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Institute of Welsh Affairs

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IWA - Institute of Welsh Affairs  
4 Cathedral Road  
Cardiff  
CF11 9LJ

Tel 029 2066 6606  
Fax 029 2022 1482  
Email [wales@iwa.org.uk](mailto:wales@iwa.org.uk)  
Web [www.iwa.org.uk](http://www.iwa.org.uk)

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## **Main Findings**

The main purpose of this report is to explore what legislative opportunities would accrue to Wales as a result of moving to Part 4 of the 2006 Wales Act, following a referendum. This would give the Assembly power to directly enact primary legislation, without first having to seek permission from Westminster via Legislative Competence Orders, as is currently the case under Part 3 of the Act.

In the first instance the report addresses this question by examining the legislative experience of the Scottish Parliament since 1999. The generally wider scope of powers available to the Scottish Parliament compared with the National Assembly means that in key Fields Scotland has developed a distinctive policy profile in comparison with the rest of the UK and has been able to formulate holistic policies to deal with connected areas.

The report picks out some examples of Scottish legislation which the Welsh Assembly Government might emulate in the event of the Assembly moving to Part 4. These include some quite innovative Scottish Acts, such as encouraging parental involvement in school education, legislation to ensure that children who need it have “an integrated package of appropriate health care and education support”, greater accessibility to education for the disabled, and some radical measures establishing new National Parks in Scotland.

The report then compares the Welsh experience of pursuing Legislative Competence Orders under Part 3 with Scottish initiatives in equivalent areas – relating to improving provision of mental health services, helping carers, and environmental protection. In all cases the Scottish Parliament has been able to do more, over a broader area, and in a more co-ordinated ‘joined-up’ way, and much faster than has been possible in Wales. It can be argued that while the Scottish Parliament has been able to invest its time and resources into making new law, the National Assembly has had to expend its energies in bidding for the powers to do so.

The report then examines the response of civil society in Wales to the Assembly’s new legislative powers under Part 3 and the opportunities presented by Part 4. The main finding echoes the view of the chair of the All-Wales Convention Sir Emyr Jones Parry, that there is a lot of confusion about the powers of the Assembly and a “fog” about how it gets its powers. In these circumstances very few of the people and organisations we contacted had any thoughts about legislation they would like to see enacted. An exception was NFU Cymru which laid out the case for legislation to ensure improved labelling of the origins of foodstuffs sold in Wales.

The major finding of the report is that moving to Part 4 would enable the Welsh Assembly Government to develop a far more strategic approach than is possible at present towards related matters such as health, transport, and the environment, where cross-cutting policy initiatives would be advantageous. It provides three examples where this could be the case. Under Part 4 an Assembly Government could:

- Promote a Public Health Bill enabling the adoption of a strategic approach that could achieve significant improvements in public health in Wales.
- Establish a Transport Authority for Wales to co-ordinate more integrated public transport provision.
- Initiate legislation to manage and plan the whole landscape of Wales aimed at combining social and economic benefits with sustainable development.

It is not our purpose in this document to endorse these proposals but rather to cite them as examples of the legislative potential of Part 4.

Finally, the report argues that a by-product of moving to Part 4 would be to move Wales a long way towards being in a position to adopt the Scottish devolution model, in which all powers are devolved except those reserved to Westminster. In Wales the opposite is the case, with all the Assembly's powers conferred in a specific and detailed way. This restrains the Assembly Government's scope for legislating effectively.

Acquiring direct primary legislative powers along Scottish lines would radically enhance developments already underway that would result in the creation of a distinctively Welsh legal jurisdiction, as is the case in both Scotland and Northern Ireland. A distinctive jurisdiction is a necessary requirement for being able to adopt the Scottish model. Doing so would be a major enhancement of Wales's legislative authority. It would also simplify the devolution process, make it capable of being much better understood, and contribute to lifting the "fog of understanding" that currently surrounds it.

## 1. The Argument in Outline

Under the 2006 Wales Act (Part 3) the Assembly can secure powers to make primary legislation for defined purposes by seeking authority from Westminster via Legislative Competence Orders. The Act also allows the possibility of the Assembly gaining wider legislative powers for use without Westminster's permission, once a referendum has approved the change.

This report assesses what is currently being achieved, and how the situation would change if the Assembly's powers were widened, under Part 4 of the Act. The report concludes that the main effect of the change would be to enable the Welsh Assembly Government to develop a far more strategic approach than is possible at present towards related matters such as health, transport, and the environment, where cross-cutting policy initiatives would be advantageous.

The report's title *Putting Wales in the Driving Seat* derives from a comment made by the Counsel General, Carwyn Jones, in November 2008. Giving evidence to an Assembly inquiry into legislative scrutiny, he compared the Assembly Government's main method of acquiring new powers to hitching a lift:

“When there is a Bill passing through the UK Parliament where we believe framework powers to transfer powers to us would be appropriate, we will seek to do that. Obviously, if there is a vehicle that is passing by, we will look to get on to that vehicle in order to reach our destination.”<sup>1</sup>

On the other hand, our work concludes that if the Assembly were to gain primary powers under Part 4, following a referendum, it would be able to drive its own legislative agenda.

