

MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT

CONSTITUTIONAL LAW: DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009

Draft Legislative Competence Order on the Welsh Language

Introduction

1. This Memorandum sets out the background to the provisions in the government Draft Legislative Competence Order: the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009 (“the Draft LCO”) which confers additional legislative competence upon the National Assembly for Wales and which has been laid in accordance with SO 22.31. The Memorandum is laid in accordance with SO 22.32 and explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (“the 2006 Act”) and the UK Government’s policy, contained in the White Paper “Better Governance for Wales”. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. Matters may be added to the fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament, in relation to matters, subject to the limitations provided for in the 2006 Act. An Order in Council under

Section 95 of the 2006 Act is referred to as a Legislative Competence Order (“LCO”) in this Memorandum.

3. The Draft LCO confers further legislative competence on the Assembly, in the field of the Welsh Language (Field 20 within Schedule 5 to the 2006 Act). New legislative powers in respect of the specified matters will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures. These Measures will be subject to thorough scrutiny and approval by the Assembly.

Context

4. The Welsh language is one of the defining characteristics of the UK’s cultural heritage and an essential component of the everyday lives of Welsh speakers in Wales. The 2001 Census indicated that over 580,000 people – one in five people in Wales - now speak and use the language. This represents a slight increase on previous figures, following more than a century of decline. However, even though the language has enjoyed something of a renaissance over recent years, its status as a living language in our communities remains under threat. There is a general acceptance that the action taken by public, private and voluntary agencies – along with the growth in Welsh-medium education – can play a key role in securing its health and vitality.

Current legislative framework

5. Successive UK Governments have recognised that legislation has a part to play in promoting and facilitating the use of the Welsh language. The Welsh Courts Act 1942 conferred limited rights upon any party or witness to use the Welsh language in courts in Wales where a person would otherwise be under a disadvantage by reason

of his or her natural language of communication being Welsh. The Welsh Language Act 1967 conferred on any party, witness or other person an absolute right to use the Welsh language in the courts (subject to giving prior notice), and also empowered Ministers to prescribe Welsh or bilingual versions of statutory forms.

6. The most recent and substantial statutes in relation to the language are the Welsh Language Act 1993 (“the 1993 Act”) and the 2006 Act (which includes provisions about the use of the Welsh language by the Assembly, the Assembly Commission and the Welsh Assembly Government). The 1993 Act is founded on two principles - the need to promote and facilitate the use of the Welsh language and the treatment of the English and Welsh languages on a basis of equality.
7. The 1993 Act established the Welsh Language Board, upon which the function of promoting and facilitating the use of the Welsh language is conferred. The 1993 Act lists certain categories of persons which the Board can require to prepare Welsh language schemes - and gives the Welsh Ministers the power to add further persons to the list, by order, where it appears to them that those persons meet criteria set out in the 1993 Act.
8. The 1993 Act also confers powers on the Welsh Language Board to investigate alleged breaches by public bodies of their respective Welsh language schemes, and requires it to report on its investigations. However, the Welsh Language Board has no power to require persons to provide it with evidence and information that will assist it with its investigations.
9. Most functions under the 1993 Act rest with the Welsh Language Board, an Assembly Government Sponsored Body which is funded by the Welsh Assembly Government, and whose activities are directed by remit letter from the relevant Welsh Minister. The Welsh Ministers’ functions under the 1993 Act are limited and include the

power to appoint members of the Welsh Language Board - and the power to adjudicate where the Welsh Language Board and 'public bodies' fail to reach agreement on matters in relation to Welsh language schemes, as well as the power to add to the list of 'public bodies' that may be required to produce the Welsh language schemes referred to above.

10. Section 78 of the 2006 Act places a duty on the Welsh Ministers to adopt a strategy for promoting and facilitating the use of the Welsh language – and to adopt a Welsh language scheme. Under section 61(k) of the 2006 Act, the Welsh Ministers may do anything they consider appropriate to support the Welsh language (although this does not extend to proposing or making legislation).

11. Similarly, the National Assembly for Wales does not have legislative competence in relation to the Welsh language with which to alter the legislative framework within which Welsh Ministers operate. As a result, the National Assembly for Wales is unable to legislate to respond directly to changing needs and circumstances.

