



House of Commons
Welsh Affairs Committee

The proposed amendment of Schedule 7 to the Government of Wales Act 2006

Second Report of Session 2010-11

*Report, together with formal minutes and
written evidence*

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The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

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The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk .

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm

Committee staff

The current staff of the Committee is Adrian Jenner (Clerk), Alison Groves (Second Clerk), Anwen Rees (Inquiry Manager), Ameet Chudasama (Senior Committee Assistant), Dabinder Rai (Committee Assistant), Mr Tes Stranger (Committee Support Assistant) and Laura Humble (Media Officer).

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Contents

Report		<i>Page</i>
	Summary	3
1	Introduction	5
	Background	5
	Our inquiry	5
2	The current powers of the National Assembly for Wales	7
	The current legislative competence of the National Assembly	7
	Schedule 7	8
3	Schedule 7 as amended	10
	Cases where the provisions of Schedule 7 are narrower than Schedule 5	10
	Powers of Ministers of the Crown	12
4	Managing the post-referendum settlement	14
	Devolution guidance notes	14
	Mechanisms for changing Schedule 7 in the future	14
	The current process for amending Schedule 5	14
	Amending Schedule 7	15
5	Conclusion	17
	Conclusions and recommendations	18

Summary

On 3 March 2011 the voters of Wales will be given an opportunity to decide, in a referendum, whether the National Assembly for Wales should assume primary law-making powers under Part 4 of the Government of Wales Act 2006.

If there is an affirmative vote in the referendum, the Fourth Assembly, due to be elected on 5 May 2011, will have powers far greater than those enjoyed by the First Assembly in 1999.

Schedule 7 to the Government of Wales Act would be at the heart of the new constitutional settlement if the referendum vote is affirmative. It would define the boundaries of the devolution settlement between Wales and the UK. Prior to the referendum, the Government has proposed amendments to Schedule 7 in the draft Order: the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010, laid before Parliament on 21 October 2010.

The Welsh Affairs Committee believes that it is essential that the House is clear about what it is agreeing to in approving the draft Order. In this short Report we outline the context in which the Order is being put forward, the nature of the amendments proposed, and the extent of the legislative competences which the National Assembly would enjoy if it came into effect. We conclude that the effect would be a significant widening of the powers of the Assembly. However, this should not be interpreted as a judgment by the Committee on the merits or otherwise of a “Yes” vote. While there would remain a few ambiguities and loose ends in the definition of the Assembly’s powers under Part 4 of the Government of Wales Act, the Committee sees no impediment to the House approving it.

We note that the nature of the Welsh devolution settlement is quite different from those relating to Scotland and Northern Ireland. Schedule 7, in the form it would have after this draft Order was approved, is unlikely to be the last word on the shape and nature of the constitutional arrangements for Wales. We have sought and received assurances that Parliament and the Welsh Affairs Committee will be properly involved in the examination of any future changes to the constitutional arrangements for Wales.

If the referendum vote is affirmative, then the Government has promised a wider review of the Welsh devolution settlement, a “Calman process” for Wales. The Welsh Affairs Committee will maintain a close oversight of this process.

1 Introduction

Background

1. Under the Government of Wales Act 1998, the powers of the National Assembly for Wales (NAW) were restricted to the making of secondary legislation within the scope of powers previously delegated to the Secretary of State for Wales or subsequently added to by primary legislation.
2. The structure and powers of the National Assembly were significantly altered and expanded by the Government of Wales Act 2006, which came into effect with the election of the Third Assembly in May 2007. Part 3 of that Act provided for the Assembly to make “Measures” within the scope of the legislative competence defined by Schedule 5 to the Act. The Act also made provision for that scope to be altered by amendments made to Schedule 5 either by primary or secondary legislation. Since 2007, the Assembly’s legislative competence has been significantly enlarged by these means.
3. The 2006 Act also included, at Part 4, arrangements for the transfer of primary legislative competence to the Assembly following a positive vote in a referendum of the Welsh electorate. The scope of that competence was defined (provisionally) by Schedule 7 to the Act.

Our inquiry

4. The Government has announced its intention that on 3 March 2011 a referendum will take place in Wales on extending the legislative competence of the National Assembly.¹ Before it can be held, three Orders relating to the referendum must be approved by both Houses of Parliament. The first Order sets the date and defines the referendum question;² the second Order relates to the amount of money the respective campaigns can spend.³
5. This Report considers the third draft Order: the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010. A “Yes” vote in the referendum would bring into effect Part 4 of the Government of Wales Act (GOWA) 2006, giving primary legislative competence to the NAW in certain areas. Schedule 7 of the Act sets out in detail the subjects over which the Assembly would have the power to make laws in the event of a “Yes” vote in the referendum. According to the Secretary of State, the draft Order would amend Schedule 7 to take account of changes in powers conferred upon the NAW since 2006.⁴
6. The draft Order was laid before Parliament by the Secretary of State for Wales on 21 October 2010.⁵ On 1 November, we wrote to the Secretary of State, Rt Hon Cheryl Gillan

1 HC Deb, 21 October 2010, col 72WS

2 The draft Referendum Order (National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum, Etc.) Order 2010)

3 The draft Expenses Limits Order (National Assembly for Wales Referendum (Assembly Act Provisions) (Limit on Referendum Expenses Etc.) Order 2010)

4 Ev 1

5 HC Deb, 21 October 2010, col 72WS

MP, requesting further information and clarification of a number of points.⁶ We also issued a press notice inviting comments from members of the public on the Order.⁷

7. We are grateful to the Secretary of State and to others whose timely responses have enabled us to publish our Report before the draft Order is considered by a Delegated Legislation Committee of the House of Commons. On 15 December 2010, subject to approval by both Houses of Parliament and the Assembly,⁸ the Secretary of State will submit the Order to be made by Her Majesty in Council. Our Report considers the draft Order; it does not address whether or not it is desirable that the people of Wales vote “Yes” in the referendum on the Assembly’s powers.

8. The Committee was assisted in this inquiry by its Specialist Advisers, Professor Keith Patchett and Alan Trench.⁹

6 Ev 1

7 <http://www.parliament.uk/business/committees/committees-a-z/commons-select/welsh-affairs-committee/news/Schedule-7-Order/>

8 The National Assembly for Wales approved the Order on 9 November 2010.

9 See formal minutes of 26 October 2010 and 4 November 2010.

2 The current powers of the National Assembly for Wales

The current legislative competence of the National Assembly

9. Unlike the other two devolved jurisdictions of the UK (Scotland and Northern Ireland) where the scope of devolved powers is defined by exception (that is that the legislatures can make the law in any area other than those which are specifically excluded by statute) the competence of the National Assembly for Wales is defined by inclusion. The Assembly can only legislate in areas where it has explicit statutory authority to do so, granted by Parliament. The extent of the Assembly's legislative competence is set out in Part 1 of Schedule 5 to the Government of Wales Act 2006, subject to certain restrictions set out in Part 2 of that Schedule. The Schedule specifies a number of "fields". Within each field "matters" can be specified. Currently, Assembly Measures can make the law for Wales within the scope of any "matter".

10. Devolution of legislative competence to the National Assembly has so far been a process of adding to these fields. Further matters have been added by primary legislation (when a bill on an appropriate area is going through Parliament) or by a procedure under which the National Assembly can bring forward proposals for Legislative Competence Orders (LCOs) under section 95 of the Act.¹⁰ The primary legislation or Orders in Council when made do not themselves change the general law for Wales – they pave the way to subsequent changes in the law applying to Wales within the devolved areas of legislative competence by enlarging the scope of the Assembly's legislative competence.

11. Since 2007, 15 proposals for draft LCOs have been introduced by the Welsh Assembly Government, by committees of the National Assembly, or by individual Assembly Members. These have been subject to pre-legislative scrutiny by committees of the Assembly and referred by the Secretary of State for Wales to each House of Parliament for pre-legislative scrutiny at Westminster. In the Commons, this pre-legislative scrutiny has been undertaken by its Welsh Affairs Committee,¹¹ and in the Lords by its Constitution Committee.