As things stand, however, with the Assembly exercising powers under Schedule 3 of the 2006 Wales Act, it can only draw down powers, on a piecemeal basis and with the case by case consent of Westminster, which militates against the development of a strategic approach to legislation. As the Ministry of Justice Guidance Note, published in the wake of the Act, underlines:

“Defining matters to be added to Schedule 5 should be approached on a case by case basis, from the standpoint of what the matter is intended to cover.”<sup>2</sup>

The influence of legislation in determining outcomes, changing attitudes, and the way people behave should not be under-estimated. There are a number of striking examples in the recent past where relatively controversial proposals have rapidly become widely accepted once legislation has been enacted. These include the ban on smoking in enclosed public places and stricter curbs on drinking and driving. In Wales legislation on the Welsh language has also changed attitudes. For example, where requirements for bilingual road signs, road tax discs, and certain official forms,

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<sup>1</sup> Assembly *Record*, Subordinate Legislation Committee, ‘Enhancing the Scrutiny of Subordinate Legislation – Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers’, paras. 49, 11 November 2008.

<sup>2</sup> Devolution Guidance Note 16, July 2008. Schedule 5 of the Act lists the Matters on which the Assembly can legislate. It changes from month to month as more Matters are added, mainly as a result of Westminster legislation in which the Assembly has no part.

and the delivery of some public services through the medium of Welsh in appropriate circumstances were once hotly disputed, there is now widespread acceptance.

Legislation can also be influential in more general public policy fields. In this report we explore some examples where, if the National Assembly had broader legislative authority without recourse to Westminster (as has been the case in Scotland since 1999), significant policy initiatives could be implemented in such fields as public health, transport, and the planning and management of the landscape of Wales. With the present legislative powers the potential to develop such a strategic approach is restricted.

This report explains first the current legislative arrangements under Part 3 of the Wales Act. It describes how the **Legislative Competence Order** procedure that enables the Assembly to draw powers from Westminster is a device to enable it to move in the direction of gaining more powers but without requiring a referendum.

The report then describes how, in terms of democratic scrutiny, the current state of the Assembly's powers is far from satisfactory. In practice most Welsh legislation is still originating in Westminster and many powers are passed directly to the Welsh Assembly Government with little debate in the Westminster Parliament and none at all in the National Assembly. As Marie Navarro and David Lambert, of Cardiff Law School, have said:

“Reading the media, and the statements of some AMs and MPs, the impression is that all new devolved powers since the 2006 Government of Wales Act came into force have been the result of Legislative Competence Orders. However, in practice the main way the Assembly is receiving new legislative powers is directly by Acts of Parliament. These ‘framework powers’, which add Matters to Schedule 5 of the 2006 Act set out the Assembly legislative powers. Also new Acts are passing responsibilities to the Assembly Government with little debate or scrutiny. Since the Government of Wales Act 2006 came into force following the May 2007 election, the National Assembly has been by-passed for most devolved powers.”<sup>3</sup>

This reality appears to be directly contrary to the aims of the 2006 Wales Act, as stated in the White Paper that preceded it:

“Both Parliament and the Assembly currently make law for Wales, and the question is what should be the balance of responsibility between the two bodies. The Government believes that it is now time to re-balance legislative authority towards the Assembly.”<sup>4</sup>

However, experience since the 2006 Act came into operation does not accord with this intention. Overwhelmingly, the initiative for new legislation has come from Westminster, with direct negotiations between UK and Assembly Governments about the inclusion of Assembly legislative powers, in a manner reminiscent of the days of the Welsh Office and also of the executive devolution settlement laid down by the 1998 Wales Act. In practice, most primary legislation for Wales is currently being made in the absence of the accountability that democratic devolution in the form of the Assembly was designed to provide.

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<sup>3</sup> Marie Navarro and David Lambert, ‘Bypassing the Assembly’, *Agenda*, IWA, Spring 2009.

<sup>4</sup> Wales Office, *Better Government for Wales*, para. 3.6, 2005.

The Scottish and UK Parliaments have established a convention (the Sewel agreement) whereby the Scottish Parliament can vote to consent for the UK Parliament to make laws in areas devolved to Scotland. If the same kind of constitutional convention were followed in Wales, moving to Part 4 of the Wales Act would address most of this democratic deficit.<sup>5</sup> It would mean that new legislation, whether proposed by the Welsh Assembly Government, Assembly Committees or Assembly backbench Members, would originate in the Part 4 powers and flow through the Assembly itself, so it could more closely reflect Welsh needs and aspirations and be subject to more effective scrutiny.

The report compares efforts by the Assembly Government and Assembly Members to acquire additional powers through the LCO route with the Scottish experience in similar policy areas. In the examples cited - carers, mental health, and environmental protection – the Welsh initiatives have been to a great extent inspired by the example of Scottish legislation passed since 1999. However, the Scottish Parliament's broad powers, analogous to those that the National Assembly would acquire if it moved to Part 4, have meant that it has been able to legislate more thoroughly, broadly and strategically in these policy fields than is possible in the case of Wales.

The report explores in greater detail the opportunity that would be available to the Assembly Government to legislate in a more strategic way under Part 4 powers - the main conclusion emerging from this report. As examples, we examine the benefits that would flow from legislation that would:

- Promote a Public Health Bill enabling the adoption of a strategic approach that would achieve significant improvements in public health in Wales.
- Establish a Transport Authority for Wales to co-ordinate more integrated public transport provision.
- Initiate legislation to manage and plan the whole landscape of Wales aimed at combining social and economic benefits with sustainable development.

