



The proposed Welsh Language Legislative Competence Order

Standard Note: SN/HA/4973

Last updated: 11 December 2009

Author: Philip Ward. Home Affairs Section

Section Home Affairs Section

A proposed legislative competence order was laid before the Welsh Assembly on 2 February and the Westminster Parliament on 9 February 2009. The order seeks to transfer legislative competence in Welsh language matters from Westminster to the Assembly in Cardiff. After scrutiny by Cardiff and Westminster, a draft Order, somewhat revised from the proposal seen in February, was brought forward in October.

This Note was originally prepared in February 2009. An “update” section at the end lists developments to December. The Note will be fully revised when time permits.

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1 Background

A principle of equal validity for the Welsh and English languages in Wales was first enshrined in the *Welsh Language Act 1967*. Its preamble stated that “it is proper that the Welsh language should be freely used by those who so desire in the hearing of legal proceedings in Wales and Monmouthshire.” It also said that “further provision should be made” for the use of Welsh “with like effect as English, in the conduct of other official or public business.” Ministers were empowered to prescribe Welsh versions of statutory documents or form of words.

However, almost immediately the 1967 Act came under attack from those who felt that the principle of equality validity was weak in effect – a common complaint was that it “lacked teeth”. Application of the principle was ultimately discretionary and while some bodies, such as local authorities in Gwynedd adopted a “maximalist” approach, others adopted a “minimalist” approach.¹

The *Welsh Language Act 1993*² aimed to remedy the shortcomings of the 1967 Act by placing Welsh and English on an equal basis in public life in Wales. The Act specifies three things:

- it places a duty on the public sector to treat Welsh and English on an equal basis, when providing services to the public in Wales
- it gives Welsh speakers an absolute right to speak Welsh in court
- it establishes the Welsh Language Board to oversee the delivery of these promises and to promote and facilitate the use of the Welsh language

The 1993 Act created a statutory Welsh Language Board with powers to require public bodies to prepare Language Schemes, detailing how they will treat the Welsh and English languages on a basis of equality in providing services to the public.³

Public bodies named in section 6 of the Act have a duty to prepare Welsh Language Schemes. The Act details steps to be taken by the Welsh Language Board and by public sector bodies such as local authorities, health trusts and government agencies in the preparation and implementation of Welsh Language Schemes. These schemes set out which services will be available in Welsh and how and when they will be provided. The Act does not apply to Crown bodies although UK Government departments and public bodies have schemes on a voluntary basis.

The following orders have already been made under section 6(1) of the 1993 Act:

¹ Gwilym Prys Davies, “The legal status of the Welsh language in the twentieth century”, in *Let’s do our best for the ancient tongue: the Welsh language in the twentieth century*, ed. Geraint H Jenkins and Mari A Williams, 2000, p243 [copy available for reference in HA section of HC Library]

² The Act can be seen in full at: http://www.opsi.gov.uk/acts/acts1993/Ukpga_19930038_en_1.htm

³ <http://www.bwrdd-yr-iaith.org.uk>

Welsh Language Schemes (Public Bodies) Order 1996, SI 1996/1898

Welsh Language Schemes (Public Bodies) Order 1999, SI 1999/1100

Welsh Language Schemes (Public Bodies) Order 2001, SI 2001/2550

Welsh Language Schemes (Public Bodies) Order 2002, SI 2002/1441

Welsh Language Schemes (Public Bodies) Order 2004, SI 2004/71⁴

Welsh Language Schemes (Public Bodies) Order 2008. SI 2008/1890⁵

The 1993 Act originally vested these order-making powers in the Secretary of State for Wales. Following devolution these powers were transferred to the Welsh Ministers.⁶

2 “Primary” legislative powers

Thus the only power currently devolved to the Welsh Ministers is that to make secondary legislation under the *Welsh Language Act 1993*. New legislative powers were conferred on the National Assembly for Wales at the start of the Third Assembly in May 2007. These new powers were provided for in the *Government of Wales Act 2006*, which allows for the Assembly to pass legislation in areas where it has legislative competence. The Welsh language is Field 20 in Schedule 5 of the 2006 Act. There are currently no “Matters” listed within the Field; therefore the Assembly currently has no “primary” legislative competence with regard to the Welsh language. However, the 2006 Act allows the National Assembly to seek Measure-making powers over Welsh-language matters through Legislative Competence Orders. When the White Paper, *Better Governance for Wales* was published in 2005, Elin Jones AM argued in a submission to the White Paper Committee that the Assembly should have such Measure powers for the Welsh language at the outset.⁷

I am of the opinion that the National Assembly is the appropriate place to legislate on the Welsh language. The White Paper, by means of Orders in Council, affords an opportunity for this to happen. An Order in Council, giving the Assembly the power to legislate on the Welsh Language, could be passed in Westminster. The Assembly would then be free to discuss and approve Measures on the Welsh language at any time. Given that the Welsh Language is relevant only to Wales, this would not be contrary to the spirit of the White Paper.