12. Following the pre-legislative scrutiny stage, the National Assembly has agreed an actual draft Order which has been laid before Parliament by the Secretary of State for Wales. Once approved, and once royal assent has been given, direct law-making powers have been devolved to the Assembly within the scope of the new matter or matters thereby added to Schedule 5 of the 2006 Act. Within that scope the Assembly can then make the law for Wales in the form of Assembly Measures, which must be passed by the National Assembly but which require no further approval by either Whitehall or the UK Parliament.

¹⁰ Government of Wales Act 2006, s. 95.

¹¹ Welsh Affairs Committee: Second Report of Session 2007-08, HC 44; Fourth Report of Session 2007-08, HC 257; Fifth Report of Session 2007-08, HC 576; Seventh Report of Session 2007-08, HC 812; Third Report of Session 2008-09, HC 5; Sixth Report of Session 2008-09, HC 306; Ninth Report of Session 2008-09, HC 348; Twelfth Report of Session 2008-09, HC 678; Fourteenth Report of Session 2008-09, HC 778; First Report of Session 2009-10, HC 40; Second Report of Session 2009-10, HC 142; Fourth Report of Session 2009-10, HC 36; Sixth Report of Session 2009-10, HC 186; Seventh Report of Session 2009-10, HC 274; Eighth Report of Session 2009-10, HC 273. See also Fifth Report of Session 2009-10, *Review of the LCO Process*, HC 155.

13. Since 2006, the operation of the arrangements under Part 3 of the Act has resulted in a widening range of legislative powers being conferred on the Assembly.¹² The current legislative competence of the National Assembly is therefore that set out in Schedule 5 to the 2006 Act, as amended. It sets out the matters in relation to which the Assembly may legislate by Assembly Measure, restrictions on the Assembly's legislative competence to legislate by Assembly Measure and exceptions to those restrictions. There are twenty fields in Schedule 5; with the exception of the field relating to the functioning of the Assembly itself, the fields are broadly based on the areas in which the Welsh Ministers have executive functions.

14. Following a majority affirmative vote in a referendum,¹³ the primary legislative competence of the Assembly would then be defined by Schedule 7 to the 2006 Act, rather than by Schedule 5.

15. Following a "Yes" vote in the referendum, the new legislative powers which could be exercised by the NAW would be broader than those currently exercised under Part 3 of the Government of Wales Act.¹⁴ Although under the present arrangements, Schedule 5 allows for powers to be conferred in 20 Fields, in five fields none has been introduced to date. Under Part 4 and Schedule 7 the Assembly would gain immediate competence over the full range of Subjects set out there.¹⁵

Schedule 7

16. Schedule 7 sets out the legislative powers that would be exercisable by the National Assembly if the "Assembly Act" provisions set out in Part 4 of the Act were to come into effect. If an area of law is defined in Schedule 7, the National Assembly will be competent to legislate in that area. As is the case currently with Schedule 5, the National Assembly would have no power to legislate on matters not set out in the Schedule, or explicitly excluded from it. The Schedule therefore is central to the working of those powers.

17. In the original scheme of the 2006 Act, it was provided that the first Order amending Schedule 7 would be subject to negative, rather than affirmative resolution procedure. That was on the basis that the first revision would do no more than tidy up the Schedule and align it with the then existing competence of the Assembly, prior to the commencement of Part 4. However, the first revision was made in 2007, and therefore this draft Order is subject to the affirmative resolution procedure. We welcome the fact that this provides a better opportunity for the House to take stock of what is proposed before making its decision.

18. The draft Order in Council we are examining in this report would amend Schedule 7 in advance of the referendum. This would enable the voters in the referendum, if they chose

12 For an explanation of the LCO process see Welsh Affairs Committee, Fifth Report of Session 2009-10, *Review of the LCO Process* HC 155.

13 Government of Wales Act 2006.

14 Ev 14

15 Schedule 7 further differs from Schedule 5 in that it does not contain "fields", with scope to add "matters" within those 'fields'. It lists 20 areas of policy which correspond to the 'fields' in Schedule 5. In Schedule 7 these are called 'subjects', which are not further broken down other by arrangement into paragraphs.

to, to inform themselves of the scope of the powers on which they were being invited to decide whether to extend to the National Assembly. We have conducted this swift inquiry and produced this short Report so that the House, in deciding whether to approve the draft Order, will understand what powers it is potentially transferring to the National Assembly. We were particularly concerned to establish the extent to which those powers would differ (whether they would be narrower or broader) than the existing powers enjoyed by the Assembly. We were also concerned to look briefly at the implications of the new devolution settlement that would follow an affirmative vote in the referendum for the mechanics of relationships between the UK Government and the Welsh Assembly Government (WAG) and between the UK Parliament and the National Assembly. We have not considered the question of whether the new settlement which would be ushered in by an affirmative vote in the referendum is desirable.

19. In most instances, Schedule 7 expresses the “subjects” on which the Assembly may legislate in much broader terms than the “matters” in Schedule 5. While matters in Schedule 5 are typically expressed in specific and precise language, those in Schedule 7 use much more general terms. In consequence, Schedule 7 is shorter and far less detailed than the way Matters are elaborated in Schedule 5.

20. In October, David Jones MP, Parliamentary Under Secretary of the Wales Office, described the purpose of the Order as a tidying up exercise, “It is essentially so that when people vote in the referendum, they will know precisely what powers are proposed to be devolved to the National Assembly”.¹⁶ The Minister’s argument was reinforced by evidence we received which broadly supported the draft Order.¹⁷

21. The Government is right to ensure that Schedule 7 of the Government of Wales Act 2006 is amended in advance of the referendum on the transfer of powers to the National Assembly for Wales. It should be clear to Parliament, the National Assembly and the people of Wales what powers the National Assembly for Wales will be able to exercise if the electorate votes “Yes” in the referendum.

22. Our purpose in this short Report is to seek to reassure the House of Commons, and others, that the proposed amendments are appropriate and necessary.

¹⁶ Oral evidence taken before the Welsh Affairs Committee on 14 October 2010, HC (2010-11) 495, Q 85 [Mr Jones].

¹⁷ Ev 12-14.

3 Schedule 7 as amended

23. A detailed analysis of the proposed amendments to Schedule 7 identifies a number of areas where Schedule 7, as amended, appears to diverge in a minor and technical way from Schedule 5 as it currently stands.

Cases where the provisions of Schedule 7 are narrower than Schedule 5

24. There are a number of instances where the draft Order does not make changes to Schedule 7, but where legislative powers have been conferred on the Assembly through Acts of Parliament or Legislative Competence Orders. This could imply that the powers of the Assembly following a referendum might be narrower than the ones it already enjoys. We wrote to the Secretary of State seeking clarification in the following three areas:

- Education and training (Field 15/subject 9);
- Health and health services (Field/subject 9); and
- Local government (Field/subject 12).

In each of these cases, our concern was about whether the generality of the powers conferred under Schedule 7 would include the specific issues covered in Schedule 5.¹⁸ Ultimately, if the Assembly were to legislate on such questions and its legislation was to be challenged, it would be a matter for the courts to determine whether this was so. It would be clearly undesirable should the courts become involved in this area.

25. On Education, the Secretary of State's response was:

The equivalent subjects in Schedule 7 are described in very broad terms, and would devolve power to the Assembly to legislate on almost all aspects of education and training policy, including the limited number of areas over which the Assembly cannot currently legislate - for example the careers service and higher education. In addition, there are two significant areas of education policy on which the Assembly cannot currently legislate, and which would remain non-devolved in the event of a "yes" vote in the referendum and the Assembly Act provisions coming into force. The first is research councils, for which there is an exception in paragraph 5 of Schedule 7. The second is the setting of teachers' pay and conditions.¹⁹

26. On Health, we were told:

Schedule 7 in contrast sets out a broad spectrum of powers which the Assembly would take on in the event of [...] the Assembly Act provisions coming into force. These include the competence the Assembly currently has (the provision of redress

¹⁸ Issues of particular concern to us include the Assembly's present power to provide transport for learners to the places where they receive education or training; powers relating to the provision of redress and compensation to victims of alleged medical negligence, and such local government functions as the direct election of executives, and the making of bye-laws.