These examples derive from discussion and policy debates that are current in public bodies and civil society in Wales. They provide concrete case studies of the wide-ranging and strategic opportunities for innovative legislation that would be available to an Assembly Government with Part 4 powers that simply do not apply with Part 3.

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<sup>5</sup> In fact, National Assembly Standing Order 26 already provides for Legislative Consent Motions that seek the Assembly's agreement to the inclusion of provisions in UK Bills that have a purpose within the Assembly's legislative competence or that have a negative impact on that competence.

## 2. The National Assembly's Current Legislative Powers

The National Assembly's current powers are known as 'Part 3 powers' after the part of the 2006 Act that describes them. Part 3 specifies that the National Assembly can pass laws for Wales – called Assembly Measures.

Assembly **Measures** can apply only to Wales and they must also relate to a specific **Matter** contained within one of the **Fields** in Schedule 5 of the 2006 Act, listed below:

- Field 1: Agriculture, fisheries, forestry and rural development
- Field 2: Ancient monuments and historic buildings
- Field 3: Culture
- Field 4: Economic development
- Field 5: Education and training
- Field 6: Environment
- Field 7: Fire and rescue services and promotion of fire safety
- Field 8: Food
- Field 9: Health and health services
- Field 10: Highways and transport
- Field 11: Housing
- Field 12: Local government
- Field 13: National Assembly for Wales
- Field 14: Public administration
- Field 15: Social welfare
- Field 16: Sport and recreation
- Field 17: Tourism
- Field 18: Town and country planning
- Field 19: Water and flood defence
- Field 20: Welsh language

As new powers accrue to the Assembly these are listed as Matters under the relevant Field. For example, as of March 2009, Field 5, Education and training, contains 18 Matters. On the face of it these 18 Matters provide the Assembly with wide-ranging opportunities to legislate. An example is Matter 5.4, "Provision about the curriculum in schools maintained by local education authorities". Nevertheless, the requirement is that any legislative proposal must fall within the Matters listed. Consequently, it remains difficult to contemplate an overarching strategic approach to legislation even within this Field under Part 3 powers. So long as the Assembly had the power to legislate directly, without recourse to Westminster – as would be the case under Part 4 of the 2006 Act - it would be much better if there were just one Matter listed under this Field, which simply stated 'Education and training'.

The Assembly can add more powers (more Matters) to the Fields listed above, and therefore expand its legislative powers, in one of two ways:

- By asking Parliament in London to transfer Matters and consequently legislative powers to the National Assembly using an Act going through the UK Parliament. In this case when MPs vote to approve an Act of Parliament in

London they are giving responsibility for making laws under that Matter to Wales.<sup>6</sup>

- By formally requesting Matters to be added to a policy Field through a ‘Legislative Competence Order’ (LCO). An LCO comes from the National Assembly and needs approval in the Assembly, in Parliament and in the relevant UK Government department or departments.

Assembly Measures, which have all the force of an Act of Parliament, are examined and passed by the Assembly itself, being passed into law through a vote among AMs after a process of examination in the Assembly. After AMs have approved the final text it is given to the Queen for approval, which formally brings the law into existence.

As Keith Bush, the Chief Legal Adviser to the National Assembly, said:

“To be successful an LCO requires approval at its various stages but the new system allows the National Assembly to bid for legislative competence over any Matter in the list of twenty policy Fields.”<sup>7</sup>

If Part 4 of the Act were implemented, the Assembly would be directly empowered to pass the equivalent of primary legislation - without parallel approval by the UK Parliament - in the subject areas described in Part 4, with some exceptions. These subject areas come within the 20 policy Fields set out in the Act. Part 3 and Schedule 5 would then cease to operate.

Implementation of Part 4 would be a significant extension to the National Assembly’s legislative authority. Many powers would be devolved as a complete package in a single step, compared with the current system which devolves highly specific powers individually and by request.

For example, under Part 4 in the Field of ‘Education and training’ the National Assembly would be able to make any laws over:

- Education, vocational, social and physical training and the careers service.
- Promotion of advancement and application of knowledge.

The only exceptions to the National Assembly’s powers in this Field would be ‘Research councils’ and, unless agreed by a UK Government Minister, any areas of education and training which, at the time, are the responsibility of central government in relation to Wales.

Peter Hain, Secretary of State for Wales during the formation of the Government of Wales Act 2006, said:

“[Part 3] was a constitutional innovation because as Secretary of State for Wales I wanted to make progress on giving the Assembly more powers. I knew that without a referendum you couldn’t give full primary powers – but I put full primary powers [Part 4] in the Government of Wales Act 2006 and said a referendum would be necessary to trigger them. I did this because full primary powers would be a fundamental change from the Government of Wales Act

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<sup>6</sup> However, it is usually the case with Westminster Bills that confer powers directly on Welsh Ministers that AMs are unaware of their content or the way they might impact on their legislative powers by adding Matters to Schedule 5 of the 2006 Wales Act.

<sup>7</sup> Interview with Keith Bush, February 20, 2009.

1997 settlement that the people of Wales endorsed by referendum. In the meantime, I thought, we should get on with giving the Assembly more powers, more quickly than the old system of an average of one Bill a year.”<sup>8</sup>

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<sup>8</sup> BBC Radio 4, Westminster Hour, March 29, 2009.