Rationale

12. The primary purpose of the Draft LCO, therefore, is to provide the National Assembly for Wales with legislative competence in relation to the Welsh language. The competence reflects the Welsh Ministers' already devolved executive functions – whilst also reflecting the Welsh Minister's and Welsh Language Board's functions under the 1993 Act and, for Welsh Ministers, the 2006 Act. In addition to the need to devolve legislative competence to the Assembly, the Welsh Assembly Government has brought forward this Draft LCO in order that it can propose legislation to the Assembly to better deliver its policies and address the constraints and shortcomings within the current legislative framework.

13. The Welsh Assembly Government's National Action Plan for a Bilingual Wales, *laith Pawb* (2003), states that it wants Wales to be a truly bilingual nation. This is not defined as implying that everyone in Wales should be able to speak both Welsh and English. It is defined as a country where people can choose to live their lives through the medium of either Welsh or English, and where the presence of the two languages is a visible and audible source of pride and strength. *laith Pawb* reflects what has been the policy of successive Governments – at Wales and UK level – to support and encourage the use of the language in all aspects of life in Wales. The scope of the Draft LCO reflects this approach, to ensure that the language can continue to be a prominent and vibrant part of people's everyday lives.
14. The Draft LCO provides competence to enable the Assembly to build on the achievements of successive Governments, to update the legislative framework in order to address specific shortcomings that have emerged since 1993 - and to respond to future changes.
15. Much has been achieved under the auspices of the 1993 Act to improve the quality of services provided to Welsh speakers, but there remains scope to improve the legislative framework under which the providers of public services operate, and to clarify for Welsh speakers what level of service they can expect to receive. This is in line with the Welsh Assembly Government's commitment to a citizen-centred model of improving public services. Following the recommendations of Sir Jeremy Beecham's *Review of Local Service Delivery* (2006) the Welsh Assembly Government is investing in a programme of action to deliver efficient, effective, citizen-centred public services.
16. The Welsh Assembly Government recognises that members of the public in Wales can still face inconsistencies and difficulties in accessing services through the medium of Welsh. In many areas, arrangements for delivering services to the public in Wales have

changed since 1993. However, the framework set by the 1993 Act does not enable these changes to be taken into account in a consistent way.

17. A need for greater clarity has arisen in part, therefore, from changes to the structure of certain, key public services - and new ways of delivering services. As a result, the public face of some sectors and certain key services fall outside the scope of the 1993 Act. The Welsh Ministers have the power to specify some persons from within these sectors under the 1993 Act, but not all. This creates the potential for an uneven playing field within these sectors and uncertainty about the services that Welsh speaking customers can expect to receive.
18. In addition, the 1993 Act provides only a single formal mechanism for investigating breaches of Welsh language schemes and does not provide for any graduated alternatives. A single mechanism for investigating breaches of commitments made in Welsh language schemes, or made under any other arrangements, may not be appropriate in all cases, and may not achieve the right results for all users.
19. A key principle is that citizens should clearly understand the level of Welsh language services they can expect to receive, irrespective of who the public provider is. The competence conferred by the Draft LCO would enable the National Assembly to consider legislating to provide a consistent basis for accessing services through the medium of Welsh. As is the case at the moment, UK Government Departments responsible for non-devolved services would have a crucial contribution to make. Agencies such as Job Centres, Her Majesty's Revenue and Customs and the Driver and Vehicle Licensing Agency have been at the forefront of the development of Welsh language services to date - and it will be important to ensure that their contribution continues.

20. The Welsh Assembly Government is committed to the growth of the language and believes that the freedom of persons wishing to speak Welsh with one another is integral to this growth. The need to ensure that Welsh speakers can feel confident speaking the language with one another is vital. Although people already enjoy the freedom to communicate with one another in Welsh, that freedom is not adequately protected in law.

21. The Welsh Assembly Government believes that if the language is to be safeguarded, the freedom of people living and working in Wales to communicate with one another in Welsh should be capable of being protected. As such, the Welsh Assembly Government believes that Matter 20.2 is necessary in order to enable a subsequent Measure to take steps to protect this freedom.