¹⁹ Ev 2

for negligence in relation to health services, and the assessment of mental health and treatment of mental disorder), and new areas of legislative competence including the promotion of health; the prevention, treatment and alleviation of disease and the provision of health services. The Schedule also includes a number of exceptions to this competence, including abortion, human genetics and the regulation of health professionals, which will remain non-devolved.²⁰

27. On Local Government, the Secretary of State's response stated that, in addition to its existing powers under Schedule 5, the Assembly:

... would also gain powers over local government finance and all powers and duties of local authorities and their members and officers.²¹

She also noted that these powers would continue to be subject to exceptions for franchise, registration and administration and the voting system, and to a number of further exceptions to ensure areas such as alcohol licensing, Sunday trading and anti-social behaviour orders remain non-devolved.

28. Our analysis also identified a number of other cases where powers of more limited scope have been conferred on the Assembly so far but where it is unclear whether these powers would arise under Schedule 7. For example, in Field/subject 15 (Social welfare), there were concerns relating to the power for local authorities to charge for social care services other than residential care, and to provide for advocacy services in cases where mental capacity is at issue.

29. We also invited the Secretary of State to comment on the scope of the whole of Schedule 7, identifying those areas where it differed from the scope of Schedule 5.

30. The Secretary of State told us that Schedule 5 is drafted so precisely as a consequence of the incremental addition of powers conferred on the NAW since 2006 by way of LCOs so that:

The subjects and exceptions [in Schedule 7] are often described in much broader terms than in Schedule 5, reflecting the much wider scope of legislative competence which the Schedule sets out.²²

The Secretary of State's acknowledgement that Schedule 7 would confer broader powers on the National Assembly than it currently exercised is set out in some detail in her response with relation to Education, Health and Local Government.²³ She also confirmed that in no case were the powers under Schedule 7 narrower than the current powers enjoyed by the National Assembly under Schedule 5.

31. Were it to be put into effect, Schedule 7, as amended, would confer broader powers on the National Assembly for Wales than currently exercised under Schedule 5. We

20 Ev 2

21 *Ibid.*

22 Ev 1

23 *Ibid.*

have identified no immediate need for any further protection of the current legislative competence of the National Assembly.

Powers of Ministers of the Crown

32. Paragraph 1 of Schedule 7 provides that the Assembly cannot remove or modify, or impose or confer, functions of a Minister of the Crown existing before the Assembly Act provisions came into force. However, those powers are not defined or listed anywhere. They are scattered across the statute book, and in some cases where they arise under the royal prerogative cannot be readily identified at all. The changes proposed to Schedule 7 do not include any definition of the powers of Minister of the Crown. There is a risk, therefore, that this provision could lead to some uncertainty about the limits on the extent of the National Assembly's legislative powers.

33. In proposing amendments to Schedule 7, it might have been an opportunity to bring some clarity about the extent of Ministers' powers in relation to the NAW. However, the Secretary of State told us that to have done so would have involved "an examination of the statute book to identify all relevant Minister of the Crown functions, and [would have been] too extensive an exercise in terms of time and resources for the Wales Office to undertake".²⁴ She noted, however, that:

By virtue of paragraph 6 in Part 3 of Schedule 7, these restrictions do not apply if the Secretary of State consents to the relevant Assembly Act provision (or, in the case of a provision removing or modifying pre-commencement functions, if the provision is incidental or consequential).²⁵

And she also explained that:

Subject to these exceptions [...] the Assembly could neither legislate to impose new functions on a Minister of the Crown nor to change any existing function which Ministers of the Crown exercise at the time the Assembly Act provisions come into force. But the Assembly could legislate to change a function which is conferred on a Minister of the Crown after the Assembly Act provisions are commenced, without needing the Secretary of State's consent, so long as the legislation relates to one or more of the subjects in Schedule 7. In the event of the Assembly Act provisions being commenced, we would expect the Welsh Assembly Government to work closely with the Government on any proposal to remove functions of Ministers of the Crown in devolved areas. The Government would also expect to be consulted by the Welsh Assembly Government on any proposal to change the functions of a Minister of the Crown by an Act of the Assembly.²⁶

34. We note that the Government has not used this opportunity to define more clearly the powers of Ministers in relation to the National Assembly for Wales on the grounds of time and cost. However, we also note that there would be scope for the National

24 Ev 4

25 Ev 3

26 *Ibid.*

Assembly to legislate on the powers of Ministers of the Crown in certain circumstances, with and sometimes without the consent of the Secretary of State.

4 Managing the post-referendum settlement

Devolution guidance notes

35. The *Memorandum of Understanding* between the UK Government and devolved administrations is key to the overall relationship between the administration in Cardiff and the UK Government.²⁷ However, for many practical purposes, the *Memorandum of Understanding* lacks specific detail. This is provided by the Devolution Guidance Notes detailing working relations between UK and Welsh governments. Of particular importance are Devolution Guidance Note 4 on the Role of the Secretary of State for Wales and Note 9 on post-devolution primary legislation affecting Wales. The Report of our predecessors, *Wales in Whitehall*, identified a number of areas of friction in Government where devolution protocols were not given sufficient consideration.²⁸

36. Following any affirmative outcome in the referendum, and any consequential increase in legislative competence, it would be necessary for the Government to update these notes and to refresh the actual relationship between the different parties to the settlement. It would also need to replace Devolution Guidance Note 16, which is concerned with orders under section 95 of the Government of Wales Act 2006 relating to the making of Legislative Competence Orders.

37. The Government told us that it would update the Devolution Guidance notes “in light of the outcome of next year’s referendum”.²⁹ However, the Secretary of State did not “expect that the outcome of the referendum will necessitate changes to the Memorandum of understanding”.³⁰

38. The Devolution Guidance notes, which set out the working arrangements between the UK Government and the devolved administrations, are key to the administrative and the constitutional relationship between the administration in Cardiff and the UK Government. Clearly, these constitutional arrangements would have to be changed if there were a “Yes” vote in the referendum in March 2011. We recommend that in those circumstances, the Welsh Affairs Committee be consulted during the process of the revision of these documents.

Mechanisms for changing Schedule 7 in the future

The current process for amending Schedule 5

39. Schedule 5 to the Government of Wales Act 2006 has been amended in two ways since 2006; by Acts of Parliament and by Legislative Competence Orders (LCOs). LCOs are

27 Cm 7864

28 Welsh Affairs Committee, Eleventh Report of Session 2009-10, *Wales and Whitehall* HC 246

29 Ev 3

30 *Ibid.*

normally proposed by the Welsh Assembly Government (WAG), but can also be proposed by a backbench Assembly Member or an Assembly committee.³¹

40. Following WAG-proposed LCOs there is a period of negotiation between WAG and the UK Government to agree on a text that the Government will be willing to lay before Parliament. When a text is ready, the Secretary of State for Wales lays a proposed draft LCO before Parliament and refers it to Welsh Affairs Committee and the House of Lords Constitution Committee for pre-legislative scrutiny. The LCO is also laid before the Assembly and referred to one of its committees for scrutiny. Following these pre-legislative stages, a draft Order proposed by the National Assembly is laid before Parliament for approval in the manner of an affirmative statutory instrument. In the Commons this has been normally debated in a delegated legislation committee.

Amending Schedule 7

41. Section 109 of the 2006 Act provides a general power for the Secretary of State to amend Schedule 7. There are no limits on what amendments might be made in this way, or in the timing of them. However, any Order doing so would require the approval of both Houses of Parliament, and of the National Assembly. It therefore could not be used without the consent of the House of Commons.

42. Under the Government of Wales Act 2006, the National Assembly has no power formally to propose changes to Schedule 7. It is not clear what role, if any, would be taken by the Welsh Affairs Committee in consideration of any proposal to amend Schedule 7.

43. Further matters might also be devolved by Act of Parliament. Primary legislation has been used when substantial additional functions have been devolved to both Scotland and Northern Ireland – even though similar order-making powers to that in Wales exist in both systems. However, as we noted above, the devolution settlement with Wales is of a different nature. Because it is based on transfers of powers from Westminster to Wales, rather than on a definition of “reserved” matters, it seems likely that there may be more frequent need, even if Schedule 7 comes into effect, for detailed adjustment of the legislative competence of the Assembly on a scale which would not normally justify primary legislation.