### 3. Part 3's Democratic Deficit

The *Better Governance for Wales* White Paper that preceded the 2006 Wales Act stated, "The Government favours an incremental approach, both to permit the Assembly to develop the capacity to deal with enhanced legislative powers and also to allow Parliament and the Assembly to develop a balance between them which provides the best possible legislative framework for Wales and the UK".<sup>9</sup>

This section of the report shows that after almost two years of operation of the Act, there is no indication that "the best possible legislative framework for Wales" is being achieved.

*Better Governance for Wales* also stated that "the relationship between Parliament and the Assembly on these issues needs to be reconsidered... The Government believes that it is now time to re-balance legislative authority towards the Assembly".<sup>10</sup>

However, with both the majority of new executive powers continuing to be given to Welsh Ministers and the majority of legislative powers being given to the Assembly directly by Act of Parliament, it does not seem either that the Assembly is being given the ability to influence its own legislative framework, or that a re-balancing of legislative authority towards the Assembly is taking place.

Part 3 empowers the National Assembly to make laws of its own in many fields and to bid for further powers to make laws, using the **Legislative Competence Order** (LCO) process. The process has attracted much attention in the media and among politicians because the process is new and determines how much say the Assembly should have over people's lives in Wales.

Despite this attention the largest number of legislative powers devolved to the National Assembly have not come as a result of LCOs – originating in the National Assembly – but from Acts of the UK Parliament originating in London. Between 2007 and early 2009 three LCOs were approved, which added 12 Matters to the National Assembly's powers. It could, therefore, pass laws in 12 more areas as a result. However, in the same period 33 Matters were added through UK Acts of Parliament.

In these 33 instances of powers devolved, there was no debate in the National Assembly about whether these powers were appropriate and little consideration given by Welsh MPs in the UK Parliament or in the media. Some of these 33 Matters are very wide in scope, and give the National Assembly significant responsibilities. For example, Matter 12.1 was devolved in this way and it allows the National Assembly to pass laws that fundamentally change the structure of local government in Wales:

- To make new local authority boundaries or abolish or alter existing boundaries.
- To establish councils for the new boundary areas and abolish existing councils.

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<sup>9</sup> Wales Office, *Better Governance for Wales*, June 2005, para. 3.13.

<sup>10</sup> *Ibid.*, para. 3.6.

The UK Parliament has been used to enable the Assembly to confer considerable executive and subordinate law-making powers on the Assembly Government, although there is no procedure for Assembly Members to debate or approve them. In 2007-2008 there were 21 Acts of Parliament passed in London and which transferred powers to the Welsh Assembly Government without any prior debate in the National Assembly.

As well as Acts of Parliament, the Secretary of State for Wales can make 'Transfer of Functions Orders', which, with Parliament's consent, transfer powers and duties directly to Welsh Ministers from UK Government Ministers. This process of transferring functions to Wales by order has existed since the Assembly was established in 1999. Some of the transfer orders that the Secretary of State for Wales has enacted since the new law making system (Part 3) came into being in 2007 relate to areas outside the scope of the National Assembly's 20 policy Fields.

These include:

- Criminal law (Offender Management Act 2007).
- Human fertilisation and embryology (Human Fertilisation and Embryology Act 2008).
- Banks (Consumers, Estate Agents and Redress Act 2007).
- Coroners: (Criminal Evidence (Witness Anonymity) Act 2008).

A strong case can be made that all such powers proposed by Parliament should be the subject of prior discussion by the National Assembly. After all, it is the Assembly to which the Welsh Assembly Government is accountable.

The Assembly Government appears to approach the current system in an opportunistic way, by looking out for Bills going through Westminster and trying to ensure that Wales receives new powers through them. Where it can, it tries to insert clauses that would give it direct powers to implement in Wales whatever changes Westminster legislation is proposing for England.

In November 2008 the Counsel General, Carwyn Jones, giving evidence to an Assembly inquiry into the way it examines laws, described the process:

"When there is a Bill passing through the UK Parliament where we believe framework powers to transfer powers to us would be appropriate, we will seek to do that. Obviously, if there is a vehicle that is passing by, we will look to get on to that vehicle in order to reach our destination. There will be occasions, however, when there is not an appropriate parliamentary vehicle in Westminster for us to achieve what we wish and so we will go through the LCO process ... The difference between LCOs and looking for framework powers in UK Bills is that, when we look for framework powers, we look to get them via a Bill that is at all times the responsibility of the UK Parliament and not of the Assembly."<sup>11</sup>

Yet this position seems to run against the grain of the UK Government's declared intention to give the Assembly 'wider and more permissive powers', as stated in the *Better Governance for Wales* White Paper that preceded the 2006 Wales Act:

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<sup>11</sup> Assembly *Record*, Subordinate Legislation Committee, 'Enhancing the Scrutiny of Subordinate Legislation – Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers', paras. 49 and 58, 11 November 2008.

“The Government believes that there should be a more consistent approach to drafting legislation for Wales. It also recognises that legislation made by the Assembly is subject to scrutiny by Assembly Members using procedures as least as rigorous as those available to Members of Parliament. In light of that the Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales.”<sup>12</sup>

Instead of moving legislative authority towards the Assembly, as was the Government’s expressed intent, in practice most primary legislation for Wales coming within the Part 3 Fields is currently being made without the kind of accountability that democratic devolution in the form of the Assembly was designed to provide.