***One Wales* commitments and Welsh Assembly Government objectives**

22. A key commitment of the Welsh Assembly Government's *One Wales* programme of government is to seek legislative competence for the National Assembly which will enable the Welsh Assembly Government to propose an Assembly Measure that confirms official status for both Welsh and English, linguistic rights in the provision of services and the establishment of the post of Language Commissioner. The Welsh Language LCO was therefore announced in the First Minister's first annual statement on the legislative programme in June 2007.

23. To support the Welsh Assembly Government's focus on citizen-centred public services, the competence conferred by the Draft LCO will enable the Welsh Assembly Government to propose a flexible approach to Welsh language provision, allowing it to develop a framework around legislative provision which can be adapted to the

circumstances of particular sectors, the services they provide and the areas in which they operate. The Welsh Assembly Government may, for example, wish to propose different duties in respect of the former utilities than on the mobile phone sector.

24. It is the Welsh Assembly Government's policy that subsequent Measures should not impose duties on organisations unless there is a clear public benefit in doing so. It is not the intention to place disproportionate obligations on any organisation.
25. This would reflect the current principles of the 1993 Act, whereby the Welsh Language Board may require public bodies to prepare Welsh language schemes setting out how they will give effect, "so far as is both appropriate in the circumstances and reasonably practicable, 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". To this end, for instance, current practice by the Board reflects the fact that it does not expect public bodies located outside Wales to employ Welsh-speaking staff (whereas public bodies located in Wales are expected to consider, for instance, the need to employ Welsh speakers as they recruit). The Board also bears in mind matters such as the size and location of organisations based in Wales, when determining their capacity to deliver services in Welsh. An example of this is its three separate templates for community council Welsh language schemes, reflecting the differing linguistic nature of communities around Wales, whilst also reflecting the limited range of services offered by those councils.
26. The ability to challenge the imposition of duties on grounds of reasonableness and proportionality (see paragraph 32) will provide organisations, such as, for example, small businesses (which could include small training bodies and those providing sub-post office services) and other businesses, such as the mobile phone companies, with additional protection in this respect. The Welsh

Assembly Government's policy is that any appeal mechanism for challenging duties would be appropriately independent and impartial.

27. The Welsh Assembly Government also believes that any appeal arrangements should be simple to understand and to operate - and should allow for appropriate methods for dealing with complaints and addressing areas of concern.

Scope

28. The Draft LCO inserts two matters into Field 20 (the Welsh Language) of Schedule 5 to the Government of Wales Act 2006, to enable the Assembly to consider legislating on these issues by way of an Assembly Measure.

29. Article 3 of the Draft LCO inserts a new Matter 20.1 into Field 20. This matter reflects, and builds upon, the principles that underpin the 1993 Act, namely to promote and facilitate the use of the Welsh language; and the treatment of the Welsh and English languages on the basis of equality. For example, this could include marketing, providing support for organisations and developing ICT tools within any given sector, reflecting the range of functions carried out, at present, by the Welsh Language Board.

30. This matter does not extend to the use of the Welsh language in the courts. The relevant functions relating to the use of the Welsh language in the courts under the 1993 Act are currently exercised by the Lord Chancellor, and the Draft LCO does not seek competence to modify the position.

31. Matter 20.1 confers competence on the Assembly to consider legislating in relation to Wales to impose duties on persons falling within the categories listed in paragraphs (a) to (j), requiring, for

example, particular services to be provided bilingually to the public. The Assembly would not be able to impose duties under this matter on persons who do not fall within these categories. The Assembly already has (under section 94(5) of the 2006 Act) the power to provide for the enforcement of provisions in Assembly Measures or otherwise, as appropriate, to make them effective, and it is under this existing provision, together with Matter 20.1, and/or 20.2, that any enforcement procedures in relation to Welsh language duties would be established.

32. Matter 20.1 is subject to an additional limitation, in that the Assembly will be able to impose duties on a person only if there is some means (such as a review or appeal procedure) by which the person can challenge the reasonableness and proportionality of the duties as they apply to that person.

33. Matter 20.1 defines the categories of person in respect of which the National Assembly will be able to consider legislating to impose duties in relation to the Welsh language. The categories of persons listed under Matter 20.1 are drawn to include existing persons which fall within the scope of section 6(1) of the 1993 Act and certain sectors which currently fall outside that Act, but which provide key public services. The categories provide the Assembly with the scope to deal with changes in infrastructure and to provide for a level playing field in specified sectors. It will be for future proposed Assembly Measures, and subordinate legislation made under those Measures, to specify the persons upon whom duties will or may be imposed.