44. The Secretary of State told us that the Government intended to consult the Welsh Assembly Government and the Welsh Affairs Committee before deciding how to deal with any requests from the National Assembly to amend Schedule 7.³²

45. The Government has made clear that the Welsh Affairs Committee will be consulted on how requests from the National Assembly for Wales should be dealt with in the event of Schedule 7 coming into effect following a “Yes” vote in a referendum. We consider that any future conferral of legislative power on the National Assembly

³¹ The LCO process has existed since 2007 and 15 LCOs have reached Parliament to date. Most of these LCOs have been backed by the Welsh Assembly Government, but there have been 2 backbench LCOs and the one committee-sponsored LCO has passed through its stages in the National Assembly.

³² Ev 3

should have the consent of both Parliament and the Assembly itself, whatever means is used to achieve that end.

5 Conclusion

46. If there is an affirmative vote in the referendum next March, which triggers the devolution of primary legislative competence to the National Assembly for Wales, this will be a significant change from the existing devolution settlement. Schedule 7 to the Government of Wales Act 2006 will be at the heart of that settlement.

47. In the light of the assurances we have received from the Secretary of State, we can recommend that the House approve the Order in readiness for a vote in a referendum on the National Assembly's legislative powers. This should not be interpreted as a judgment by the Committee on the merits or otherwise of a "Yes" vote.

48. If Members were to approve the Order, the House should be fully aware that it is potentially significantly enlarging the legislative competence of the National Assembly should there be a "Yes" vote in the referendum. Should the outcome of the referendum be affirmative, legislative competence should be conferred as smoothly and efficiently as possible.

49. It is unlikely that Schedule 7, as amended by the draft Order, will not need further revision at some point, if the Schedule should come into effect as the basis of the Assembly's legislative powers. Further amendments to it will be likely to be needed to reflect the continuing development of the devolution settlement, and may yet prove necessary to address the issues identified in this report.

50. We note and welcome the Secretary of State's commitment to engage in early consultation about any further proposals to amend Schedule 7, with Parliament and with this Committee in particular. For our part, we intend to continue our role of maintaining oversight of the operation and development of the settlement, on behalf of the House of Commons.

Conclusions and recommendations

1. The Government is right to ensure that Schedule 7 of the Government of Wales Act 2006 is amended in advance of the referendum on the transfer of powers to the National Assembly for Wales. It should be clear to Parliament, the National Assembly and the people of Wales what powers the National Assembly for Wales will be able to exercise if the electorate votes “Yes” in the referendum. (Paragraph 21)
2. Were it to be put into effect, Schedule 7, as amended, would confer broader powers on the National Assembly for Wales than currently exercised under Schedule 5. We have identified no immediate need for any further protection of the current legislative competence of the National Assembly. (Paragraph 31)
3. We note that the Government has not used this opportunity to define more clearly the powers of Ministers in relation to the National Assembly for Wales on the grounds of time and cost. However, we also note that there would be scope for the National Assembly to legislate on the powers of Ministers of the Crown in certain circumstances, with and sometimes without the consent of the Secretary of State. (Paragraph 34)
4. The Devolution Guidance notes, which set out the working arrangements between the UK Government and the devolved administrations, are key to the administrative and the constitutional relationship between the administration in Cardiff and the UK Government. Clearly, these constitutional arrangements would have to be changed if there were a “Yes” vote in the referendum in March 2011. We recommend that in those circumstances, the Welsh Affairs Committee be consulted during the process of the revision of these documents. (Paragraph 38)
5. The Government has made clear that the Welsh Affairs Committee will be consulted on how requests from the National Assembly for Wales should be dealt with in the event of Schedule 7 coming into effect following a “Yes” vote in a referendum. We consider that any future conferral of legislative power on the National Assembly should have the consent of both Parliament and the Assembly itself, whatever means is used to achieve that end. (Paragraph 45)

Formal Minutes

Thursday 18 November 2010

Members present:

David T.C. Davies, in the Chair

Stuart Andrew
Geraint Davies
Jonathan Edwards

Karen Lumley
Jessica Morden

Draft Report (*The proposed amendment of Schedule 7 to the Government of Wales Act 2006*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 50 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 23 November at 10.00 am

List of printed written evidence

1	Letter from the Chair to the Secretary of State for Wales	Ev 1
2	Letter from the Secretary of State for Wales to the Chair	Ev 1
3	Written evidence from Manon George and David Lambert, Legal Members of the Wales Governance Centre of Cardiff University	Ev 12
4	Written evidence from Emyr Lewis, Partner in Morgan Cole Solicitors, Cardiff	Ev 14
5	Letter from the Law Society of England and Wales	Ev 15
6	Letter from Carwyn Jones AM, First Minister of Wales	Ev 15

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–11

First Special Report	Welsh prisoners in the prison estate: follow up: Government Response to the Committee's Ninth Report of Session 2009-10.	HC 398
Second Special Report	Wales and Whitehall: Government Response to the Committee's Eleventh Report of Session 2009-10.	HC 399
Third Special Report	Cross-border provision of public services for Wales: follow up: Government Response to the Committee's Tenth Report of Session 2009-10.	HC 419
First Report	The implications for Wales of the Government's proposals on constitutional reform	HC 495

Written evidence

Letter from the Chair to the Secretary of State for Wales

I am writing in connection with the draft Order (The National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010) which was laid on Thursday 21 October. The Welsh Affairs Committee has agreed that I should write to you seeking clarification and elaboration on a number of issues relating to the Order which were not contained in the accompanying Explanatory Memorandum.

- (1) The proposed changes to Schedule 7 in relation to Subjects 5 (education), 9 (health) and 12 (local government) appear to be substantively narrower than the provisions in corresponding fields in Schedule 5. Is this the case, and if so, why?
- (2) What mechanism the Government envisages there would be for the National Assembly of Wales to request changes to Schedule 7, if it came into effect following a “yes” vote in the March 2011 referendum?
- (3) What future role is envisaged by the Government for the UK Parliament and in particular the Welsh Affairs Committee in scrutinising proposed amendments to Schedule 7 if it came into effect following a “yes” vote in the March 2011 referendum?
- (4) How does the Government plan to revise the range of documents which set out the practical framework for managing devolution between Westminster and Wales? In particular, what changes are envisaged to the Memorandum of Understanding and the UK Government’s Devolution Guidance notes and will the Welsh Affairs Committee be invited to comment before hand?
- (5) Will the Government define and list the powers of Ministers of the Crown as they apply to Wales in the light of the general restriction which would fall under paragraph 1 of Part 2 to the Order?
- (6) Finally, the Committee would appreciate a detailed analysis of how each Subject area in Schedule 7 (as amended) will differ from the legislative competence of the National Assembly currently enjoyed under Schedule 5.

Owing to the timetable that has been established for consideration of this Order, I would be grateful for a response to the points raised in this letter by Monday 15 November.

1 November 2010

Letter from the Secretary of State for Wales to the Chair

Thank you for your letter of 1 November seeking clarification and elaboration on a number of issues relating to the draft Order.

The attached annex responds to each of the issues you raised. You will be aware that the draft Order will be considered in Committee on 23 November. My officials would be happy to brief Committee members informally before that debate on the content of the draft Order, and Schedule 7 generally, if that would be helpful.

APPENDIX

GOVERNMENT RESPONSE

1. *The proposed changes to Schedule 7 in relation to Subjects 5 (education), 9 (health) and 12 (local government) appear to be substantively narrower than the provisions in corresponding fields in Schedule 5. Is this the case, and if so, why?*

The draft Order does not propose changes to the subjects listed above. We therefore assume the question is intending to ask whether the scope of the subjects in Schedule 7 is narrower than the equivalent matters in Schedule 5. The answer in all three cases is “no”.

Schedule 5 and Schedule 7 are drafted differently, reflecting the different nature of the powers set out in the Schedules. Schedule 5 describes the current legislative competence of the Assembly. The competence is set out in matters inserted into 20 fields (or subject areas) in the Schedule, and has developed incrementally since the Government of Wales Act 2006. Each matter describes the competence devolved to the Assembly in a specific area of policy which relates to the field into which the matter is inserted, and can include specific exceptions which apply to that area of competence. Matters and associated exceptions can often describe the boundaries of devolved and non-devolved areas in some detail, reflecting their relatively narrow scope.