According to the Law Society, which represents solicitors in England and Wales:

“Our clear perception is that the Welsh Assembly Government’s persistence in looking to London is stunting the development of the National Assembly’s status as Wales’ law-making body in the devolved Fields.”<sup>13</sup>

In Scotland there is a convention (the Sewel agreement) whereby the Scottish Parliament can vote to consent for the UK Parliament to make laws in areas devolved to Scotland. Similarly, Parliament may legislate on matters devolved to Wales, but Assembly Standing Orders require the passing of a motion by which the National Assembly gives its agreement to the inclusion of the Welsh-related provisions in the Bill.<sup>14</sup> It does not seem that such consent has been sought, as a matter of practice, by the Assembly Government before it seeks powers in a Bill.

It is likely that moving to Part 4 of the Wales Act would address most of the democratic shortfall in this area. Firstly, broad and substantial powers would be devolved to Wales in a single step, as happened in Scotland in 1999. This would mean that new legislation would increasingly come from the National Assembly, whether originally proposed by the Welsh Assembly Government, Assembly Committees or Assembly backbench Members. There would be less reason to seek such powers in a Westminster Bill when the Assembly’s legislative powers themselves would permit the creation of provisions. As a result, legislative change enabling coherent legislative policies to be made would originate in the Assembly itself, rather than in piecemeal legislation emanating from Westminster.

The overall result should be to ensure that legislation affecting Wales would more closely reflect the democratic expression of Welsh needs and aspirations and, equally importantly, be subject to more effective scrutiny of legislative procedure and content. It is difficult to resist the conclusion that a more direct and consistent line of democratic accountability would be easier to understand by both the public and civil society.

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<sup>12</sup> Wales Office, *Better Government for Wales*, para. 3.12, 2005.

<sup>13</sup> The Law Society, Evidence to the All Wales Convention.

<sup>14</sup> National Assembly Standing Order 26.

## 4. The Scottish Experience

In a formal sense moving to Part 4 would not bring the Assembly fully into line with the Scottish Parliament's primary legislative powers, even if the practical effect in most Fields would be the same. The Scottish Parliament's powers extend across considerably more Fields, including Home Office functions. Moreover, all powers fall to the Scottish Parliament unless they are expressly reserved to Westminster. In Wales's case the National Assembly, even under Part 4, would have only those powers expressly transferred, although additional subjects can be added by Order in Council approved by Parliament.<sup>15</sup> That is to say, they are 'specified' or 'conferred' powers. Nevertheless, Scottish legislation provides an example of the kind of policy initiatives the National Assembly could approve, within comparable policy Fields.

The Scottish Parliament's powers were devolved in one step, in 1999, with some exceptions, including for example the majority of tax-raising powers and defence. Scotland has a distinct legal system and many aspects of criminal justice were also devolved. In its first two terms, between 1999 and 2007, the Scottish Parliament passed almost 20 Acts specifically in the area of criminal justice and the legal system.

The generally wider scope of powers available to the Scottish Parliament compared with the National Assembly means that in key policy Fields Scotland has developed a distinctive policy profile in comparison with the rest of the UK and has been able to formulate holistic policies to deal with connected areas.

Paul Griffiths, a former special adviser to the Assembly Government, believes the Scottish Parliament's greater legislative capacity has resulted in a more focused approach to policy making:

"The Scots have had a distinct legal system for some time – something we do not really have in Wales. But until 1999, when the Scottish Parliament was created, the Scots legal system in reality meant just having a different judicial and legal structure. The Scots, just like the Welsh, had to grapple for the first time with creating Scotland-specific policies, in health and education for example. They had no particular head start over Wales in thinking about how to make new policies that might be different from England's, but their system does seem to have given them clarity about what they can actually do."<sup>16</sup>

The following examples describe a selection of Scottish laws that enact ideas that Wales might consider, if it had the powers afforded by Part 4 of the Government of Wales Act 2006.

### Parental Involvement in School Education

The Scottish Schools (Parental Involvement) Act 2006 provided for further involvement of parents in their children's education and in school education more generally. It related mainly to 'public schools', which in Scottish law are schools under the management of an education authority. The Act was the Scottish Government's solution to the issues highlighted by *Educating for Excellence: Choice*

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<sup>15</sup> Government of Wales Act 2006, s. 109. Additional Fields may be added to Schedule 5 by similar means, s. 95.

<sup>16</sup> Interview with Paul Griffiths, March 12, 2009.

*and Opportunity* (The Executive's Response to the National Debate on Education, January 2003).

The 2006 Act said that all parents of pupils at a state-run school are to be known as the 'parent forum', and that the forums can create a 'parent council'. Parents can decide how to setup the council, what it should be called and what it discusses. Local education authorities are required to promote the establishment of Parent Councils. According to the Scottish Government's guidance for Parent Councils they have four aims:

- Support the school in its work with pupils.
- Represent the views of parents.
- Promote contact between the school, parents, pupils, providers of nursery education and the community.
- Report to the Parent Forum.

