



Cymdeithas y Cyfreithwyr
The Law Society

**Consultation on the Proposed National Assembly
for Wales (Legislative Competence) (Welsh
Language) Order 2009**

March 2009

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supporting
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The Law Society is the representative body for over 100,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

In Wales the Law Society has a committee dedicated to legal issues both stemming from devolution of law-making and consequent upon a developing legal community. The committee is both proactive and reactive and comprises specialist lawyers (not all of whom are solicitors) drawn from across Wales. The Wales Committee is supported by a specialist staff based in Cardiff.

General Consultation

This response is made in respect of the nature and appropriateness of the proposed Legislative Competence Order ("the LCO").

The Law Society supports the transfer of the power to make laws in all Fields set out in Schedule 5 to the Government of Wales Act 2006 ("GOWA"). The question whether legislation on the use of Welsh should be made in Wales or in Westminster follows this assertion and our answer is yes.

- 1. Should the National Assembly for Wales be able to make laws on the promotion and use of the Welsh language?.*
- 2. Should the National Assembly for Wales be able to make laws about which services the public should be able to receive bilingually?*
- 3. Should the National Assembly for Wales be able to make laws on the freedom of persons to use the Welsh language with each other?*

Our answer to all three questions in this section is yes.

At this stage it is the extent to which legislative competence should be constrained and the policy reasons for that within the overall devolution settlement which is the central question. In constitutional terms many of the various published commentaries, arguments and objections so far aired against the proposed LCO are second order points that properly fall to be debated as and when the National Assembly legislates on the use and status of Welsh, once it has competence.

Detailed consultation

- 4. What are your views on the general principle that legislative competence in the area identified in Matters 20.1 and 20.2 be conferred on the Assembly?*

We support the transfer of power to the National Assembly to make laws within Field 20 Welsh Language.

5. *The Explanatory Memorandum states that Matter 20.1 would echo and build on the principles that underpin the Welsh Language Act 1993 and would allow the Assembly to legislate on the range of functions carried out at present, by the Welsh Language Board, and to build on these functions. Do you agree that it will allow the Assembly to do this? If not, how should it be amended?*

The pursuit of legislative competence in this Field is an opportunity for Wales to gain a power to legislate in its own way in order to promote and facilitate the use of the Welsh language. By following the provisions in the Welsh Language Act 1993 (“the Act”) the proposed new Matter 20.1 reads as a “version” of sections 3(1), 3(2) and 6 of the Act. The Law Society is disappointed that the Welsh Assembly Government is not seeking powers to make its own innovative legislation to deal with today’s Wales and is following an Act made over 15 years ago.

6. *What are your views on the scope of the proposed Order with respect to the categories of persons on whom it would allow the Assembly to impose duties to provide particular services bilingually to the public e.g. is it too narrowly or broadly drawn (Matter 20.1 (a) - (i))? Please indicate clearly to which sub-section(s) your comments relate i.e. (a) - (i) and any particular sub-sub-sections under (h).*

Matter 20.1 (a) includes “public authorities” in the categories of persons covered by the legislative competence. By section 6(3)(a) of the Human Rights Act 1998 (“the HRA”) ‘public authority’ includes “a court or tribunal”. The Explanatory Memorandum states that “this Matter does not extend to the use of the Welsh language in the courts”¹ but there is no section in the LCO making this exception. Schedule 7 of GOWA includes the exception of “Use of the Welsh language in Courts” but this only comes into force under Part 4 of GOWA. There is no exception to Field 20 Welsh Language in Schedule 5 GOWA. (See further under question 7 regarding interpretation)

The remaining proposed categories have attracted many questions which illustrate the difficulties arising from an attempt to categorise bodies within a legislative power e.g. Why are railway services alone caught and not all transport services?

Generally speaking, our view is that categorising the *persons* on whom duties may be placed is not appropriate for a legislative power. The power would be better described by reference to the *services provided* and so the LCO would be better if it were to contain descriptions of relevant services in respect of which it is proposed that the National Assembly of Wales can exercise legislative power: it is the nature of the services provided to the public which should be clear.

The legal duties attaching to those services could then be imposed on persons in relation to those services. In this way the nature of the provider or the arrangements by which the services are delivered are irrelevant and there would be no need for categories (a) to (e) & (h) to appear in the LCO.

Such an approach would also circumvent any territorial issues (e.g. where category (h) requires qualification).

¹ Paragraph 26 Memorandum from the Welsh Assembly Government

The Explanatory Memorandum states that the intention is to “provide a consistent basis for improving access to services through the medium of Welsh”² and “the competence sought under the proposed LCO would, for example, allow the Assembly to legislate to achieve greater clarity for citizens with regard to the categories of bodies that can be required to produce a Welsh language scheme”³: the inclusion of inconsistent and indefinite categories within the LCO do not meet these objectives.

