problems as differences of opinion or emphasis. But somehow it seems that there is emerging a real disagreement on more than a matter of principle. Significant difference of opinion between the key players in the Assembly and Westminster over the scoping of LCOs seems to pose the biggest current danger to the whole process.

**Is the new system too complex?**

Having considered all this evidence, we now turn to the issue of whether the new legislative system is too complex to deliver. In his speech to Cardiff Law School on the new legislative process, the Archbishop of Wales argued that “I admit to being confused about this; but I’m sure this is something I have in common with at least ninety-eight per cent of the people of Wales.” Dismissing the new system out of hand because it is complex seems to be an increasingly acceptable attitude, partially legitimised by this quote from Cymru Yfory. There may be complexities in the system – we do not deny that – but it is understandable.

The first claim that needs to be examined is that the Part 3 system is any more complex than some other legislative processes. Would any more than 2 per cent of the population understand the process of an European Directive? What percentage of Welsh people are familiar with all the processes of the passage of a Bill into an Act at Westminster? How many of us are fully conversant with the various procedures which can be applied to secondary legislation made by Welsh Assembly Government Ministers? In the context of such questions, surely the notion of some peculiar complexity apparent in the new Welsh system is diminished.
Even if the process of gaining powers under LCOs is complex (and any system involving three legislatures and a number of Committees is bound to be), that does not mean the whole of the new system is. The 4-stage process for the passage of an Assembly Measure is a lot clearer than the equivalent process for a Westminster Bill and, in the case of the Learner Travel Measure, relatively speedy too. There is much to commend in the clarity and transparency of the Assembly Measure process and those who dismiss the new system out of hand never seem to acknowledge this.

Assembly Measures: Some Reflections

Since the bulk of this pamphlet has been given over to the LCO process, reflecting on the way in which the power to legislate is gained by the Assembly, it is only right and proper that we offer some examination of the way in which the new powers are being exercised at the Assembly end. As time passes, we hope more attention will be given by stakeholders and the media to the Measure-making process. After all, the Measures are the outcomes and the reason for the process in the first place.

As with LCOs, it would appear that a table of Measures proposed or enacted would be helpful before launching into a fuller examination. Excluding Measures which have not been granted leave by the Assembly to proceed, the following table sets out the range of Measures which are progressing or have fully progressed through a system which we have previously described as easily understandable and uncomplex.
There are a number of observations that needs to be made on Measures. The first is that WAG is placing more importance on Measures in its second year of legislative competence than it did in the first, with the balance changed to 5 Measures and 4 LCOs for 2008-09 compared to the promised 3 Measures and 6 LCOs in 2007-08. Marie Navarro

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<tr>
<th>No.</th>
<th>Source</th>
<th>Purpose</th>
<th>Status</th>
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<tbody>
<tr>
<td>1</td>
<td>WAG</td>
<td>NHS Redress Measure</td>
<td>Received Royal Assent July 2008</td>
</tr>
<tr>
<td>3</td>
<td>WAG</td>
<td>Learner Travel Measure</td>
<td>Passed all legislative stages and awaiting Royal Assent</td>
</tr>
<tr>
<td>5</td>
<td>WAG</td>
<td>Draft Learning and Skills Measure</td>
<td>Currently being scrutinized in Assembly Committee at Stage 1</td>
</tr>
<tr>
<td>2</td>
<td>AM Ballot 1 Jenny Randerson</td>
<td>Draft Measure for healthier school meals</td>
<td>Currently being scrutinized in Assembly Committee at Stage 2</td>
</tr>
<tr>
<td>4</td>
<td>AM Ballot 3 Dai Lloyd</td>
<td>Draft Measure on Impact Assessments for the Selling off of Playing Fields</td>
<td>Drafted and laid; awaiting Stage 1 scrutiny in Committee</td>
</tr>
<tr>
<td>6</td>
<td>WAG</td>
<td>Draft Local Government Measure</td>
<td>Currently being scrutinized in Assembly Committee at Stage 1</td>
</tr>
<tr>
<td>AM Ballot 7 Alun Cairns</td>
<td>Proposed Special Educational Needs Notification Measure</td>
<td>Awaiting leave to be introduced by Plenary Session</td>
<td></td>
</tr>
<tr>
<td>WAG</td>
<td>Proposed Access to SEN Tribunal Measure</td>
<td>Promised for this legislative session</td>
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<tr>
<td>WAG</td>
<td>Proposed Child Poverty Measure</td>
<td>Promised for this legislative session; awaiting passage of LCO to provide powers for introduction</td>
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<tr>
<td>WAG</td>
<td>Proposed Domiciliary Care Measure</td>
<td>Promised for this legislative session</td>
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<tr>
<td>WAG</td>
<td>Proposed Affordable Housing Measure</td>
<td>Promised for this legislative session; awaiting passage of LCO to provide powers for introduction</td>
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reflects positively on this outcome in her recent monitoring report: “It shows that the settlement is working and that the legislative competence of the Assembly has already sufficiently increased to allow so many Measures proposals.”