34. Paragraph (a) confers competence on the Assembly to consider legislating by Measure to impose duties on 'public authorities'. 'Public authorities' include all public authorities within the meaning of

the Human Rights Act 1998, such as local authorities and local health boards. A similar definition is used in several UK statutes, including the Anti-terrorism, Crime and Security Act 2001, the Climate Change and Sustainable Energy Act 2006 and the Identity Cards Act 2006. In addition, a similar mechanism has already been used in The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (S.I. 2008/3132).

35. Where public authorities outsource the delivery of services to the public, the Assembly will be able to consider legislating under paragraph (b) to place duties in relation to the Welsh language on contractors, but only in connection with the services provided in relation to Wales under the outsourcing arrangements. Accordingly, any future Measure could not impose duties in respect of the Welsh language in relation to any of a contractor's other activities (unless the contractor fell under paragraphs (a) to (j) for other reasons).
36. Paragraph (b) is based on the discretion given to the Secretary of State (since transferred to the Welsh Ministers) under paragraph 6(1)(o)(ii) of the 1993 Act to specify as public bodies, persons carrying out activities conducted under an agreement or in accordance with arrangements made with a public body or servants or agents of the Crown.
37. Paragraph (c) confers competence on the Assembly to consider legislating to impose duties in relation to the Welsh language on persons providing services to the public that have been established by enactment (for example, the Big Lottery Fund, the Electoral Commission and S4C).
38. Paragraph (d) confers competence on the Assembly to consider legislating to impose duties on persons which have been established

by prerogative instrument (such as a Royal Charter) where they fall within one or more of sub-paragraphs (i) to (v). These are persons:

- (i) established to advance learning and knowledge by teaching or research or by developing or awarding qualifications. Examples of persons within this category include the University of Wales and the Open University;
- (ii) established to collect, preserve or provide access to recorded knowledge or to objects and things which further understanding, for example the National Museum of Wales and the National Library of Wales;
- (iii) established to support, improve, promote or provide access to heritage, culture, sport or recreational activities, for example the Sports Council for Wales and the Arts Council of Wales;
- (iv) engaged in promoting a wider knowledge and representing the interests of Wales in other countries, such as the British Council; and,
- (v) engaged in central banking, for example the Bank of England.

39. All of the persons mentioned as examples in paragraph 38 are currently 'public bodies' for the purposes of the 1993 Act.

40. Paragraph (e) confers competence on the Assembly to consider legislating to impose duties on persons that have functions of providing services to the public conferred or imposed upon them by an enactment. This includes, for example, the Royal Commission on the Ancient and Historical Monuments of Wales, Consumer Focus and Investors in People UK. 'Functions' is a term defined in the 2006 Act to encompass both powers and duties. The principle behind this is that the only persons that fall within the competence provided for in paragraph (e) are those upon whom legislation has conferred

functions of providing services to the public. The competence will extend to legislating only in relation to persons with functions in relation to Wales.

41. Paragraph (f) gives the Assembly the competence to consider legislating to impose Welsh language requirements on persons providing services to the public and who are in receipt of public money amounting to, or above, a threshold of £400,000 in a financial year, either provided directly by the Assembly, the Welsh Ministers, the UK Parliament, Ministers of the Crown or from an institution of the European Communities, or indirectly by or from these bodies (for example, through local authorities or Assembly Government Sponsored Bodies). The underlying principle in all these cases is that persons benefiting from substantial public funds should fulfil public responsibilities. Persons within the competence provided for in paragraph (f) include the National Theatre of Wales, the Wales Millennium Centre, the Welsh National Opera, Fforwm and the National Botanic Garden of Wales.

42. Paragraph (f) would also give the Assembly the competence to consider legislating to impose requirements in relation to the Welsh language on persons providing services to the public who are in receipt of public money amounting to, or above, a threshold of £400,000 or more in a financial year provided by virtue of any enactment, for example, the BBC, which receives licence fee monies under the Communications Act 2003 (see also paragraph 60 with regard to broadcasting).

43. Paragraph (f) does not include persons receiving one-off payments amounting to £400,000 or more. Persons receiving public money at, or above, this threshold will fall within paragraph (f) only if they also received public money in a previous financial year or if a decision has been made that they will receive public money in a subsequent financial year.