Prior to elections to the Welsh Assembly in 2007, the outgoing Assembly Government announced its intention to merge the Welsh Language Board with itself and create a Dyfarnydd⁸ to undertake the Board’s regulatory role in respect of Welsh language schemes. This would require the passing of a Legislative Competence Order (LCO) and an Assembly Measure. Other political parties also indicated that they would wish to pass Measures relating to the Welsh language.⁹

⁴ <http://www.opsi.gov.uk/legislation/wales/wsi2004/20040071e.htm>

⁵ http://www.opsi.gov.uk/legislation/wales/wsi2008/wsi_20081890_en_1

⁶ *The National Assembly for Wales (Transfer of Functions) Order 1999* (SI 1999/672)

⁷ Elin Jones AM, Letter to the Presiding Officer, 29 July 2005, BGW EV-4

<http://www.wales.gov.uk/keypubassembettergov/content/bgw2-ev4.htm>

⁸ An office to undertake the adjudication functions of the Welsh Language Board and to provide comments on the development by the Welsh Ministers and by servants or agents of crown of their Welsh Language Schemes

⁹ National Assembly for Wales, Members’ Research Service, *Topic Brief: Welsh Language*, April 2007, <http://www.assemblywales.org/welshlanguage.pdf>

After the 2007 election, a Coalition Government was formed between the Wales Labour Party and Plaid Cymru, and the basis of the agreement and programme for Government is set out in a document entitled *One Wales*.¹⁰ This states:

We will be seeking enhanced legislative competence on the Welsh Language. Jointly we will work to extend the scope of the Welsh Language Legislative Competence Order included in the Assembly government's first year legislative programme, with a view to a new Assembly Measure to confirm official status for both Welsh and English, linguistic rights in the provision of services and the establishment of the post of Language Commissioner (p34).

The document further states that the Assembly Government will drive forward efforts to obtain agreement on the use of the Welsh language in specified areas of EU business and use this experience to explore with the Westminster government the making of an official application to the Council of Ministers for the Welsh language to receive official EU language and working language status.¹¹ It also undertakes to expand the funding and support for Welsh-medium magazines and newspapers, including the establishment of a Welsh-language daily newspaper and continue research work into population shifts in order to promote balanced populations in all parts of Wales.

The media and broadcasting, including broadcasting in the Welsh language and the activities of Sianel Pedwar Cymru (S4C), remain matters reserved to the UK Government.

In his statement announcing the legislative programme for the newly elected Assembly on 6 June 2007, the First Minister Rhodri Morgan stated:

In our discussions with the Liberal Democrats we also explored proposals for a legislative competence Order in relation to the Welsh language, and, again, I am keen to involve other parties in further discussion on that issue. I want to ensure that sufficient time is available to work towards an agreed conclusion on this matter, and we will place that legislative competence Order in the autumn part of our programme to allow a minimum of three months for the discussions to hopefully come to fruition. Once that has happened, the relevant legislative competence Order will be laid before you.¹²

A "proposed" LCO was laid before the Assembly on 2 February 2009¹³ and was the subject of a plenary statement by the Minister for Heritage on the following day.¹⁴

3 The legislative competence order process

Now that the order has been introduced in the Assembly, it will follow a two-stage process:

- Pre-legislative scrutiny of the **proposed** order by the Assembly and Parliament (in the Commons by the Welsh Affairs Committee and in the Lords by the Constitution Committee)

¹⁰ *One Wales - A progressive agenda for the government of Wales: An agreement between the Labour and Plaid Cymru Groups in the National Assembly*, 27th June 2007, <http://www.plaidcymru.org/uploads/publications/281.pdf>

¹¹ *One Wales*, p35

¹² <http://new.wales.gov.uk/about/cabinet/cabinetstatements/2007/1516865/?lang=en>

¹³ <http://www.assemblywales.org/lco-ld7372-e.pdf>

¹⁴ NAW Record of Proceedings, 3 February 2009, <http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=115357&ds=2/2009#rhif4>

- Consideration of the **draft** order by the Assembly and, if laid by the Secretary of State, Parliament (in the Commons by a delegated legislation committee and in the Lords in the Chamber or Grand Committee). If approved by both Houses the order is given royal assent in the Privy Council.