A second observation would also be positive and relates to the Measure most recently selected from the backbench ballot. On 15th October 2008 Alun Cairns won the ballot with an idea to bring forward a Proposed Special Educational Needs Information Measure. This Measure is notable because it seeks to replicate provisions which already apply in England through the recently passed Special Educational Needs (Information) Act. In England too, this Act was brought about through a backbencher ballot. This is the first example of an Assembly Measure which seeks to extend provisions from England to Wales. It is not being done through developing joint legislation in Westminster but through similar provisions in Wales informed by the process in England. As such it is an important staging post in the maturing relationship between two legislatures who can now “borrow” legislative ideas from each other.

The third reflection we would make is that the process of facilitating Measures has not yet been found wanting. At the time of writing two have completed their passage with general agreement by the Assembly Members involved in the process that it has worked well. Outside organizations have also valued the opportunity to input into the process and, with reference to a backbench Measure like Jenny Randerson’s on nutrition in school meals, there seems to have been support available to ensure backbenchers have the same opportunity to propose fully rounded legislation as do WAG Ministers.

The appropriateness of the system makes it therefore all the more dis-appointing that so few Assembly Members have proposed Measures for the regular ballot opportunities, as documented in the table below.

<table>
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<tr>
<th>Ballot</th>
<th>June 07</th>
<th>Oct 07</th>
<th>Dec 07</th>
<th>Feb 08</th>
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<th>June 08</th>
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<tr>
<td>Proposals</td>
<td>8</td>
<td>5</td>
<td>12</td>
<td>9</td>
<td>3</td>
<td>0</td>
<td>1</td>
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</table>

These numbers are disappointing indeed. Faced with the opportunity to actually suggest primary legislation for Wales it is clear that, for whatever reason, the ideas are not forthcoming. The most common anecdotally suggested explanation for this is the amount of Matters in
Schedule 5 and, to a point, that must hold some water. However, Schedule 5 is continually expanding and it is therefore sad that fewer AMs entered the Measure ballot on the last two occasions than did the first few times the ballot was opened. Further, if you examine the ideas put forward at each ballot it is clear that were it not for the Liberal Democrat group in the Assembly, who have provided the bulk of the proposals to the ballot, there would always have been a miniscule number of suggestions brought forward.

The lack of ideas for Measures being promoted by Assembly Members contrasts poorly with the operation of the similar system for Private Members Bills in Westminster, although of course the scope for introduction is much more limited. But in writing this we reflect too that this failure is also down to civic society in general which is clearly failing to provide the ideas and impetus for Wales-based legislation through this new system. As public affairs practitioners or political trainers specialising in this new legislative process we accept part of that blame too. Our hope must surely be that, as Matters with greater scope are added to Schedule 5, and as organizations in Wales become more familiar with the system, this fundamental problem will be overcome.

**Conclusion**

Our intention in writing this pamphlet has been to offer a reasoned and fact-based appraisal of the new legislative system as we see it. Inevitably, in discussing such an important area that is, by its essence, political there are bound to be responses to what we have written. Disagreement on such a political “hot potato” is bound to happen, and we accept and welcome that. In some cases there are bound to be challenges over what we have not written too, examples we should have quoted or areas we should have examined. Ultimately we anticipate that there will be few people who have watched the new legislative process unfold who agree with everything we have written. But we hope at the same time that most people might agree with most of the pamphlet as a fair and supported analysis.

We thank the Bevan Foundation for offering us the opportunity to publish our views, in the certain belief that there will be much, much more to be written by others as Wales’ new legislative system matures in coming years. We welcome further contributions to this debate.
In short, we hope to have provided an appraisal which is fair and positive. In many, many ways the new system is working. Though far from perfect, it is a major step forward. We would echo the sentiments of the Presiding Officer of the Assembly who wrote in April 2008 that the passage of the first LCO showed:

“that the new powers granted to us under the Government of Wales Act are working, and that the Assembly and Welsh Ministers have shown they can rise to the challenge of creating legislation for Wales. We have heard critics say that the processes for creating legislation were unclear and did not work, but today those critics have been shown to be wrong.”

Yes, there are problems and pitfalls, and we have tried to illustrate some of these in this pamphlet. But overall the first eighteen months of this new legislative system have been a major step forward for Wales.
END NOTES


7 www.wales-legislation.org.uk

8 Public Attitudes 2008 (Institute of Welsh Politics) for the National Assembly for Wales), September 2008 http://www.assemblywales.org/abthome/abt-commission/about_us-public_attitudes_2008.htm


12 Select Committee on Welsh Affairs Second Report: The proposed Order on additional learning needs (December 2008) http://www.publications.parliament.uk/pa/cm200708/cmselect/cmwelaf/44/4404.htm#a7

13 Welsh Affairs Committee Press Notice 07-08, 14 October 2008 http://www.parliament.uk/parliamentary_committees/welsh_affairs_committee/wacpn2907-08.cfm


18 Petition: Sustrans Call on The National Assembly for Wales to Develop and Maintain a Network of Traffic Free Shared Use Paths (November 2008)

19 National Assembly for Wales Plenary Session, 18 July 2008

20 Record of Welsh Affairs Select Committee, 21 November 2007
http://www.parliament.the-stationery-office.com/pa/cm200708/cmselect/cmwelaf/44/7112101.htm

21 Welsh Affairs Committee report on the proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008 (October 2008)

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