Parent Councils have considerable influence. Parentzone, the Scottish Government's information site for parents, states:

"Parent Councils were recognised in law in August 2007, so the school and the local authority must listen to what your Parent Council says and give it a proper response."<sup>17</sup>

### **Inspections of Children's and Social Work Services**

The Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Act 2006 provides for the carrying out of joint inspections of the provision of services to children; and makes provision for inspectors and their duties. The law was produced by the Scottish Government to help implement its aims outlined in *Closing the Opportunity Gap*, which addresses poverty, inequality and deprivation. One objective relates to young people:

"To ensure that children and young people who need it have an integrated package of appropriate health, care and education support."

As a result of the law Scottish Ministers can direct two or more people or bodies (listed by the Act) to conduct an inspection into the provision of children's services. Ministers may also appoint 'social work inspectors' to carry out inspections. Ministers are also permitted for a limited extent or purpose "to include [in the inspection] lay people or specific organisations with particular knowledge or expertise in any aspect of services for children". As *Closing the Opportunity Gap* states:

"These inspections will look at strategic leadership and management, service delivery and service receipt. New legislation has been enacted to provide a legal base for joint inspections and to facilitate both access and sharing of information."

### **Water Services**

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<sup>17</sup> <http://www.ltscotland.org.uk/parentzone>

The Water Services etc. (Scotland) Act 2005 made provisions for water supply. It made a number of changes. Firstly, it created a Water Industry Commission to improve the transparency, accountability and consistency in water industry regulation. The explanatory note for the law said:

“The commission has the general function of promoting the interests of persons whose premises are connected or might reasonably become connected to the public water supply and/or sewerage system. This ensures that the Commission will promote the interests of both Scottish Water's direct customers, and the customers of licensed providers of retail services. It is a duty to promote the interest of customers as a whole which might be relevant, for example, where the interests of different categories of customers conflicted.”

The Act also strengthened representation of customer interests. It established customer panels for public water customers. It has a duty to publish reports and to make recommendations to specific bodies to promote the interests of water customers, either generally or specifically.

### **Accessibility for Education**

The Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 requires bodies responsible for schools to prepare and implement strategies relating to accessibility for pupils with a disability. The Act requires the preparation of a strategy to increase over time the physical accessibility of schools and the accessibility of the curriculum for pupils with disabilities. The strategy is to be prepared by education authorities, in relation to schools they manage, and by proprietors, managers or boards of independent, grant-aided and self-governing schools. These are required to:

- Increase the extent to which pupils with a disability can participate in the school's curriculum
- Improve the physical environment of the school to increase the extent to which pupils with a disability are able to take advantage of education and associated services provided or offered the school
- Improve communication with (and especially to) pupils with a disability.

### **National Parks**

The National Parks (Scotland) Act 2000 provides for the procedure for making new national parks in Scotland. Scottish Ministers may designate an area as a National Park and establish an authority to oversee the management of the park. In designating the area the Scottish Ministers must consider:

- That the area is of outstanding national importance because of its natural heritage or the combination of its natural and cultural heritage
- That the area has a distinctive character and a coherent identity

- That designating the area as a National Park would meet the special needs of the area and would be the best means of ensuring that the National Park aims are achieved in a co-ordinated way.

There is a procedure for investigating and consulting on the designation order. The draft designation order is placed before the Scottish Parliament.

As a result of the law the Scottish Parliament has created two national parks in Scotland: the Loch Lomond and the Trossachs National Park; and the Cairngorms National Park. In June 2005 the Scottish Government announced that it wanted to create Scotland's first coastal and marine national park. Ross Finnie, the then Environment Minister, said:

“This represents a new approach within the UK and internationally, because although there are marine national parks elsewhere in the world, they tend to be marine nature reserves. Our approach is about people, too. As with our terrestrial national parks we will include local communities to ensure the sustainable economic and social development of the park area.”

However, the SNP minority government that came to office in 2007 said that it did not intend to pursue the proposal for now. Scottish National Heritage said:

“Following the 2007 election, the new administration decided not to pursue these proposals. Instead, it intends to bring forward dedicated legislation to provide for the better management of the whole of the marine environment. Proposals for a Coastal and Marine National Park in Scotland may be revisited once the wider legislative framework is in place.”

## 5. Comparing the Welsh Experience with Scotland

A move to Part 4 would involve a similar broad brush, one-step devolution to that applied in Scotland in the examples given in the previous section. The Welsh Language Legislative Competence Order that is currently being considered provides an example of the difference in practice between Parts 3 and 4. Under Part 3 the Assembly Government is seeking to add “Promoting or facilitating the use of the Welsh language; and the treatment of the Welsh and English languages on the basis of equality” to the Welsh language Field of its responsibilities.

The order excludes powers over Welsh language usage in law courts and specifies the organisations that the National Assembly will be able to legislate over with respect to usage of Welsh. However, if Part 4 were implemented, the Welsh language Field would refer only to ‘the Welsh language’ as the area of competence of the National Assembly. It would then be able to pass Acts on any Welsh language matters, except the use of Welsh in courts of law, without reference to any other legislative body.

It can be argued that while the Scottish Parliament has been able to invest its time and resources into making new law, the National Assembly has had to expend its energies in bidding for the powers to do so. As at March 2009, just two Measures had been enacted by the Assembly, only one of which was made pursuant to a LCO, although a further seven were “in progress”.