44. Persons that receive public money by way of payment for services or goods supplied by them will not be included under paragraph (f) by virtue of their having received those monies. Statutory lottery distribution bodies (i.e. the Big Lottery Fund and the other bodies which distribute lottery moneys under the National Lottery etc Act 1993) will be included under paragraph (f), but not grant recipients of lottery funding.
45. Paragraph (g) confers competence on the Assembly to consider legislating to impose duties on persons engaged in the regulation of a profession or industry, or other similar sphere of activity, in relation to their activities in relation to Wales. A 'similar sphere of activity' includes, for example, persons which regulate the ability of a member of the public to earn a livelihood in a given sector, discipline or area of activity. Persons which fall within competence under paragraph (g) will include persons such as the Nursing and Midwifery Council and the General Dental Council.
46. Paragraph (h) enables the Assembly to consider legislating in relation to Wales to impose Welsh language requirements on providers of social housing. These include housing associations.
47. Paragraph (i) enables the Assembly to consider legislating in relation to Wales to impose duties upon persons providing the public with certain kinds of services, as well as services related to those services. This covers key services provided to the public as well as services incidental to them.
48. The sub-paragraphs within paragraph (i) describe the services within competence. The competence applies to persons only where they provide services to the public. These services include the utilities (i) and (ii); postal services and post offices (iii); telecommunications services (iv); education, training (where the provider receives public

money for its provision) or career guidance (including services to encourage, enable or assist participation in education, training or career guidance) (v); bus and railway services (including passenger bus and rail companies, Network Rail and bus and rail enquiries and ticketing services) (vi); and services to develop or award educational or vocational qualifications (including exam boards) (vii).

49. Paragraph (i) (i) includes the supply and distribution of gas, water or electricity.

50. Paragraph (i)(ii) covers sewerage services (including the disposal of sewerage).

51. Paragraph (i)(iii) covers postal services and post offices.

52. Paragraph (i)(iv) covers telecommunications services, including fixed line telephony and mobile phone services. Telecommunications services are defined in the interpretation section of the Draft LCO.

53. Paragraph (i)(v) covers education, training and career guidance services, including services to encourage, enable or assist participation in education, training or career guidance. Persons which fall within competence under paragraph (i)(v) will include persons such as UCAS, Sector Skills Councils and Careers Wales. As with other persons under paragraph (i), persons within this sector will be within competence only where they provide the listed services to the public. For example, this would include any education, training or careers advice services to members of the public provided by FE Colleges or Careers Wales.

54. In addition, in relation to training under paragraph (i)(v), the National Assembly would be able to impose duties only in relation to training which is funded wholly or in part by public money, including the range of government funded initiatives. Training provision which is not to

some extent publicly funded would not be within competence under this paragraph (for example, companies providing training to the staff of another company, where that provision is funded entirely privately).

55. Paragraph (vi) covers bus and railway services, and includes the sale of tickets, the provision of travel information (such as timetables) and signage.

56. There are two important qualifications that apply in relation to paragraph (i) that limit the Assembly's competence in this context. Firstly, the Assembly would be able to consider legislating to impose duties on service providers only in respect of the services mentioned, and then, only where they are delivered in relation to Wales, and not in respect of their other functions or activities (unless they otherwise fall within the competence conferred on the Assembly by paragraphs (a) to (h) and (j)). Secondly, with respect to related services, the matter excludes related services provided from shops, defined in the Draft LCO as "premises where the sale of goods is the principal trade or business carried on", except the sale of tickets or provision of timetables for bus and rail services and post office counter services.

57. Finally, paragraph (j) of Matter 20.1 confers competence on the Assembly to consider legislating to impose duties on persons who volunteer, or enter into an agreement, to subject themselves to such duties. This provides for persons to continue to opt-in to Welsh language schemes, or any successor mechanisms, in much the same way that persons opt-in to Investors in People and other such standards.

58. Matter 20.1 is subject to a further qualification. It will enable the Assembly to provide for the imposition of duties on a person only if there is some means (such as a review or appeal procedure) by which the person can challenge the reasonableness and proportionality of the duties as they apply to it. The practical effect will

be that any person creating or imposing duties by or under an Assembly Measure will have to consider the reasonableness and proportionality of their proposals.

