

**Cyflwyniad yng Nghynhadledd Cwmni Iatih
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Introduction

I am very grateful for the invitation to participate in today's conference. Although as a Civil Servant working for the Welsh Assembly Government I am not able to speak to the merits or comment upon the merits of any substantive proposals which are being or may be made, it does give me the opportunity of describing the context within which legislation relating to the Welsh language can be made by the Assembly and also to highlight the opportunities within the process of law making for individuals and organisations within Wales to contribute their own ideas as part of that process. The new devolution settlement under the Government of Wales Act 2006 is by no means easy to understand but an understanding of its complicated mechanisms can assist the making of effective contributions to the law making process. I very much hope therefore that what I am going to say will be of real and lasting benefit to those of you who are seeking the opportunity of contributing to legislative developments regarding the Welsh language.

The 2006 settlement

Most people are aware that under the Government of Wales Act 2006, the National Assembly for Wales for the first time acquired power to make primary legislation for Wales. By primary legislation it is meant that the Assembly can pass measures which have a similar force to Acts of Parliament within Wales. Indeed, within its areas of competence, Assembly Measures can amend or even repeal acts of the UK Parliament in so far as they relate to Wales. These powers mark therefore a considerable advance upon the power to

make subordinate legislation which had previously existed under the Government of Wales Act 1998.

However, although the 2006 Act gave the Assembly power to pass Measures, it did not – other than in relation to the National Assembly itself, give to the Assembly competence over any particular areas of the law. This is remarkably different to the devolution settlement as it stands in Scotland, where, from the first, the Scottish Parliament was able to legislate in all areas which had not been specifically reserved to the UK Parliament. No areas of legislative competence (other than those relating to the Assembly itself), were given to the Assembly under the 2006 Act. Competence to legislate has to be obtained, piece by piece, from the UK Parliament. In other words, competence grows incrementally. It is, by its very nature, slow in developing. The process of acquiring legislative competence has been likened to making a jigsaw, the Assembly requesting each piece of the jigsaw from the UK Parliament, gradually assembling those pieces to form the picture of its eventual legislative competence when it achieves full primary law making powers.

There are two routes by which the Assembly can obtain competence to legislate. These are respectively by means of having such competence granted to it by acts of the UK Parliament and secondly by obtaining Orders in Council, made by Her Majesty the Queen in the Privy Council, at the request of the Assembly itself and with the approval of the UK Parliament. The Orders made by means of that second route are the Legislative Competence Orders (LCOs) of which you will have read or heard about in the press and other media.

Taking the route by UK Acts of Parliament first. This basically involves the Assembly Government requesting the UK Government to place within an item of its legislative programme competence for the Assembly to legislate on issues being dealt with in a UK legislative proposal, a Bill before the UK

Parliament. The disadvantage of this method is that it is entirely dependent upon there being a suitable Bill in any year's legislative programme at Westminster. If there is no suitable Bill, there is no opportunity for the Assembly to acquire competence. While it is a very direct method therefore, involving only the passing of the Bill at Westminster with no other stages involved in Cardiff Bay, it is not free from difficulty. Even if a suitable Bill is available, there is always the danger that it will not be passed within the course of a legislative session at Westminster but will fail at the end for lack of time. This method is also open to the criticism that the Assembly itself never has the opportunity to debate or consider the competence which it is to receive.

LCOs on the other hand are creatures of both the Assembly and the UK Parliament. A Legislative Competence Order is made by Her Majesty in Council following consideration by both the National Assembly in Cardiff and the UK Parliament in London. The competence which such an Order gives the Assembly has therefore received the approval of both the Assembly in Cardiff Bay and both Houses of Parliament at Westminster. Once such an Order has passed the Assembly, the Secretary of State is required to lay it before Parliament within 60 days or else explain why he has chosen not to do so. Competence created by means of LCOs therefore reflects the wishes of the Assembly and is not dependent upon the legislative programme of the UK Government in any given year.

The Competence of the Assembly to legislate, that is to exercise the powers given it by the 2006 Act, depends upon specific areas of competence having been given to it either by UK Act of Parliament or the approval of Legislative Competence Orders. Either way, the Competence given is expressed in the form of matters in relation to which the Assembly may legislate, which matters are inserted into the 20 fields contained in Schedule 5 to the 2006 Act. These 20 fields are based upon the functions which have been devolved to Wales over the last 40 years. Initially, certain functions were granted to the