Schedule 7 describes the subjects the Assembly would be able to legislate on in the event of a “yes” vote in the referendum and the Assembly Act provisions coming into force. The subjects and exceptions are often described in much broader terms than in Schedule 5, reflecting the much wider scope of legislative

competence which the Schedule sets out. So the fact that some fields in Schedule 5 include a detailed description of legislative competence, whilst the equivalent paragraph in Schedule 7 sets out a short description, does not mean that the scope of Schedule 7 is narrower than that in Schedule 5.

Considering each area in turn:

Education

The Assembly has more extensive legislative competence over education and training than any other area of policy. The Assembly's competence is set out in 22 matters in Field 5 of Schedule 5 to GoWA, which cover most aspects of education and training policy, including the establishment and management of schools, curriculum, inspection and post-16 education. The equivalent subjects in Schedule 7 are described in very broad terms, and would devolve power to the Assembly to legislate on almost all aspects of education and training policy, including the limited number of areas over which the Assembly cannot currently legislate—for example the careers service and higher education.

In addition, there are two significant areas of education policy on which the Assembly cannot currently legislate, and which would remain non-devolved in the event of a “yes” vote in the referendum and the Assembly Act provisions coming into force. The first is research councils, for which there is an exception in paragraph 5 of Schedule 7. The second is the setting of teachers' pay and conditions. This is a function of the Secretary of State, so the Assembly could not make significant changes without the consent of the Secretary of State (as a result of the restrictions and exceptions in Parts 2 and 3 of Schedule 7, which are discussed in more detail in the answer to question 5 below).

Health

Whilst the Welsh Ministers have extensive executive powers in relation to health, the current legislative competence of the Assembly relating to health is restricted to two matters: the provision of redress for negligence in relation to health services, and the assessment of mental health and treatment of mental disorder. The first matter was inserted into Field 9 in Schedule 5 by the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007, and the second by the Mental Health LCO, brought forward originally by Jonathan Morgan AM and made in 2009.

Schedule 7 in contrast sets out a broad spectrum of powers which the Assembly would take on in the event of a “yes” vote in next year's referendum and the Assembly Act provisions coming into force. These include the competence the Assembly currently has, and new areas of legislative competence including the promotion of health; the prevention, treatment and alleviation of disease and the provision of health services. The Schedule also includes a number of exceptions to this competence, including abortion, human genetics and the regulation of health professionals, which will remain non-devolved.

Local Government

In comparison to health, the Assembly is able to legislate across a wide spectrum of local government policy. Field 12 of Schedule 5 lists seventeen matters relating to local government over which the Assembly can currently legislate, including the areas, structures and constitution of local government in Wales, the conduct and remuneration of members, scrutiny and public participation, and electoral arrangements for community councils. These matters were inserted into the Schedule through a number of parliamentary Acts and LCOs, including the Local Government LCO 2010.

The Assembly's competence over electoral arrangements for community councils does not extend to the local government franchise, electoral registration and administration or the voting system for the return of members in an election.

The Assembly would retain these powers in the event of the Assembly Act provisions coming into force, and would also gain powers over local government finance and all powers and duties of local authorities and their members and officers. These powers would continue to be subject to exceptions for franchise, registration and administration and the voting system, and to a number of further exceptions to ensure areas such as alcohol licensing, Sunday trading and anti-social behaviour orders remain non-devolved.

2. What mechanism the Government envisages there would be for the National Assembly of Wales to request changes to Schedule 7, if it came into effect following a “yes” vote in the March 2011 referendum?

It would be open to the Assembly, or the Welsh Assembly Government, to request changes to Schedule 7 after the Assembly Act provisions came into force. The Government intends to consider what would be the most appropriate process for dealing with such requests. In doing so we will consult the Welsh Assembly Government and other interested parties, including the Welsh Affairs Committee.

The Coalition's programme for government commits to “*establish a process similar to the Caiman Commission for the Welsh Assembly*”, depending on the outcome of the forthcoming referendum. If the referendum outcome leads to the establishment of a “Caiman-like” process, the Government would expect that process to consider whether or not any changes to the Welsh devolution settlement are needed, which might include whether any modifications to Schedule 7 should be made.

3. *What future role is envisaged by the Government for the UK Parliament and in particular the Welsh Affairs Committee in scrutinising proposed amendments to Schedule 7 if it came into effect following a “yes” vote in the March 2011 referendum?*

Section 109 of the Government of Wales Act 2006 provides that Her Majesty may by Order in Council amend Schedule 7. A draft Order must be approved by each House of Parliament and (except for the first such Order) by the Assembly. The draft Schedule 7 Amendment Order is the second Order to come forward under this provision, and so any future Orders seeking to amend Schedule 7 would require approval from both Houses of Parliament and from the Assembly.

The Government will consider the most appropriate process for dealing with any amendments to Schedule 7 which are proposed after the Assembly Act provisions come into force. However, it believes that any future proposed Orders would benefit from pre-legislative scrutiny by the Welsh Affairs Committee, and in bringing them forward would aim to provide adequate time for such scrutiny. The Government would also intend to inform the Committee at the earliest opportunity of any intention to bring forward an Order to amend Schedule 7.

4. *How does the Government plan to revise the range of documents which set out the practical framework for managing devolution between Westminster and Wales? In particular, what changes are envisaged to the Memorandum of Understanding and the UK Government’s Devolution Guidance notes and will the Welsh Affairs Committee be invited to comment beforehand?*

The Government intends to review its devolution guidance notes and other documentation relating to the Welsh devolution settlement in light of the outcome of next year’s referendum on full law-making powers. However, we do not expect that the outcome of the referendum will necessitate changes to the Memorandum of Understanding, which sets out broad general principles which are applicable in the different circumstances of each of the devolution settlements.

5. *Will the Government define and list the powers of Ministers of the Crown as they apply to Wales in the light of the general restriction which would fall under paragraph 1 of Part 2 to the Order?*

Paragraph 1(1) of Part 2 of Schedule 7 provides that a provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown. Paragraph 1(3) defines a pre-commencement function as one which is exercisable by a Minister of the Crown before the day on which the Assembly Act provisions come into force. Paragraph 1(2) goes on to say that the Assembly cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.

By virtue of paragraph 6 in Part 3 of Schedule 7, these restrictions do not apply if the Secretary of State consents to the relevant Assembly Act provision (or, in the case of a provision removing or modifying pre-commencement functions, if the provision is incidental or consequential).

Subject to these exceptions, this means that the Assembly could neither legislate to impose new functions on a Minister of the Crown nor to change any existing function which Ministers of the Crown exercise at the time the Assembly Act provisions come into force. But the Assembly could legislate to change a function which is conferred on a Minister of the Crown after the Assembly Act provisions are commenced, without needing the Secretary of State’s consent, so long as the legislation relates to one or more of the subjects in Schedule 7.

In the event of the Assembly Act provisions being commenced, we would expect the Welsh Assembly Government to work closely with the Government on any proposal to remove functions of Ministers of the Crown in devolved areas. The Government would also expect to be consulted by the Welsh Assembly Government on any proposal to change the functions of a Minister of the Crown by an Act of the Assembly.

Part 2 of Schedule 5 prevents the Assembly currently from legislating to modify or remove Minister of the Crown functions, whether those functions were created before or after the Assembly’s power to pass Measures came into force. However, under Part 3 of the Schedule the Assembly may modify or remove functions if the Secretary of State consents to the provision. Part 2 of Schedule 5 also provides that an Assembly Measure may not confer or impose new functions on Ministers of the Crown, even if the Secretary of State consents (except in relation to the Welsh language).

The Chair of the Committee requested a list of the powers of Ministers of the Crown as they apply to Wales. This would involve an examination of the statute book to identify all relevant Minister of the Crown functions, and would be too extensive an exercise in terms of time and resources for the Wales Office to undertake. However, we trust that the explanation set out above provides the Committee with a clear overview of how Minister of the Crown functions fit within the Welsh devolution settlement. The Wales Office and relevant Government departments consider carefully the implications for functions of Ministers of the Crown on a case by case basis, and will continue to do so.