There is a useful description of the process included as an appendix to a recent memorandum from the Welsh Affairs Committee¹⁵, reproduced below:

The Government of Wales Act 2006 introduced a new procedure whereby the National Assembly for Wales can bring forward proposals which would extend the Assembly's lawmaking powers by way of Legislative Competence Orders in Council. The Orders 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. They do this by adding new "Matters" to the "fields" of legislative competence set out in Schedule 5 of the Government of Wales Act 2006.

These proposals for draft Orders may be introduced by the Welsh Assembly Government, by committees of the National Assembly, or by individual Assembly Members.* They are subject to pre-legislative scrutiny by committees of the Assembly appointed for this purpose and, potentially, by committees of the House of Commons and the House of Lords. Whitehall agreement ("clearance") is a necessary pre-requisite before a proposed Order is referred by the Secretary of State for Wales to each House at this pre-legislative scrutiny stage.

Following the pre-legislative scrutiny stage, the National Assembly may agree an actual draft Order. This may take account of committee recommendations (from either its own committees or Westminster) following pre-legislative scrutiny. The draft Order must then be laid before Parliament by the Secretary of State for Wales – and he or she may still decline to do so at this stage. If the draft Order is laid, it is considered by both Houses of Parliament, and may be debated by them. Draft Orders at this stage are not amendable and can only be approved or rejected. If approved by both Houses, and once it is given the royal assent in the Privy Council, direct law-making powers are devolved to the Assembly within the scope of the Order in Council. The Assembly then makes those laws 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.

Extract from the 5th Report of the Welsh Affairs Committee, The proposed draft National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008 (HC 576, Session 2007-08).

*By ballot.

Further information on the process can be found in Library standard note SN/PC/04505, *The devolved legislatures: some comparisons between their powers and work*.¹⁶

The progress of legislative competence orders in both the Assembly and Parliament, with links to the documentation, can be followed on the Assembly website.¹⁷

¹⁵ Review by the Secretary of State of the procedure for Legislative Orders in Council: memorandum by the Welsh Affairs Select Committee, July 2008:

<http://www.parliament.uk/documents/upload/Review%20of%20LCOs%20by%20the%20Secretary%20of%20State%20%2D%20Memorandum%20by%20the%20Welsh%20Affairs%20Committee.pdf>

¹⁶ <http://www.parliament.uk/commons/lib/research/briefings/snpc-04505.pdf>, pp15-17

¹⁷ <http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-progress-lcos-measures.htm>

4 Westminster parliamentary activity

The proposed LCO was laid before the Westminster Parliament on 9 February 2009, as a Command paper (Cm 7544).¹⁸ In a Written Statement the Secretary of State said that he had written to the Welsh Affairs Committee and to the House of Lords Constitutional Committee requesting that they undertake pre-legislative scrutiny. On the same day, the Secretary of State answered several written questions:

Mrs. Gillan: To ask the Secretary of State for Wales if he will place in the Library copies of correspondence between officials and Ministers in his Office and Welsh Assembly Government Ministers and officials on the Welsh Language Legislative Competence Order in the last two years. [254618]

Mr. Paul Murphy: We have had frequent exchanges with Welsh Assembly Government Ministers and officials on the Welsh Language Legislative Competence Order. To make all such exchanges available in the Library would restrict our ability to conduct business effectively.

However, the Wales Office has released some information relating to exchanges on the proposed order. It is available on the Wales Office website: www.walesoffice.gov.uk/foi/disclosures

Mrs. Gillan: To ask the Secretary of State for Wales if he will publish all legal opinions and advice obtained by his Department relating to the Welsh Language Legislative Competence Order. [254735]

Mr. Paul Murphy: We have received legal opinions and advice relating to the Welsh Language Legislative Competence Order from a number of sources. To make such advice available would restrict our ability to conduct business effectively.

Mrs. Gillan: To ask the Secretary of State for Wales what (a) features, (b) rights and (c) sanctions will accrue to the Welsh language when it acquires official status under the Welsh Language Legislative Competence Order. [254737]

Mr. Paul Murphy: The Legislative Competence Order on the Welsh Language, when made, will confer legislative competence on the National Assembly for Wales in respect to the matters specified in the order. It will not confer official status on the Welsh language.