It is not part of our task to comment on the way in which the Assembly, Whitehall and Westminster have dealt with the policy content implied in bids for LCOs. That involves subjective political judgments. However, we do comment on the timescales involved, since this can be subject to objective measurement and affects the speed of legislative response to perceived need.

There appears to be no set time for an LCO to progress. Three LCOs proposed at the beginning of the third Assembly term (2007) were at different stages by late March 2009, as shown in Table 1.

**Table 1: Progress of Legislative Competence Orders**

<b>LCO</b>	<b>Date introduced</b>	<b>Progress</b>
Environmental Protection and Waste Management	June 2007	Approved by Assembly and waiting for referral to UK Parliament.
Welsh Language	February 2009 (but promised in June 2007)	Approved by Assembly and now under scrutiny in UK Parliament.
Additional Learning Needs	June 2007	Order in Council made April 2008

Daran Hill, Director of the Positif Politics consultancy, explains why different LCOs have taken markedly different times to progress:

“The course of the LCO will often depend on its scope and the speed of the UK departments in evaluating and approving the bid for extended Welsh powers. In the case of the Welsh Language LCO the Assembly Government committed itself to making a bid for those powers before consulting the UK Government Departments. Therefore it did not publish its proposals for almost two years after making the commitment to do so. But as a result of getting approval before pursuing the bid it now has something of a fair wind in Westminster, having already been approved by the UK Government. This contrasts with the Environmental Protection and Waste Management LCO, which was very wide in scope, and was published before the approval of the UK Government. That LCO has run into difficulties and I am not certain whether it will even progress at all.”<sup>18</sup>

What follows are descriptions of three bids for the devolution of powers through LCOs, compared with the law-making process in Scotland in comparable areas.

### **i) Jonathan Morgan's proposal for a LCO on provision of mental health services and the Scottish Mental Health Act (Care and Treatment) 2003**

The proposed LCO would devolve to the National Assembly powers to pass Measures providing mentally disordered persons with a right to assessment by the Welsh health service, duties on the service to provide treatment, and a right to independent mental health advocacy.

The aim of the legislation was to reduce the likelihood of the condition of patients worsening, by ensuring at an early stage that patients were fully aware of their situation through the independent advocate and assessed much earlier before possible deterioration.

The legislation took inspiration from the Scottish system, set out in the Scottish Parliament’s Mental Health (Care and Treatment) Act of 2003. As the draft explanatory memorandum accompanying the mental health LCO said:

“Scotland has used its devolved legislative powers to introduce rights for persons with a mental disorder to an assessment of need and to independent advocacy, whether or not they are subject to compulsory powers, under the Mental Health (Care and Treatment) (Scotland) Act 2003. This Act confers rights on persons with a mental disorder in Scotland that are not enjoyed by those in England and Wales.”

As the quote above acknowledges, Scotland had devolved powers in this area from 1999. This enabled the Scottish Parliament to approve a law more quickly and with wider scope than the potential Welsh laws. The draft law was introduced to the Scottish Parliament on September 16, 2002. It achieved Royal Assent seven months later on 25 April 2003.

Jonathan Morgan AM introduced his LCO in February 2008. Seven months later, although approved by the National Assembly, it was at the stage of being discussed by the Assembly Government and UK Government departments. It still needed approval from UK Government departments, a Cabinet Committee, the Secretary of State for Wales, the UK Parliament’s Welsh Affairs Select Committee, the National Assembly again, Houses of Commons and Lords, a Lords committee and the Queen.

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<sup>18</sup> Interview with Daran Hill, March 5, 2009.

Only at the end of this process will Jonathan Morgan be entitled to introduce an Assembly Measure using the powers devolved by the LCO. On past precedent the resulting measure might take another 5-10 months following the granting of the LCO.

Arguably, the more important advantage of wider powers, as enjoyed by Scotland, is the enlarged scope of legislation in a specific Field. For instance, in the Field of mental health, in addition to guaranteeing independent advocates for mental health patients, the Scottish Mental Health Act 2003 made provisions for:

- Allowing mental patients to make statements indicating their wishes about treatment.
- An assessment, under certain circumstances, of a person's needs to be carried out by a local authority or health board.
- A duty on health boards to maintain lists of approved medical practitioners with experience of treating mental disorders.
- Safeguards for patients where certain medical treatments are being administered or given.

As the draft explanation for the mental health LCO noted: "The Scottish model is much admired for adopting a humane and inclusive approach to mental health legislation." None of these extra provisions will be available in Wales for a Mental Health Measure because the LCO does not devolve powers over these areas.

## **ii) Helen Mary Jones's proposal for a LCO on carers' rights and Scotland's care provision**

Helen Mary Jones AM proposed the carers LCO after winning a ballot among AMs in the National Assembly. The LCO aims to devolve powers to the Assembly to support carers who provide "substantial care" for children with a physical or mental impairment or for any individual aged 18 or older.

In England and Wales local authorities are already required by law to assess a carer's ability to provide and continue to provide care and also to supply carers with services or payments directly to support their needs. The assessment must be requested by the carer, although since 2004 local authorities have also had a duty to inform carers of their right to an assessment. The LCO proposes to give the National Assembly powers to legislate because there are, according to the draft explanatory memorandum for the LCO, shortcomings in current delivery. For example, provision across Wales for assessments and services for carers is thought to be patchy.