59. This qualification does not apply to “Welsh language authorities” with statutory functions of imposing, enforcing, determining or deciding challenges to duties relating to the Welsh language. For example, if a Measure were to entrust the oversight of Welsh language duties to an authority such as the Welsh Language Board or a Language Commissioner, it would not have to ensure that such an authority could challenge any duties as they applied to it, on grounds of reasonableness or proportionality.

60. Matter 20.1 does not enable the Assembly to impose duties on broadcasters in relation to the commissioning, production, scheduling, transmission or distribution of programmes (including advertisements, subtitles, continuity announcements and teletext), access services, interactivity, programme related materials, online content and other output of a similar nature for television, radio, the internet or other online or wireless platforms. This reflects the policy decision that Government should not be able to affect the editorial freedom of broadcasters.

61. The second matter to be inserted into Field 20 by the Draft LCO (Matter 20.2), provides the Assembly with the competence to consider legislating in relation to the freedom of persons wishing to use the Welsh language to do so with one another (including any limitations on such a freedom, which could include, for example, limitations related to health and safety, where that was justified). This matter would enable the Assembly to consider legislating to protect individuals’ freedom to communicate with one other in Welsh. The freedom of individuals to communicate with one other in Welsh is a freedom that already exists, but the protection afforded under current legislation is limited.

62. The Assembly will be able to consider legislating to require persons to respect the freedom to use the Welsh language, but Matter 20.2 will not enable the Assembly to legislate to require them to take positive steps to facilitate the use of the Welsh language between persons wishing to use the Welsh language with one another.

Changes to the Draft LCO following pre-legislative scrutiny

63. The proposed LCO was laid on the 2 February 2009 and scrutinised by Legislation Committee No.5 of the National Assembly for Wales and the House of Commons Welsh Affairs Select Committee. The Committees published their reports on 5 June 2009 and 7 July 2009 respectively. The Welsh Grand Committee considered the issue on 14 October 2009.

64. The following paragraphs explain changes made to the proposed LCO to take account of the recommendations made in these reports and other changes made as a result of stakeholder engagement carried out by both Governments.

65. The detail of these changes is as follows:

Matter 20.1: Article 3

Reasonable and proportionate

66. A key recommendation of the Welsh Affairs Committee was the need for greater clarity and precision in the wording of the Draft LCO. The Welsh Affairs Committee recommended that the proposed LCO should contain clear principles, such as tests of reasonableness and proportionality, against which Assembly Measures could be tested. This would mean, in effect, a different approach in terms of defining competence, whereby a Measure would need to satisfy the tests

specified in the Draft LCO, rather than the Draft LCO defining who may be affected by subsequent Measures.

67. Having considered the above recommendation, the Welsh Assembly and UK Governments agree that the principle of applying duties reasonably and proportionately should be embedded in the Draft LCO. However, it was felt that conferring competence based solely on principles and tests would not provide the level of clarity being sought. For instance, what may be reasonable to one person may not be reasonable to another. Similarly, the Welsh Assembly and UK Governments do not agree with Legislation Committee No. 5's recommendation that the Draft LCO need not include a list of categories of persons who could have duties imposed on them and think that it is more helpful for the Draft LCO to be more specific.

68. The Draft LCO has therefore been amended to provide that matter 20.1 does not include imposing duties on any person (other than Welsh language authorities) unless there exists a means by which that person may challenge those duties, as they apply to that person, on the grounds of reasonableness and proportionality (see also paragraphs 32 and 58 of this memorandum).

69. This would operate in addition to the requirement in the Assembly's Standing Orders for proposed Assembly Measures to be accompanied by an assessment of the likely costs and benefits of compliance.

Paragraphs (c) and (d)

70. Paragraph (c) would enable the National Assembly to impose duties on 'persons providing services to the public established by an enactment'; the limb relating to persons established by prerogative instrument (such as a Royal Charter) is now contained in paragraph (d).

71. The Welsh Affairs Committee noted the Assembly Government's intention to impose duties on only a limited number of persons established by Royal Charter; the Draft LCO has been amended accordingly to specify the range of such persons upon which duties may be placed.

72. As a result, to come within competence under paragraph (d), Royal Charter bodies, must satisfy the additional criteria provided for under paragraph (d) (i) to (v).