6. Finally, the Committee would appreciate a detailed analysis of how each Subject area in Schedule 7 (as amended) will differ from the legislative competence of the National Assembly currently enjoyed under Schedule 5

We enclose with this response a copy of Schedule 7 showing the changes which would be made via the draft Order. A detailed analysis comparing each subject area in Schedule 7 to the equivalent field in Schedule 5 would again be too extensive an undertaking for the Wales Office to undertake and would, we believe, add little given the different natures of the schedules.

In general, the Assembly's legislative competence is described in broader terms in Schedule 7 than in Schedule 5. This is because Schedule 7 describes the full range of legislative competence which would be devolved to the Assembly in the event of a "yes" vote in next year's referendum and the Assembly Act provisions coming into force. Those descriptions are necessarily broad brush given the breadth of the powers involved. Schedule 5 in contrast describes the specific areas of competence which the Assembly has currently, and usually provides a more detailed description of that competence given its much narrower scope.

There are six fields in Schedule 5 which do not currently contain any matters. These are Field 4 (economic development), Field 7 (fire and rescue services and fire safety), Field 8 (food), Field 14 (public administration), Field 17 (tourism) and Field 19 (water and flood defence). No comparison can therefore be drawn between Schedule 7 and Schedule 5 in these areas.

Of the remaining 14 fields, the Assembly's current powers in some are relatively narrow. In our response to question 1, we explained that the Assembly's current powers in health include only the provision of redress in health services and the assessment of mental health and assessment of mental disorder. In contrast, the Assembly's powers under Schedule 7 would include most aspects of health policy, including health promotion, the provision of health services and the organisation and funding of the NHS.

There are other subject areas where the Assembly legislative competence would also broaden significantly in the event of Schedule 7 coming into force. For example, the Assembly's current legislative competence in Field 1 (agriculture, fisheries, forestry and rural development) is confined to the improvement and promotion of the red meat industry. The Assembly's competence under Schedule 7 would be significantly broader, and would include most aspects of agriculture, horticulture, fisheries, forestry and rural development. Similarly, in Field 18 (planning), the Assembly's current powers extend only to making provision relating to national and local plans. Under Schedule 7, the Assembly's powers to legislate on planning would include almost all aspects of town and country planning, including development control, listed buildings, conservation areas and hazardous substances.

In our response to question 1, we also highlighted two areas where the Assembly already has significant powers—education and training and local government. In these areas there is not such a dramatic difference between the legislative competence in Schedule 5 (the Assembly's current powers) and that in Schedule 7 (the Assembly's powers following a referendum "yes" vote). In both cases however the powers set out in Schedule 7 are broader than the powers the Assembly currently exercises under Schedule 5.

Similarly, the Assembly has significant current powers in Field 15 (social welfare) which include most, but not all, of the subjects listed in the equivalent paragraph of Schedule 7. It also has wide ranging powers over housing (Field 11), though importantly Schedule 7 would also include legislative competence over housing finance, the private rented sector and the regulation of rent, none of which the Assembly can legislate on currently.

In conclusion, the extent of additional powers which would be devolved to the Assembly if Schedule 7 came into force varies significantly between the various fields in Schedule 5 and subjects in Schedule 7. But in all cases, the Assembly would be able to legislate in a broader range of areas than it can at present.

15 November 2010

Annex from Secretary of State for Wales

GOVERNMENT OF WALES ACT 2006—SCHEDULE 7—ACTS OF THE ASSEMBLY

(This document shows Schedule 7 as it currently stands, with the proposed amendments to be made by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010. Text which would be inserted by that Order is shown underlined; text which would be deleted is shown struck through.)

PART 1

SUBJECTS

Agriculture, ~~fisheries~~, forestry, ~~animals, plants~~ and rural development

1 ~~—Agriculture, including animal health and welfare. Plant health. Plant varieties and seeds. Horticulture. Fisheries. Fish health. Forestry. Rural development.~~

1 Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds. Rural development.

In this Part of this Schedule "animal" means—

**(a) all mammals apart from humans, and
(b) all animals other than mammals;
and related expressions are to be construed accordingly.**

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, ~~fish, fish products~~, plants, plant products and other things related to them for the purposes of protecting human, animal, ~~fish~~ 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, ~~fish feedstuff~~, fertilisers and pesticides (or things treated by virtue of any enactment as pesticides) for the purposes of protecting human, animal, ~~fish~~ 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~~, animals and animal 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~~, animals and animal 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.

Occupational and personal pension schemes (including schemes which make provision for compensation for loss of office or employment, compensation for loss or diminution of emoluments, or benefits in respect of death or incapacity resulting from injury or disease),

apart from schemes for or in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General or Deputy Welsh Ministers **and schemes for or in respect of members of local authorities.**

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, **distribution** and supply of electricity.

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.

Nuclear energy and nuclear installations—

(a) including nuclear safety and liability for nuclear occurrences;

(b) but not including disposal of very low level radioactive waste moved from a site requiring a nuclear site licence.

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. Prevention, reduction, collection, management, treatment 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, except coroners' functions.

*Fire and rescue services and **promotion** of fire safety*

- 7 Fire and rescue services. **Provision of automatic fire suppression systems in newly constructed and newly converted residential premises.** 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 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—

Registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

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 the purposes of protecting human, animal, fish or plant health, animal welfare or the environment.~~

Regulation of the construction and equipment of motor vehicles and trailers, and regulation of the use of motor vehicles and trailers on roads, apart from—

(a) any such regulation which—

(i) relates to schemes for imposing charges in respect of the use or keeping of vehicles on Welsh trunk roads (“trunk road charging schemes”), or

(ii) relates to the descriptions of motor vehicles and trailers which may be used under arrangements for persons to travel to and from the places where they receive education or training, unless the regulation is the setting of technical standards for construction or equipment of motor vehicles or trailers which differ from the standards that would or might otherwise apply to them; and

(b) regulation of the use of motor vehicles and trailers carrying animals for the 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.~~

~~Traffic regulation on special roads, apart from regulation relating to trunk road charging schemes. Pedestrian crossings.~~

~~Traffic signs, apart from the placing and maintenance of traffic signs relating to trunk road charging schemes.~~

~~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 1191/69 as amended by ~~Council Regulation (EEC) No 1893/91 on public service obligations in transport~~ **Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road.**

Transport security, **apart from regulation relating to the carriage of adults who supervise persons travelling to and from the places where they receive education or training.**

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 the purposes of protecting human, animal, **fish** 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 the purposes of protecting human, animal, **fish** 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—

- (a) those used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales (or for two or more of those purposes), and
- (b) regulation for the purposes of protecting human, animal, **fish** or plant health, animal welfare or the environment.

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

Technical specifications for fuel for use in internal combustion engines.

Housing

- 11 Housing. Housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. 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 in respect of matters in relation to which the Welsh Ministers, the First Minister or the Counsel General exercise functions. 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) **and of young adults**. Care of **children**, 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, **apart from subscriptions to such funds by—**

(a) a county council or county borough council in Wales, or

(b) the Welsh Ministers.

Tax credits.

Child benefit and guardian’s allowance.

Social security.

Independent Living Funds.

Motability.

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~~ **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 and conservation areas. Caravan sites. Spatial planning. Mineral workings. Urban development. New towns. Protection of visual amenity.

Exception—

Functions of the Infrastructure Planning Commission or any of its members under the Planning Act 2008.

Water and flood defence

19 Water supply, water resources management (including reservoirs), water quality and representation of consumers of water and sewerage services. Flood risk management and coastal protection.

Exceptions—

Appointment and regulation of any water undertaker whose area is not wholly or mainly in Wales.
Licensing and regulation of any licensed water supplier within the meaning of the Water Industry Act 1991 (c 56), apart from regulation in relation to licensed activities using the supply system of a water undertaker whose area is wholly or mainly in Wales.

Welsh language

20 Welsh language

Exception—

Use of the Welsh language in courts.

PART 2

GENERAL RESTRICTIONS

Functions of a Minister of the Crown

- 1 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown.
- (2) A provision of an Act of the Assembly cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.
- (3) In this Schedule “pre-commencement function” means a function which is exercisable by a Minister of the Crown before the day on which the Assembly Act provisions come into force.