The explanatory memorandum accompanying the proposed order explains its scope and content in detail. I have today laid these documents as a Command Paper before the House for pre-legislative scrutiny. Copies have been placed in the Library and can be found in the Vote Office.¹⁹

5 Characteristics of the proposed order

The purpose of the order is, as its title states, to transfer legislative competence. Once it is passed, the Assembly can then introduce Measures using its newly won competence. The order does not itself have an impact on business. The impact will arise from any Measures introduced by the Assembly once the order has been approved; hence the statement (which has puzzled some) at the end of the Explanatory Note to the proposed order that “a full

¹⁸ HC Deb 9 February 2009 c54WS; the *National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009*

¹⁹ HC Deb 9 February 2009 c1524W

regulatory impact assessment has not been prepared for this order as no impact on the private or voluntary sector is foreseen”.

The order inserts new “matters” into field 20 of Schedule 5 of the 2005 Act. As stated above, there is already an obligation on specified public bodies to prepare Welsh Language Schemes. However, the Welsh Government argues that the framework established by the 1993 Act no longer reflects the ways in which services are delivered to the public in Wales:

16. (...) The proposed LCO would provide competence to enable the Assembly to revisit and update the legislative framework established by the 1993 Act to address specific shortcomings that have become apparent during the intervening period. (...)

18. The need for greater clarity has arisen in part from changes to the structure of certain key public services and as a consequence of the emergence of new service delivery mechanisms which have resulted in the public face of some sectors and certain key services falling outside the scope of the 1993 Act. The Welsh Ministers have the power to specify some bodies from within these sectors under the 1993 Act, but not all. This creates the potential for an uneven playing field within these sectors and a lack of clarity about service expectations for end users.²⁰

Many services to the public are now delivered by private companies, or privatised utilities. The examples allowed for in the order include gas, water and electricity services, telecommunications and railway services. The order speaks of “imposing duties on” such bodies. Once passed, it would therefore enable the Assembly to introduce Measures requiring such companies to prepare Welsh Language Schemes. Similar duties could be imposed on “persons providing services to the public who receive public money amounting to £200,000 or more in a financial year” and on those who provide services to the public “under agreements, or in accordance with arrangements, made with public authorities” (i.e. where public bodies outsource the delivery of services).

In an Assembly reply to Bethan Jenkins AM, the Welsh Heritage Minister, Alun Ffred Jones, made the following point about impact on business:

You asked about the impact of the proposed Order given the present economic climate. It is important to realise that we are preparing legislation here that we hope will last a long time; it is not intended only for this year or the next. By the time any Measures come into force, we hope that the economy will be in a different and more optimistic condition.²¹

Invited by Lesley Griffiths AM during the same debate to “confirm that this LCO will not place a burden on the local chip shop, local taxi business, or local plumber”, he replied

Certainly, from what I have seen, there is serious misunderstanding on the part of the London media with regard to what has been proposed, and that is regrettable. (...)

There is no intention that this proposed Order should catch any chip shop. I am sorry that I did not get around to replying to Lesley Griffiths, but she is quite right—we do not intend to catch businesses of that nature within the scope of the proposed LCO. By and large, we are dealing with companies that provide a service of a public nature, or which is deemed to be essential to the life of the community. That has largely been

²⁰ Welsh Assembly Government, *Memorandum on Proposal for a legislative competence order on the Welsh language*, February 2009, <http://www.assemblywales.org/lco-ld7372-em-e.pdf>

²¹ NAW Record of Proceedings, 3 February 2009

defined by the 1993 Act, but we need to widen the scope in certain areas to ensure that we include all relevant parties within the legislation.

In its “manifesto” for the 2007 Assembly Election, the Welsh Federation of Small Businesses stated that

the next Welsh Assembly Government should continue to oppose calls to bring private businesses under the terms of any Welsh Language Act and continue to encourage a voluntary approach to business adoption of the Welsh language”.²²

6 Particular concerns

Members at Westminster have already raised particular concerns about the proposed order. At present, the main source of information is the Explanatory Memorandum prepared by the Welsh Assembly Government.²³ In what follows I have also drawn on suggestions kindly supplied by officials in the Members’ Research Service of the Assembly and in the Assembly Government.

6.1 Can the Assembly actually make Welsh an “official language”?

The phrase “official language” does not occur in the order. The text which it inserts into field 20 speaks of “the treatment of the Welsh and English languages on the basis of equality”. The phrase “basis of equality” derives from the 1993 Act, where the Welsh Language Board is empowered to

advise persons exercising functions of a public nature on the ways in which effect may be given to the principle that, in the conduct of public business and the administration of justice in Wales, the English and Welsh languages should be treated on a basis of equality.²⁴

As mentioned above, “official status” is a phrase used in the *One Wales* document, which speaks of “confirm[ing] official status for both Welsh and English” and “explor[ing] with the Westminster government the making of an official application to the Council of Ministers for the Welsh language to receive official EU language and working language status”.