7. Is the definition used for “public authorities” for this Matter appropriate (“each public authority within the meaning of section 6 of the Human Rights Act 1998”)? If not, what definition should be used and why?

This reply is subject to our reply to the preceding question regarding section 6(3)(a) HRA. The definition of ‘public authority’ as interpreted under the HRA does not prescribe that certain ‘bodies’ are public authorities (except for courts and tribunals under section 6(3)(a)) the term is defined in Section 6(3)(b) HRA in relation to public functions to include “any person certain of whose functions are functions of a public nature...”. It would be more usual to say “‘public authority’ has the same meaning as in Section 6 of the Human Rights Act 1998’, and we suggest that the LCO be modified accordingly.

8. Matter 20.1 would allow duties to be imposed on “telecommunications services” and “postal services and post offices” (Matter 20.1 sub-section (h)(iii) and (h)(iv)). Are the definitions used for “postal services”, “telecommunication services” under the “Interpretation of this field” section in the proposed Order necessary and appropriate? If not, how should they be re-drafted and why?

Terms used in legislative powers, if defined on the face of the Order, should accord with existing legislation for the purposes of interpretation; it is only where there is a reason why that approach cannot be followed that an Order such as this should include some other *new* definition, which would then need to be clear and precise.

Neither of these ‘definitions’ follow those in the relevant UK statutes. We are also surprised that “broadcasting, radio and television” are excepted from the definition of those terms, and should be interested to have the reasoning for this exclusion publicly available.

9. In relation to Matter 20.1 sub-section (e) - persons providing services to the public who receive public money amounting to £200,000 or more in a financial year”, and includes “moneys made available directly or indirectly”:

(i) Is it necessary to set out the definition of “public money” in the propose Order? If so, is it appropriate (as set out under “Interpretation of this field”)?

(ii) Duties would only be imposed on the recipients of more than £200,000. Is £200,000 the right threshold for the assembly to have legislative powers?

As stated above the categories set out in the proposed LCO give rise to many questions.

² Paragraph 9 *ibid*

³ Paragraph 17 *ibid*

If the term “public money” is to be used it is imperative that a clear definition is included. The proposed definition is not clear.

Further, the examples given of the type of ‘person’ within the category ⁴are all national bodies which receive significant sums of revenue funding as well as having received capital from the Welsh Assembly Government and/or Assembly Sponsored Bodies, and indeed, all three exemplars charge for access to the majority of their ‘services’.

However, the category as drawn will catch many other persons e.g. firms of solicitors undertaking Legal Aid work which in total receive more than £200,000 could be included in future legislation.

Arguments relating to the appropriateness and nature of any duties imposed are not relevant to this consultation and this consultation response, but are relevant to such Assembly Measures as might be made consequential to the powers being given by the LCO. We consider that we must draw the attention of the committee to the fact that this particular category is very substantially wider than the few examples given in the Explanatory Memorandum due to the breadth of the meaning of “public money”.

The application of a threshold for sub-section (e) does not follow the policy objective to “provide a consistent basis for improving access to services through the medium of Welsh”⁵

10. Is the scope of Matter 20.2 appropriate (“provision about or in connection with the freedom of persons wishing to use the Welsh language to do so with one another (including any limitations on it)”? Will it allow the Assembly to legislate in future to implement the policy proposal as outlined in the Explanatory Memorandum?

The implementation of this policy will raise issues around rights, freedoms and discrimination. It is not clear from the policy what sort of legislation the Welsh Assembly Government intends to bring forward.

11. What are your views on Articles 4 and 5 of the proposed LCO which deal with the application of the proposed LCO to Crown bodies?

Article 4 clearly brings the sections of GOWA relating to the use of English and Welsh through the Assembly, by the Welsh Ministers and the Assembly Commission within the group of sections of GOWA which can be modified through Measure making.

Article 5 introduces a restriction on future law-making under Matter 20.1 and 20.2 only. It is inappropriate to restrict the National Assembly’s law-making powers in relation to individual Matters. This fettering of the National Assembly’s powers in relation to the Welsh language places the subject apart from other devolved subjects. The existing provision in Schedule 5 Part 3 Paragraph 7 GOWA is subject to the consent of the Secretary of State and the extent of the National Assembly’s power to create criminal offences is restricted in Schedule 5 Part 2 Paragraph 2 GOWA. In our view Article 5 should not be included in the LCO.

⁴ Paragraph 35 *ibid*

⁵ Paragraph 9 *ibid*

Explanatory Note

The inclusion of the final paragraph in the Explanatory Note is unnecessary as the making of the LCO has no impact in practice until a Measure is made. Regulatory Impact Assessments are only relevant to proposed legislation not to LCOs.