Enactments other than this Act

- 2 **(1)** A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the Table below—

TABLE

<i>Enactment</i>	<i>Provisions protected from modification</i>
European Communities Act 1972 (c 68)	The whole Act
Data Protection Act 1998 (c 29)	The whole Act
Government of Wales Act 1998 (c 38)	Sections 144(7), 145, 145A and 146A(1)
Human Rights Act 1998 (c 42)	The whole Act
Civil Contingencies Act 2004 (c 36)	The whole Act
Re-Use of Public Sector Information Regulations 2005 (SI 2005/1505)	The whole set of Regulations

(2) Sub-paragraph (1) does not apply to any provision making modifications, or conferring power by subordinate legislation to make modifications, of section 31(6) of the Data Protection Act 1998 so that it applies to complaints under an enactment relating to the provision of redress for negligence in connection with the diagnosis of illness or the care or treatment of any patient (in Wales or elsewhere) as part of the health service in Wales.

- 3 A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any provision of an Act of Parliament other than this Act which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund.
- 4 A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any functions of the Comptroller and Auditor General.

This Act

- 5 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in this Act.
- ~~(2) Sub-paragraph (1) does not apply to sections 20, 22, 24, 36(1) to (5) and (7) to (11), 53, 54, 146, 147, 148 and 156(2) to (5).~~
- (2) Sub-paragraph (1) does not apply to the following provisions—**
- (a) sections 20, 22, 24, 35(1), 36(1) to (5) and (7) to (11), 53, 54, 78, 146, 147, 148 and 156(2) to (5);**
- (b) paragraph 8(3) of Schedule 2.**
- (3) Sub-paragraph (1) does not apply to any provision—
- (a) making modifications of so much of any enactment as is modified by this Act, or
- (b) repealing so much of any provision of this Act as amends any enactment, if the provision ceases to have effect in consequence of any provision of, or made under, an Act of the Assembly.

PART 3

EXCEPTIONS FROM PART 2

Functions of Ministers of the Crown

- 6 (1) Part 2 does not prevent a provision of an Act of the Assembly removing or modifying, or conferring power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown if—
- (a) the Secretary of State consents to the provision, or
- (b) the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.
- (2) Part 2 does not prevent a provision of an Act of the Assembly conferring or imposing, or conferring power by subordinate legislation to confer or impose, any function on a Minister of the Crown if the Secretary of State consents to the provision.

Comptroller and Auditor General

7 Part 2 does not prevent a provision of an Act of the Assembly modifying, or conferring power by subordinate legislation to modify, any enactment relating to the Comptroller and Auditor General if the Secretary of State consents to the provision.

Restatement

- 8 Part 2 does not prevent an Act of the Assembly—
- (a) restating the law (or restating it with such modifications as are not prevented by that Part), or
 - (b) repealing or revoking any spent enactment, or conferring power by subordinate legislation to do so.

Subordinate legislation

- 9 Part 2 does not prevent an Act of the Assembly making modifications of, or conferring power by subordinate legislation to make modifications of, an enactment for or in connection with any of the following purposes—
- (a) making different provision about the document by which a power to make, confirm or approve subordinate legislation is to be exercised,
 - (b) making provision (or no provision) for the procedure, in relation to the Assembly, to which legislation made in the exercise of such a power (or the instrument or other document in which it is contained) is to be subject, and
 - (c) applying any enactment comprised in or made under an Act of the Assembly relating to the documents by which such powers may be exercised.

November 2010

Written evidence from Manon George and David Lambert, Legal Members of the Wales Governance Centre of Cardiff University

The Wales Governance Centre comprises a group of academic members from Cardiff Law School and Cardiff School of European Studies. We monitor and comment upon developments in Welsh Devolution. We are responding to the invitation of the Welsh Affairs Select Committee to give evidence on this draft Order.

INTRODUCTION

From paragraph 7.1 of the Explanatory Memorandum prepared by the Wales Office in relation to this draft Order, it is noted that the purpose of the Order is to reflect in amendments to Schedule 7 of the Government of Wales Act 2006 the legislative competence which has been conferred on the Assembly by current Legislative Competence Orders. A second purpose is to update references in Schedule 7 and to make amendments clarifying some subject and exceptions.

We note that in many respects the draft Order fulfils the objective of paragraph 7.1. However it seems that there are certain exceptions in Legislative Competence Orders which constrain the Assembly's powers to make Measure under those Orders, but which are not reflected in the draft Order. There is no apparent reason given as to why the draft Order does not reflect these exceptions. As we understand the present exceptions which are set out in the various Matters in Schedule 5, the purpose is to reflect powers which are retained by Central Government in relation to Wales in respect of items within such Matters which would otherwise come within the jurisdiction of the Assembly's legislative powers. If we are right in this assumption it is not clear to us the reason for omitting these exceptions set out in the amendments to Schedule 7 made in the draft Order. As we understand the situation, merely because an item is excepted from a subject area in Schedule 7 does not mean that its omission allows the Assembly to legislate in relation to such item.

Paragraph 1(1) of Part 2 of Schedule 7 prevents the Assembly from legislating under Schedule 7 in such a way as to remove or modify any function exercisable by a Central Government Minister prior to the coming into force of the provisions of Schedule 7.

Although a Central Government Minister under paragraph 6(1) of Part 3 of Schedule 7 can consent to the Assembly removing or modifying such a Central Government power, without such consent the Assembly cannot legislate in relation to such a function. The problem seems to be that paragraph 1(1) of Part 2 of Schedule 7 prevents the Assembly exercising its legislative powers in relation so as to affect the powers of Central Government Ministers. This is so, whether or not such powers are expressly set out as exceptions in Part 1 of Schedule 7.

Unless there are such express exception in Part 1 of Schedule 7, it is difficult to ascertain the extent of the Central Government powers in relation to Wales because these are not listed elsewhere other than to a certain extent in the Wales Governance Centre's website, Wales Legislation Online.

We set out below what appears to be exceptions arising in Legislative Competence Orders in Schedule 5 which are not reflected in the provisions of the draft Order amending Schedule 7.

1. SUBJECT 3: CULTURE

The National Assembly for Wales (Legislative Competence) (Culture and Other Fields) Order SI 2010/1212 has an exception preventing the Assembly from legislating on the "licensing of sale and supply of alcohol, provision of entertainment and late night refreshment". The exception in the LCO may reflect the powers of the Home Office in relation to these matters, if so, we are not sure why this exception is not reflected in Subject 3 of Schedule 7.

2. SUBJECT 6: ENVIRONMENT

The present LCO was inserted in Schedule 5 Field 6 by the National Assembly for Wales (Legislative Competence)(Environment) Order SI 2010/248.

Looking at the description of Environment in Schedule 7 it was with considerable surprise that the Environment LCO was made in the way it is expressed. The Order gives legislative competence to the Assembly in four Matters and then proceeds in relation to each Matter to take away that legislative competence by very specific and not general exceptions sometimes making exceptions to those exceptions, and in some cases making exceptions to the exceptions to the exceptions.

It is understood that the exceptions to this LCO are a statement of what is considered to be the continuing functions of Central Government in relation to the areas set out in the four Matters in the LCO. The absence of such exceptions being inserted into the Environment Subject 6 in Part 1 of Schedule 7 does not mean that the Assembly would necessarily have no exceptions to the apparently wide legislative powers given in this Schedule 7 subject. All legislative powers in Schedule 7 are not only subject to the exceptions set out on the face of Part 1 of Schedule 7 they are also subject to paragraph 1(1) of Part 2 of Schedule 7.

It seems that the effect of not carrying forward into Schedule 7 in the new Draft Order the considerable exceptions to the Assembly's legislative powers in relation to areas of the Environment is to make it more difficult to ascertain to what exceptions the Assembly would be subject under its Environment legislative powers in Schedule 7.

3. SUBJECT 9: HEALTH AND HEALTH SERVICES

In Schedule 5 Matter 9.2 introduced by the National Assembly for Wales (Legislative Competence)(Health and Health Services and Social Welfare) Order SI 2010/236 there are a series of exceptions to the Assembly's power to legislate on the "assessment of mental health and treatment of mental disorder". The draft Order amending Schedule 7 does not reflect these exceptions.