Arguably, the language has had “official” recognition since the 1967 Act. However, the debate has been about practical application. As stated above, the 1967 Act was deemed “toothless” by some and the 1993 Act introduced a “basis of equality” which means that Welsh has an official status but falls short of the principle of full bilingualism where everything produced by Government is available in both languages.

During the passage of the 1993 Act amendments were put down that would have specified Welsh as an “official language” on the face of the Act. This was not accepted by the Government of the day. At third reading debate in the Lords, Lord Ferrars, speaking for the Government, said:

The Government understand the depth of feeling which many of your Lordships have on this—a feeling which is a reflection of that which is prevalent in the Principality. We understand that because confirming the status of the Welsh language in Wales is a prime objective of this Bill. We think, though, that the Bill 345 achieves this by

²² FSB Wales, Policy Unit, *Small Firms, Big Issues*, Manifesto for 2007 Assembly Election. <http://www.fsb.org.uk/policy/rpu/wales/assets/FSBInsertEng.pdf>

²³ Welsh Assembly Government, *Memorandum on Proposal for a legislative competence order on the Welsh language*, February 2009, <http://www.assemblywales.org/lco-ld7372-em-e.pdf>

²⁴ *Welsh Language Act 1993* s3(2)(b)

establishing the principle of equality and by removing legislative obstacles which would prevent the Welsh language from enjoying equality of status with the English language.

He continued:

The Government's view is that the official status of the Welsh language should not be dependent upon any single piece of legislation. Its status should be—and is—a reflection of its general position in the statute book and because it has been the everyday language of public administration in many parts of Wales for many years.

The whole philosophy behind the Bill has been that the provision of public services in Welsh should be seen as part and parcel of the provision of public services in Wales. The intention is not to establish Welsh as an official language, but to reflect our view that it already is.

We are not, therefore, proposing that Welsh language schemes should be drawn up in order to emphasise the status of Welsh as an official language. They will be prepared because Welsh already enjoys official status, and they will simply illustrate how individual public bodies intend to reflect that fact.²⁵

A legal commentator on Welsh language matters regards this as a missed opportunity:

Adopting such a clause would have been an expression of the high constitutional status of the language. It would have given a firm purpose to the [1993] Act and provided guidance to the executive and to the courts, when in doubt, about the application of any of its provisions.²⁶

The debate about the “official” status of Welsh also has a European dimension. In November 2008 the language was used for the first time in a meeting of the EU Council of Ministers when Alun Ffred Jones addressed the Education, Youth and Culture Council in Welsh. Welsh now has the same “co- official” status in the Council of Ministers as Basque, Catalan and Galician, meaning that citizens can now write to the Council in Welsh and receive a reply in the same language. Negotiations have also begun to allow the use of Welsh, Scottish Gaelic and Ulster Scots in the European Parliament and the European Commission.²⁷

6.2 The proposed order binds everyone receiving over a certain sum²⁸ of taxpayers' money. Does the Assembly have the power to do this? How would it determine which bodies are in receipt of such money?

If the order is approved, it would confer power on the Assembly to legislate to impose duties – by a future Assembly Measure – on organisations falling into that category, where they provide services to the public in Wales. The phrase “public money” is defined in the order and includes, for example, “moneys made available directly or indirectly by the National Assembly of Wales”. Examples of recipient bodies mentioned in the Explanatory Memorandum (para 35) include Welsh National Opera and the National Botanic Gardens of Wales. It seems highly probable that all the bodies in question here – both the donors and the recipients – are of a type that would publish their accounts, so that all this information is in the public domain.

²⁵ HL Deb 25 February 1993 vol 543 c342

²⁶ Gwilym Prys Davies, “The legal status of the Welsh language in the twentieth century”, in *Let's do our best for the ancient tongue: the Welsh language in the twentieth century*, ed. Geraint H Jenkins and Mari A Williams, 2000, p248 [copy available for reference in HA section of HC Library]

²⁷ “Breakthrough as minister uses Welsh at EU Council”, *Western Mail*, 21 November 2008, p2

²⁸ Originally £200,000 in the proposed order; since raised to £400,000 in the draft version (see below section 8)

In his statement to the Assembly, the Minister made clear that a future Measure in this area is likely to target recurrent grants, not one-off payments:

You referred to the £200,000 limit when imposing expectations and duties, but it must be borne in mind that any organisation that falls within the scope of any future Measure has to be one that is there for the long term. We would not be looking to deal with a company that happens to get £200,000 for whatever reason one year but not the next, for example. We are talking about organisations and some companies that are there for the long term and are dealing with the public annually. A large, multinational company that received a public subsidy to set up in Wales is not the type of company that we would expect to deal with in any Measure. We are dealing with those that have an interface with the public in the long term in Wales, but the details, as you say, will be dealt with at a future date. I thank you all for your comments.²⁹

From its wording it appears that the order cannot “bind”; it rather empowers the Assembly to legislate in this area. Details (including the amount of money specified – it might be applied incrementally over time) would be spelt out in a subsequent Measure.