Secretary of State for Wales, so that successive Secretaries of State could legislate by means of subordinate legislation for Wales regarding matters within their power in a way which was remarkably different from that of their current counterparts in England. With the setting up of the National Assembly under the 1998 Act, those functions were in the main transferred from the Secretary of State to the National Assembly, which acquired the competence therefore to make subordinate legislation for Wales in areas where Government Ministers were doing that for England. With the coming into force of the 2006 Act's arrangements, those functions were again transferred in the main from the National Assembly to the Welsh Ministers. Those functions, which had initially been the province of the Secretary of State later the National Assembly now the Welsh Ministers, were granted to Wales in a piecemeal fashion – not unlike the manner in which legislative competence to make measures is now being granted. There was never a grant of the right to legislate in an entire area. It was the grant of a particular function, so that there was no rationale to the functions which had been transferred from Westminster to Wales. What we have therefore in the 20 fields within Schedule 5 to the 2006 Act is the first occasion upon which any real attempt has been made to rationalise the functions which have been devolved to Wales. The 20 fields attempt to describe the areas in which devolution of executive functions has already taken place. It recognises that in those areas the Assembly can now claim the right to pass primary legislation. The 2006 Act itself does not give the Assembly that right, only the right to request the power to make legislation in those areas. If no functions of an executive nature have been devolved to Wales, it is not possible for the Assembly to exercise primary legislative powers in that area. The executive functions support the fields and it is only within those fields that the Assembly can request competence to legislate.

When the Assembly does make a measure in exercise of its competence, for the provisions of the measure to be valid the provisions must relate to one or more of the matters which UK Acts of Parliament or Legislative Competence

Orders have inserted within the fields of Schedule 5. The question of whether a provision does relate to one or more of the matters in Schedule 5 is to be determined by reference to the purpose of the provision, having regard to its effect in all the circumstances. To be valid, in addition, the provision must not apply other than in relation to Wales nor confer impose modify or remove directly or indirectly functions exercisable other than in relation to Wales. Subject to those principles, an Assembly Measure becomes part of the Law of England and Wales, but only applies in Wales. What this means is that, although the laws made by the Assembly only apply in Wales, courts in England recognise them as valid law and will act upon them accordingly. The 2006 Act also provides that an Assembly Measure can provide for the enforcement of its provisions or take other appropriate steps to make the provision effective.

There are however certain things which an Assembly Measure cannot do. These are the general restrictions imposed by Part 2 of Schedule 5. An Assembly Measure cannot remove or modify any functions of UK Government Ministers, unless the consent of the appropriate Secretary of State has been obtained. More restrictive however is the fact that a Measure cannot confer or impose functions on UK Government Ministers at all. This in effect means that the Assembly cannot require UK Government Ministers to do anything which they do not already do in order to implement the legislative policy behind a Measure.

Restrictions are also placed upon the Assembly's ability to create criminal offences. This is limited to creating offences which would be punishable on summary conviction with imprisonment for roughly a year or on conviction on indictment with imprisonment of 2 years. Likewise there are restrictions upon the level of fine which the Assembly can prescribe with regard to criminal offences of its creation.

Although the Assembly generally can amend or appeal UK Acts of Parliament, there are some Acts which it cannot touch. These include for instance the Human Rights Act 1998; the Data Protection Act of the same year and the European Communities Act 1972. Further, it is not open to the Assembly to modify the provisions contained in the 2006 Act itself. Although there are certain exceptions to that rule with regard to the Welsh Language, it is not open to the Assembly to legislate on all matters relating to its own use of the language, nor those of the Assembly Commission and the Welsh Ministers. Even though, therefore, the Welsh Language is one of the 20 fields within which the Assembly is able to request Legislative Competence, there are certain things which it could not do even if that Competence were acquired – at least as things currently stand under the 2006 Act.

Acquiring Legislative Competence

I will now look at the process by which the Assembly can obtain competence to legislate in relation to a particular matter – in this case the Welsh language – and how that competence is then exercised by the passing of an Assembly Measure. I shall also note the opportunities that exist within these processes for individuals and organisations to feed in their ideas, concerns and comments both with regard to the competence which the Assembly intends to request and with regard to how it intends to exercise that competence by passing a Measure.

Firstly, the obtaining of competence by means of an LCO.

I shall deal here with the route which an Assembly Government request for legislative competence would take. Given that in relation to the Welsh Language, it is the stated policy of the coalition government as expressed in the *One Wales* document to obtain and exercise legislative competence in the field of the Welsh Language. Once the policy to be pursued has been fully worked out and agreed upon by the Welsh Ministers, the lawyers, including the staff of my office as Legislative Counsel, will draft a Legislative

Competence Order for introduction to the Assembly. However, by agreement with the UK Government, it is customary for the UK Government to be consulted upon the draft Order before it is introduced to the Assembly. This makes sense in that, as the LCO will have to be passed by both the House of Commons and the House of Lords after it has been approved by the Assembly, the agreement of the UK Government means that it will be assured of Government support at that stage. Without that support, there would be a risk that the LCO would fall at the final fences. Therefore, the two Governments achieve a consensus with regard to the Legislative Competence requested prior to the draft Order being produced into the Assembly.