Paragraph (f)

73. Paragraph (f) brings within competence persons providing services to the public and who are in receipt of public money. The threshold has been raised from £200,000 to £400,000 to exclude from competence many small and medium sized bodies which are in receipt of public money, including those working in the community and voluntary sectors. The new threshold has been set at a level which will capture within competence those persons for which this limb is intended (see paragraph 41).

74. The principle that persons benefiting from substantial public funds should fall within scope of the Draft LCO was accepted by the Welsh Affairs Committee and Legislation Committee No.5 as an appropriate one, although both the concept of including a threshold in the Draft LCO, and the amount at which it was set (public funding of £200,000 or more in a financial year), attracted criticism during scrutiny. However, the Welsh Assembly and UK Governments have agreed to set a clear boundary in order to define what is considered to be "substantial" public funding. Following careful consideration, the threshold has been increased 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 however that certain persons, such as the National Botanic Garden of Wales, come within scope of the Draft LCO.

75. The Welsh Affairs Committee recommended redrafting the paragraph to ensure that persons in receipt of one-off payments are excluded. This recommendation has been accepted, as described in paragraph 43, above. This will ensure that duties could not be applied to organisations simply by virtue of them receiving a one-off grant.

76. Legislation Committee No.5 asked that lottery funding be included within the definition of public money. The definition does include lottery funding made available to the statutory lottery money distribution bodies, since this constitutes “money provided by virtue of an enactment”. As such, it will be possible to impose duties on lottery money distribution bodies. However, as this part of the definition of public money is limited to monies provided directly by virtue of any enactment, recipients of lottery grants (who receive lottery monies provided by virtue of an enactment on an ‘indirect’ basis) will not come within competence by virtue of their receipt of lottery grants.

Paragraph (i) – Retail outlets

77. The Draft LCO has been redrafted to exclude ‘shops’ (as defined in the Draft LCO) from ‘*other services which relate to any of those services*’, apart from the sale of tickets or provision of timetables for bus and rail services and post office counter services. This reflects the current position in respect of post offices (including sub-post offices) which are subject to the Welsh language scheme of the Post Office.

78. This reflects the fact that most retail services do not come within the ambit of the Welsh Language Act 1993 (although the retail sector has made great advances in Welsh language provision in recent years as

a result of voluntary schemes). For similar reasons banks and insurance companies are not specified within the Draft LCO.

Paragraph (i) (i) – Production and transmission

79. The Welsh Affairs Committee was unconvinced of the need to include the production and transmission of gas and electricity in the proposed Draft Order. As such, it has been agreed by the UK Government and the Welsh Assembly Government that both activities should be deleted from the Draft LCO.

80. Legislation Committee no. 5 recommended that all energy services (for example oil suppliers) should be included within the scope of the LCO. However, the Welsh Assembly Government and UK Government have agreed not to seek to extend the competence to such fuel suppliers at this stage, recognising that oil suppliers, for example, are not subject to the same level of statutory control as gas and electricity, and do not rely on a network or grid controlled under statute in order to deliver or supply oil to their customers.

Paragraph (i) (v) – Training providers

81. A further qualification has been introduced in relation to training provision so that only training funded wholly or partly from public money will come within competence under paragraph (i)(v). This would ensure that Welsh language duties could not be applied in reliance upon the competence set out in paragraph (i)(v) in respect of training funded wholly by the private sector, providing a safeguard for, for instance, small training providers in the private or voluntary sectors who do not receive any public money.

Paragraph (i) (vi) - Buses

82. Both committees noted that the proposed LCO risked establishing inconsistencies in terms of public transport by including only railway services, rightly pointing 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.

83. The Welsh Assembly and UK Governments agree with both scrutiny Committees that bus services are key public services and should be specifically included on the face of the Draft LCO. The Draft LCO has therefore been modified so that bus and railway services are both included within the scope of the legislative competence under paragraph (i)(vi). This would enable the National Assembly to consider, for example, signage and timetabling information at bus stations and bus stops to be available in both Welsh and English. The Draft LCO defines the term 'bus service' as specifically excluding chartered services, private trips and organised tours as bus services need to be defined clearly, so that scheduled coach services come within scope but services chartered for private use do not. This will operate in tandem with the challenge mechanism previously described, in order to minimise the risk of unintentionally imposing disproportionate burdens on bus companies.