6.3 Is the proposed order intended to bind the UK Parliament, MPs, Ministers and the EU, and if so how can it?

The 1993 Act does not apply to Crown bodies, although UK Government departments and public bodies have schemes on a voluntary basis. The general principle, of course, is that the Welsh Assembly, even when it gains legislative competence in an area hitherto reserved to Westminster, can only make legislation having application in Wales.³⁰

The Explanatory Memorandum to the order states at paragraphs 51-52:

The Welsh Ministers intend to require Crown bodies, including Ministers of the Crown, to comply with broadly the same duties as all other public bodies, where the Secretary of State consents. This will require a limited amendment to the 2006 Act, in relation to Field 20: the Welsh language only. The proposed amendment will permit the Assembly to confer or impose new duties or powers on Ministers of the Crown, but only with the consent of the Secretary of State, and not so as to make Ministers of the Crown liable to punishment for criminal offences.

Government Ministers, during the passage of the 1993 Act, gave an undertaking that Crown bodies, including Ministers of the Crown, would prepare Welsh language schemes. Consequently, to allow the Assembly to make provisions for the equitable and consistent application of functions across all public bodies, Article 5 of the proposed LCO would modify paragraph 7 of Part 3 of Schedule 5 to the 2006 Act to confer competence on the Assembly to legislate to confer or impose duties upon Ministers of the Crown in relation to the Welsh language, with the consent of the Secretary of State.

The paragraph quoted here clearly refers to the Assembly Government and Westminster Ministers. A list of Crown bodies may be found on the website of the Office of Public Sector Information.³¹ The Assembly has no powers to impose duties on the European Union; it can only encourage, as happens at present where the Assembly funds translation activities in meetings of the Committee of the Regions. Nor can it impose duties on backbench Westminster MPs.

²⁹ NAW Record of Proceedings, 3 February 2009

³⁰ *Government of Wales Act 2006* s94(3) and (4)

³¹ <http://www.opsi.gov.uk/advice/crown-copyright/uk-crown-bodies>

6.4 Does the Assembly have the right to enforce sanctions for non-compliance?

The Explanatory Memorandum states at paragraph 27:

The proposed LCO would provide competence, for example, permitting the Assembly to impose duties on persons falling within these categories requiring particular services to be provided bilingually to the public in Wales. Provisions contained in section 94(5) of the 2006 Act would permit the Assembly to provide appropriate remedies for a breach of such duties, and the proposed LCO does not seek to extend those provisions in any way.

The section of the 2006 Act referred to here confirms that it is within the legislative competence of the Welsh Assembly to pass Measures providing for the enforcement of laws which are within its competence.

At present, the failure of a public body to discharge its obligations under its language scheme does not of itself render it liable to penalty. Under the 1993 Act (sections 17 to 20), where the Welsh Language Board receives a complaint about non-compliance with a language scheme, it investigates and reports. In its report it may recommend action to remedy the failing or to avoid future failures. If the body fails to take the recommended action, the Board may refer the matter to the Secretary of State,³² who may give directions to the public body, and, in the event of non-compliance, may at his sole discretion apply to the court for a compliance order.

6.5 Are linguistic rights not already granted by the 1993 Act?

The 1993 Act imposes duties on public bodies – the duty to prepare Welsh Language Schemes under section 5 – rather than enshrining “rights”. Of course, depending on one’s perspective, a duty to provide something when required could be viewed by the recipient as a “right” to receive it. For example, when Milford Haven town council proposed to opt out of its language scheme on the grounds that there was too little demand for documents in Welsh to justify the costs, Plaid Cymru councillor Rhys Sinnott responded that

there were a number of Welsh speakers in the area who had a **right** under the Welsh Language Act to choose to have services provided in their first language.³³

The order inserts new Matter 20.2 into field 20, enabling the Assembly to make legislative “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 upon it)”. The Explanatory Memorandum asserts (paras 44-45) that

The protection afforded under current legislation is limited. This matter would enable the Assembly to legislate to protect individuals’ freedom to speak Welsh with each other. This matter would not require bodies to take positive steps to facilitate the use of the Welsh language between individuals, merely to respect the freedom to use the language.