4. SUBJECT 10: HIGHWAYS AND TRANSPORT

There is no apparent exception in the draft Order amending Schedule 7 to reflect the exception from the Assembly legislative powers in relation to the "registration of local bus services and the application and enforcement of traffic regulation conditions in relation to those services". This exception appears under the heading "Highways and Transport" in Part 2 of Schedule 5 and was introduced by the National Assembly for Wales (Legislative Competence)(Environment) Order 2010/248.

5. SUBJECT 15: SOCIAL WELFARE

Matters 15.1—15.10 are inserted by the following Orders:

- (a) The National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2008/1785
- (b) The National Assembly for Wales (Legislative Competence)(Social Welfare and Other Fields) Order 2008/3132
- (c) The National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009/3010
- (d) The National Assembly for Wales (Legislative Competence)(Health and Health Services and Social Welfare) Order 2010/236

In Matter 15.1 of Field 15 of Schedule 5 there is an exception from the legislative powers of the Assembly in relation to "charges and payments for residential care". There is no such exception in the draft Order amending Schedule 7.

In Matter 15.10 of Field 15 of Schedule 5 introduced by SI 2010/236, the Assembly may legislate in relation to "social care services connected to mental health". In so legislating they cannot create law relating to "the independent mental capacity advocacy services established by Part 1 of the Mental Capacity Act 2005". There is no such exception made to either Subject 15 "Social Welfare" or Subject 9 "Health and Health Services" by the draft Order amending Schedule 7.

In Part 2 of Schedule 5 in relation to Social Welfare there are exceptions preventing the Assembly from legislating for “independent living funds”; “motability” and “welfare foods”. These exceptions were introduced by The National Assembly for Wales (Legislative Competence)(Environment) Order 2010/248. There are no such exceptions in the draft Order amending Schedule 7.

6. SUBJECT 16: SPORT AND RECREATION

In Schedule 5 Field 16 the National Assembly for Wales (Legislative Competence)(Social Welfare and Other Fields) Order 2007/3132 established Matter 16.2. This enables the Assembly to legislate to enable the public to make recreational journeys to the coast. There are two exceptions to this Matter relating to mechanically propelled vehicles, except invalid carriages, and the creation of new highways. It does not seem that these exceptions are specifically referred to in Subject 7 (Highways and Transport) of the draft Order amending Schedule nor in any amendments proposed to Subject 16.

7. SUBJECT 20: WELSH LANGUAGE

No amendments are proposed to this subject by the draft Order. In Field 20 of Schedule 5 two Matters are introduced into this Field by The National Assembly for Wales (Legislative Competence)(Welsh Language) Order SI 2010/245. In the first of these two Matters—Matter 20.1—there are a considerable number of exceptions to the Assembly’s power to legislate with regards to the use of the Welsh language and the treatment of the Welsh and English language on the basis of equality. Apart from the exceptions relating to the Assembly not being able to legislate on the use of the Welsh language in courts and in relation to broadcasting there does not seem to be any reflection of these exceptions in the proposed draft Order. Furthermore there are definitions in the Matters given to words in some of the exceptions, such as broadcasting and bus services, which are not reflected in the draft Order.

CONCLUSION

It does not seem to us that the stated purpose of paragraph 7.1 in the Explanatory Memorandum relating to this draft Order is completely fulfilled in that certain aspects of the Assembly’s present legislative competence are not fully reflected in the draft Order. Without an explanation of the reasons for these omissions it is not clear whether despite the absence of such references, the Assembly would still not be able to legislate in relation to such exceptions under Schedule 7. This is because such exceptions though not specifically recorded in Part 1 of Schedule 7 may still reflect Central Government functions in relation to Wales and so be excepted from the Assembly’s legislative competence by paragraph 1(1) of Part 2 to Schedule 7 unless the exercise of powers relating to these items is specifically agreed to by the Secretary of State under paragraph 6(1) of Part 3 of Schedule 7. There does not seem to be such express agreement to their exercise currently in existence.

November 2010

Written evidence from Emyr Lewis, Partner in Morgan Cole Solicitors, Cardiff

1. Devolution of law-making powers to the Assembly under schedule 5 has been, as many commentators have noted, inconsistent and haphazard.

2. For instance, there is a notable contrast between fields such as education or social welfare on the one hand, and health on the other.

3. In the fields of education and social welfare, there has been substantial and orderly devolution of powers in some areas which would enable the Assembly to legislate in a mature and targeted manner, using the powers purposefully when the need arises.

4. In the field of health, only two focused areas (redress and aspects of mental health) have been devolved, despite substantial executive devolution to the Welsh Ministers to reform the health service in Wales. In this case, the danger of creating a democratic deficit is clear.

5. In other cases, the need to reach political compromises both within and between London and Cardiff has given rise to very complex constraints on and exceptions to the powers of the Assembly to make laws in certain fields, notably the Welsh language and housing.

6. If the Assembly Act provisions come into force, so that the Assembly gets the broader powers contained in schedule 7, then one beneficial effect will be to start to iron out these inconsistencies and to remove these constraints.

7. The draft Order amending Schedule 7 of the Government of Wales Act 2006 is to be welcomed, because it responds in a constructive way to the growth of certain fields over time. Paragraph 7.1 of the Explanatory Memorandum states:

This instrument amends Schedule 7 in order to reflect legislative competence which has been conferred on the Assembly under the current arrangements and certain exceptions and restrictions which have been applied to that competence, since Schedule 7 was last updated in 2007.

8. From this, the informing principle seems to be that, where the Assembly has already acquired powers to make laws which are broader than Schedule 7, these are kept. This is a very important principle, since it would be totally anomalous if the effect of implementing Schedule 7 were to be to remove law-making powers from the Assembly which Parliament had already decided should be devolved.

9. This paragraph also makes it clear that the draft Order reflects only certain exceptions and restrictions. Again this is sensible, since the exceptions to and restrictions on current law-making powers reflect not only areas which might properly be regarded as reserved matters (and therefore should be reflected in Schedule 7), but also reflect the piecemeal way and diverse processes by which the current powers have reached the statute book.

10. One aspect which needs attention is the exceptions in Schedule 7. Unlike Schedule 5 exceptions, these apply across subjects, so that an exception to Health will apply also to Education. This could lead to unintended loss of legislative competence.

11. For instance, under Schedule 5, matter 20.1, the Assembly has the power to legislate in relation to facilitating and promoting the use of the Welsh language. On the face of it, that must include use of the language in broadcasting. There is a specific exception in matter 20.1, which states: "This matter does not include imposing duties about broadcasting", but other types of provision about broadcasting could be made, for instance by giving the Welsh Ministers powers (but not a duty) to fund or assist Welsh-language broadcasting.

12. One can also foresee circumstances relating to other currently-devolved matters, where the power to legislate in relation to broadcasting might be relevant (for instance education), and where it is not currently excluded.

13. Schedule 7, however, excludes broadcasting from subject 3, which contains the power to make laws about culture. This exception extends, therefore, to the whole of Schedule 7, so would remove the existing powers.

14. I have not analysed each current power under Schedule 5 against each current (or envisaged) exception under Schedule 7, so I cannot say to what extent the issue identified here is extensive. Nevertheless, assuming that it is agreed that Schedule 7 should not remove from the Assembly law-making powers which Parliament has already devolved, I would recommend that a saving provision be included so as to preserve the extent of the current law-making powers. This should be done by including a further amendment to Schedule 7. One option would be to state: No exception from any Subject shall have effect to the extent that it would prevent the Assembly from making a provision in an Assembly Act which it could have made in an Assembly Measure under its legislative competence as it was before the Assembly Act Provisions came into force.

14 November 2010

Letter from the Law Society of England and Wales

Thank you for your invitation to respond to the Welsh Affairs Committee's call for evidence in relation to the above draft order.

It is our opinion that the amendments to Schedule 7, as proposed in the draft order, will be effective in reconciling its contents with the provisions of Schedule 5.

The Law Society of England and Wales remains committed to supporting a move to Part 4 of the Government of Wales Act 2006.

12 November 2010

Letter from Carwyn Jones AM, First Minister of Wales

I am writing in response to your letter of 1 November concerning the amendment of Schedule 7 of the Government of Wales Act 2006, through an Order in Council (The National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010), a draft of which is currently laid before the Houses of Parliament.

I can confirm that the Welsh Assembly Government was involved in the preparation of this Order and is content with its provisions.

12 November 2010