General exceptions to Matter 20.1 - Broadcasting

84. To respond to the concerns of stakeholders and of the committees, expressed during pre-legislative scrutiny, an exception has been drafted to Matter 20.1 so that the Assembly may not impose duties on broadcasters in relation to the commissioning, production, scheduling, transmission or distribution of programmes (including advertisements, subtitles, continuity announcements and teletext), access services, interactivity, programme related materials, online

content and other output of a similar nature for television, radio, the internet or other online or wireless platforms.

Effect of other provisions in the 2006 Act

85. The effect of the Draft LCO needs to be considered in the context of the overall provisions of the 2006 Act.

Geographical limits of any Assembly Measure

86. The Draft LCO and the provisions of the 2006 Act permit the Assembly to consider legislating by Measure in relation to the use of the Welsh language in relation to Wales.

87. Article 2 of the Draft LCO ensures that, if the Assembly was minded to repeal any provisions of the 1993 Act, any such repeal would have the same extent as the original provision. This permits the Assembly, by Measure, to repeal any provision of the 1993 Act which extends beyond the competence conferred upon the Assembly by the 2006 Act (i.e. where the 1993 Act extends to Scotland or Northern Ireland). This article is limited to the repeal of provisions and does not permit the making of any 'new' legislation. It is, in any event, to be subject to the requirements set out in the 2006 Act to seek the consent of the Secretary of State if any repeal would lead to the removal or modification of a function of a Minister of the Crown.

Modifications to the Government of Wales Act 2006

88. Article 4 proposes to provide competence for the Assembly to consider legislating by Measure to amend sections 35(1), 78 and paragraph 8(3) of Schedule 2 of the 2006 Act in order to be able to legislate as regards itself, the Welsh Ministers or the Assembly Commission. This allows the Assembly to place those bodies on the same footing as other persons.

89. The ability to amend these sections is required in order to allow the Assembly the flexibility to avoid having a multi-layered system in the future; the aim being to provide the end user with as straightforward and effective a system as possible. To provide an example, section 78 states that the Welsh Ministers must adopt a Welsh language scheme. If the Assembly was minded to legislate to move away from Welsh language schemes then, without the competence to amend section 78, the Welsh Ministers would be the only persons left operating under the 'old' system.

Minister of the Crown functions

90. The Welsh Ministers intend to require Crown bodies, including Ministers of the Crown, to comply with broadly the same duties as all other persons, where the Secretary of State consents. This will require a limited amendment to the 2006 Act, in relation to proposed Matters 20.1 and 20.2 only. The amendment will permit the Assembly to confer or impose new functions 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.

91. 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 persons, Article 5 of the Draft LCO modifies paragraph 7 of Part 3 of Schedule 5 to the 2006 Act to confer competence on the Assembly to legislate to confer or impose functions upon Ministers of the Crown in relation to the Welsh language, with the consent of the Secretary of State.

92. Currently, paragraph 7 of Part 3 of Schedule 5 to the 2006 Act allows a provision of an Assembly Measure to remove or modify functions of a Minister of the Crown with Secretary of State consent but no such provision exists to allow the conferral or imposition of functions. Article 5 of the Draft LCO replicates the provisions of the current paragraph 7 in a new sub-paragraph 7(2), to allow a provision of a future Assembly Measure to confer or impose functions on Ministers of the Crown in relation to Matters 20.1 and 20.2, with the Secretary of State's consent. This Article is required in order to give the Assembly the competence to be able to avoid a multi-layered system from existing in the future, where Ministers of the Crown would provide a different level of service to the remainder of the public sector. Article 5 allows the Assembly the flexibility to be able to provide a consistent and straightforward system across the public sector.

93. The Draft LCO in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 and Part 3 of Schedule 5 to the 2006 Act, the Assembly may not by Measure alter the functions of a Minister of the Crown without the consent of the Secretary of State. In relation to any future proposals that may impact on Minister of the Crown functions, the appropriate UK Government Departments will be consulted, and agreement will be sought to any future proposals to change or modify such functions.

Conclusion

94. For the reasons outlined in this memorandum, the Welsh Assembly Government requests that the legislative competence of the National Assembly for Wales be extended in accordance with the provisions in the Draft National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009.

October 2009