I am told that the “current legislation” referred to here is various existing legislation such as the *Human Rights Act 1998*, anti-discrimination law and employment law.

In the Assembly debate on the proposed order, Bethan Jenkins AM, a Plaid Cymru Member, observed:

³² This power now lies with Welsh Ministers following the *Transfer of Functions Order* in 1999

³³ As reported in: “Council wants to abandon its Welsh translations”, *Western Mail*, 10 November 2008, p5

A matter of principle lies at the heart of this Order—the simple but far-reaching principle that everyone should have the right to use the Welsh language. If the Order is realised, no company will have the right, for example, to prevent their staff from using their mother tongue. There will be no more bullying such as that seen at Thomas Cook. Such behaviour should not be allowed in the twenty-first century.³⁴

Ms Jenkins is here referring to events in 2007 when staff at a Thomas Cook branch in Bangor, Gwynedd, were told by their employer that all work-related discussions with colleagues must be in English. At the time there were suggestions from the Commission for Racial Equality that such a rule might be unlawful.³⁵ However, following protests and discussions with the Commission and the Welsh Language Board, the company announced that it would implement an action plan to support Welsh, and no litigation ensued.

7 Reaction

In a lengthy survey of opinion, the *Western Mail* reports a wide range of reactions to the proposed order.³⁶ A BBC News story reports a similar spectrum of reactions to the proposed order.³⁷ Broadly speaking, the strongest criticism of the potential new powers has come from the business community, fearing that enterprises already contending with recession will be further weighed down with new bilingual obligations. Welsh language pressure groups welcome the order but see it as too timid. The *Western Mail's* editorial line illustrates the middle position:

It's difficult to argue against a modest extension of that Act to cover privatised utility companies; most provide services in Welsh already, and while some are objecting that they would prefer that arrangement to be voluntary, it's hardly credible that large institutions will be disadvantaged in any serious way.³⁸

8 Update: December 2009

Progress on the proposed order (in Cardiff and Westminster) can be viewed on the [Welsh Assembly website](#). The following documentation has appeared since February 2009:

[National Assembly for Wales, Legislation Committee No 5, National Assembly for Wales \(Legislative Competence Order\) \(Welsh Language\) Order 2009, Committee Report, 5 June 2009](#)

[Welsh Affairs Committee, Proposed National Assembly for Wales \(Legislative Competence Order\) \(Welsh Language\) Order 2009, 7 July 2009, HC 349 2008-09](#)

[Welsh Grand Committee, 14 October 2009 \(morning session\)](#)

[Welsh Grand Committee, 14 October 2009 \(afternoon session\)](#)

³⁴ NAW Record of Proceedings, 3 February 2009

³⁵ "Thomas Cook Welsh rule 'unlawful'", *BBC News*, 11 June 2007, <http://news.bbc.co.uk/1/hi/wales/6739935.stm>

³⁶ "Battle lines are drawn on historic day for language", *Western Mail*, 3 February 2008, p1, <http://www.walesonline.co.uk/news/wales-news/2009/02/03/battle-lines-are-drawn-on-historic-day-for-language-91466-22839349/>

³⁷ "Welsh language legal bid starts", *BBC News*, 2 February 2009, <http://news.bbc.co.uk/1/hi/wales/7863542.stm>

³⁸ "Comment: Time is right for mature language conversation", *Western Mail*, 3 February 2009, p16, <http://www.walesonline.co.uk/news/wales-news/2009/02/03/time-is-right-for-mature-language-conversation-91466-22839201/>

[Welsh Affairs Committee, Proposed National Assembly for Wales \(Legislative Competence Order\) \(Welsh Language\) Order 2009: Government Response to the Committee's Ninth Report of Session 2008-09, 15 October 2009, HC 1024 2008-09](#)

[National Assembly for Wales \(Legislative Competence Order\) \(Welsh Language\) Order 2009, considered in Lords Grand Committee, HL Deb 9 December 2009 cc92-107GC](#)

The [draft LCO](#) was laid on 20 October with an accompanying [Explanatory Memorandum](#). The key changes made to the Order in response to reaction to the version proposed earlier in the year were summarised in a letter from the Welsh Secretary to the Chairman of the Welsh Affairs Committee, dated 5 October:

I note the Committee agreed it is appropriate that persons benefiting from substantial public funds should fall within scope of the LCO. I am aware that both the concept of including a threshold of public funding in the LCO, and the amount at which it was set (public funding of £200,000 or more in a financial year), attracted criticism during scrutiny. Nevertheless I believe it is appropriate to set a clear boundary in order to define what is considered to be "substantial" public funding. Following discussions with the Welsh Assembly Government, it is proposed to increase the threshold to £400,000, thereby ensuring smaller organisations are less likely to be included in scope by virtue of the public funding they receive. Setting the threshold at this amount will ensure that certain bodies of a national character, such as the National Botanic Garden and the Wales Millennium Centre, come within scope of the Order, which is a key objective of the Welsh Assembly Government. By contrast, local voluntary, charitable and sporting bodies will not.

The Committee recommended redrafting the paragraph to ensure that bodies in receipt of one-off payments are excluded. I agree that it is sensible to rule out one-off payments from scope, and following discussions with the Welsh Assembly Government we plan to ensure Proposed National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009 that a body receiving public money amounting to £400,000 or more in a financial year cannot fall within scope of the LCO unless it has either received public money in a previous financial year or will do so in a subsequent financial year. This change would serve to confirm the policy intention of the Welsh Assembly Government not to place Welsh language duties on bodies receiving one-off grants.

Your Committee made a number of recommendations about the detailed drafting of the Order which, following discussions between the UK and Welsh Assembly Governments and taking account of the Assembly Committee's own conclusions, we will be accepting.

First, the Committee expressed concern that the LCO included within scope all bodies established by Royal Charter including, for example, the Girl Guides and Royal British Legion. It considered that any criteria for their inclusion should focus on the nature of the services provided by the chartered body rather than the fact that a body is established by Royal Charter. The First Minister and I agree with this, and are therefore making changes to specify more exactly which types of chartered body are included.

Second, your Committee noted that the proposed LCO risked establishing inconsistencies in terms of public transport by including only railway services. It rightly pointed out that some bus companies would come within other categories, but it could not be said for certain that all bus companies would be included by these means. We are working to modify the Order so that bus services are included within scope. Bus

services will need to be defined clearly, so that scheduled coach services come within scope but services chartered for private use do not. Your Committee's point is well made about unintentionally imposing disproportionate burdens on very small bus companies, and I am confident that the challenge mechanism I have previously described will minimise the risk of duties being imposed unreasonably.

Third, the Committee was unconvinced of the need to include energy production and transmission services in the proposed Order. I agree that these activities do not serve the public directly, and can therefore be seen as distinct from other activities in the electricity and gas sectors, such as distribution and supply. Following discussions with the Welsh Assembly Government, we propose to delete these activities from the draft Order.

Fourth, your Committee recommended clarifying that any duties placed on public broadcasters could relate only to the conduct of public business and not to their functions of preparing and broadcasting programming. We agree, and are redrafting the LCO accordingly.

Finally we are redrafting the enacting words to the LCO to include a reference to section 95(3) of the Government of Wales Act 2006, as the Committee recommends.

These amendments would strengthen the focus of matter 20.1 in respect to the key public facing services in Wales, and help clarify the boundaries to the Assembly's competence.

In addition to these changes we are making other modifications to the Order to simplify the text and ensure competence reflects the policy intentions of the Welsh Assembly Government more accurately. These will include:

- ensuring that services *related to* the services listed in category (h) do not include shops. I am keen to make sure that shops do not inadvertently fall within scope of the Order by virtue of selling products or services related to the sectors listed in the Order – for example mobile phone top-ups (which would relate to telecoms) or stamps (relating to postal services). Most retail services do not come within the ambit of the Welsh Language Act 1993, and the retail sector has made great advances in Welsh language provision in recent years as a result of voluntary schemes.

We do not wish to include retail services in the draft LCO indiscriminately, and a specific exclusion for shops ensures they are not included unintentionally. The two exceptions to this exclusion are post office counter services and the sale of tickets and timetables for bus and railway services. Similarly, we do not wish to specify banks or insurance companies within the LCO (an issue raised by your Committee in its report); and

- a limitation on training provision which comes within scope, so that only training funded wholly or partly from public sources is within scope. This would ensure that Welsh language duties could not be applied in respect to training funded wholly by the private sector, providing a further safeguard for small training providers in the private sector.³⁹

³⁹ [Welsh Affairs Committee, *Proposed National Assembly for Wales \(Legislative Competence Order\) \(Welsh Language\) Order 2009: Government Response to the Committee's Ninth Report of Session 2008-09, 15 October 2009, HC 1024 2008-09*, pp2-4](#)