When the Order is introduced, it initially undergoes what it is called pre-legislative scrutiny both by a committee of the Assembly in Cardiff and by the Welsh Affairs Committee at Westminster. Both of these committees are addressing the question of whether the competence being sort is appropriate.

Pre-legislative scrutiny is the first opportunity which the public has to comment upon the competence proposal. It is very important to emphasise at this stage that one is not talking about the manner in which that competence will be exercised if it is achieved. At this point what one is discussing is whether the Assembly should have power to make law in relation to the matters contained in the LCO. If that competence is achieved, it will remain with the Assembly thereafter. It is not competence for a single occasion or for a single measure, but an enduring competence, which means that the Assembly will always have the right to legislate in relation to those matters. The question therefore that needs to be addressed by those seeking to advocate or advance a particular point of view at this stage is whether the powers which are being sought by the Assembly are sufficiently wide to achieve the sort of aims which they would like to see the Assembly achieve, or alternatively whether the powers are wider than it is appropriate for the Assembly to exercise within Wales, depending on the point of view. The Assembly Committees which undertake pre-legislative scrutiny routinely invite evidence from members of

the public and organisations with regard to the competence sought and frequently invite those who submit evidence to appear before the committee to advocate their case. This is an excellent opportunity for views to be communicated directly to the Assembly with regard to the competence it is seeking in relation to a particular matter.

The Assembly Committee and the Welsh Affairs Committee, which could meet in joint session although this has not occurred in the manner that was anticipated when the provisions of the 2006 Act came into force, both submit reports on the draft LCO and it is open to the Assembly Government to modify the order as a consequence of those reports. When that has been done, the draft LCO is then introduced formally to the Assembly for the Assembly's approval. This is obtained by a vote of the Assembly members. The Secretary of State then has 60 days within which to lay the LCO before Parliament at Westminster, or else explain in why he has chosen not to do so. When the LCO is laid before both Houses at Westminster, if it is passed by them – and they have no power to amend the LCO at that stage only to accept or reject it, it then passes to Her Majesty in Counsel for approval, which approval marks the granting of the Competence sought to the Assembly.

Having obtained the Competence to legislate in relation to the matters contained in the LCO, the Assembly can now legislate by Measure in relation to those matters. Again, taking as our example a Government sponsored piece of legislation, a draft measure will be prepared enshrining the Government policy on the matter and this measure will be introduced to the Assembly for debate. The custom has again grown up of giving an opportunity for members of the public and organisations to feed their views into the process by means of consultation. Such a consultation could occur for instance prior to the drafting of the Measure. This would be a consultation on the policy, the Government seeking to be informed as to the wishes of the nation prior to deciding upon the content of the Measure. Alternatively, if the

Government policy is settled and the key question is how it is to be carried into effect, it may be that the consultation will take place after the Measure has been drafted and that the draft Measure itself will be subject to consultation.

If there is such a consultation, formal introduction of the Measure into the Assembly will follow it, opportunity having been taken to amend the draft in the light of comments which the Government has taken on board. Prior to its introduction, the Measure will be scrutinised by the Presiding Officer and his officials to ensure that what it proposes is within the Competence of the Assembly. Subject to the Presiding Officer's determination, the Measure will begin its passage through the Assembly. This usually takes the form of four stages, although the first of those stages can be omitted whether there has been a consultation, as stage one involves the establishment of the committee which has powers to take evidence from members of the public and organisations and submit a report to the Assembly with regard to its findings. This is yet another opportunity for the public to feed in its views with regard to Assembly legislation.

On the completion of stage 1, the Measure moves to stage 2 where a committee of members scrutinises it and suggest amendments. The committee itself can amend the Measure at this stage before returning it to the Assembly for stage 3. At stage 3 there is an opportunity for further amendments to be made – this time on the floor of the Assembly itself before the Measure moves to Stage 4 which is a debate regarding its final approval. If passed at stage 4, the Measure goes to Her Majesty in Counsel, and when the Royal Assent has been given, the Measure becomes Law.

I hope that what I have said illustrates both how the law making process under the 2006 Act works and also how the public can contribute to that process at various stages, including pre-legislative scrutiny of LCOs and the pre-

legislative consultations with regard to Measures, as well as stage 1 proceedings in relation to Measures.

The process is not a simple one and if those with an interest in contributing to the legislative programme of the National Assembly for Wales wish to do so, it is important that they have an informed knowledge of the context in which they may do so. I hope that this morning's presentation will have contributed to creating such a context and thereby have facilitated effective contributions on both the current and other legislative issues.