The carers LCO has progressed further than the mental health LCO, having been submitted in December 2008 to Parliament for pre-legislative scrutiny. In terms of scale it is relatively modest. As in the case of mental health, the Scottish Parliament has been able to pursue laws with much wider scope. The draft explanatory memorandum said:

"The LCO would not allow the Assembly to legislate in respect of persons who provide care by virtue of a contract of employment or other contract or as a volunteer, neither would the Order confer power on the Assembly to alter the employment rights of carers."

The Welsh Assembly Government adopted the carers LCO from Helen Mary Jones, who agreed that the Assembly Government was better placed and resourced to develop the proposal and to ensure it survived the approval process, particularly from the UK Government. The Welsh Assembly Government believes the LCO is in the spirit of its own aims.

The Scottish laws passed in this area have a much wider scope than the Welsh LCO will allow. The Scottish Government has guided two Acts through the Parliament: the Regulation of Care (Scotland) Act 2001 and Community Care and Health (Scotland) Act 2002.

A great deal of preparation took place to ensure the Acts took a co-ordinated approach to care. The development of the Community Care and Health Act 2002 took in a number of areas outlined in previous Scottish Government documents:

- Long term care (*The Scottish Executive's Response to the Royal Commission on Long Term Care*, October 2000).
- Joint working between agencies involved in community care (*The Scottish Executive's Response to the Report of the Joint Future Group*, January 2001 and *The Response by the Scottish Executive to the Health and Community Care Committee's Inquiry into the Delivery of Community Care*, January 2001).
- Nursing care (*Report of the Chief Nursing Officer for Scotland's Group on Free Nursing Care*, December 2000).

Also, the Scottish government drew from its strategy for carers in Scotland (November 1999) and a report by the Scottish Carers Legislation Working Group (January 2001).

In comparison with the Scottish legislation in the Field the proposed Welsh LCO is extremely limited in its scope. Meanwhile, the Scottish Community Care and Health Act 2002 offered the prospect of a joined-up, over arching approach. It dealt with regulation of care covering care for older people; for people with mental health problems and for children and young people; care at home; residential care for people with learning disabilities, impairments or drug and alcohol problems; and early education and children.

### **iii) Environmental Protection and Waste Management LCO and local government waste management in Scotland**

This LCO proposal was announced in June 2007 by Rhodri Morgan, the First Minister, who said:

“We will propose a wide-ranging LCO in relation to environmental protection and waste management. This will link long-standing public concern about litter and other local environmental matters with the issue of sustainable waste management.”<sup>19</sup>

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<sup>19</sup> Assembly Government Cabinet Statement, 6 June 2007.

The proposals were to devolve powers to the National Assembly over the collection, management, treatment and disposal of waste; and environmental protection, including pollution, nuisances and hazardous substances.

The Assembly Government had already set out a strategy in this area, *Wise About Waste*. In its draft memorandum to explain the LCO the Assembly Government explained the limitations it faced that made the LCO necessary:

“The proposal for these powers is also made in the context of the limitations to the current settlement, which in some respects restricts the Assembly Government from tackling Welsh priorities and issues. In a number of areas the Welsh Assembly Government’s existing powers are constrained.”

A committee was established in the Assembly to examine the proposals and to hold a consultation. In November 2007 the committee submitted its report. However, it is now in the hands of the Secretary of State for Wales, who is required to refer it to the UK Parliament or explain why he will not refer it. To date, neither has happened.

In contrast, Scottish legislation on waste management was embraced within the Scottish Government’s wider reforms of public services and local government. The Local Government in Scotland Act 2003 dealt with community planning, council tax, local government finance and waste management.

The Scottish Parliament has brought in provisions that the National Assembly would be able to enact, but only if the LCO is passed and the powers devolved. These provisions centre on the preparation of integrated waste management plans at local authority level, which refer to policies set out in Scotland’s National Waste Strategy. They include performance targets and agreements between local authorities to co-operate in waste management when appropriate.

These provisions are not yet available to the National Assembly because the LCO has still to go through the full approval process.

## 6. Assessing the LCO and Measure Processes

As the three case studies in the previous section have shown, the critical difference between Wales and Scotland is that in Wales the LCO process allows the devolution of individual, specific areas if there is sufficient political will both in Cardiff and Westminster. In Scotland, broader powers were devolved in 1999 in one step and the Scottish Government is therefore able to approach issues more speedily and in a more holistic way. Of course, this does not guarantee success but certainly makes it easier to achieve a broad, co-ordinated approach to law making.

The LCO process involves lengthy consideration by Committees in the Assembly followed by the Secretary of State for Wales, Whitehall Government Departments, the Welsh Affairs Committee in the House of Commons, the Constitutional Committee in the House of Lords, the Joint Committee on Statutory Instruments, and finally both Houses of Parliament. There is no central driving force to ensure the speedy passage of an LCO to its finally becoming an Order in Council.

On the other hand, there is a driving force in getting Government Bills through Parliament. Marie Navarro and David Lambert, of Cardiff Law School, wonder whether the tight Parliamentary timetable for Government Bills, which can deliver major powers to the Executive usually within one Parliamentary session, is the reason why there is a diverse list (see Appendix 1) of UK Acts giving wide and varied powers to the Assembly Government, compared with the current three LCOs which are in force. The powers in the 2007-08 Acts can be activated by the Assembly Government whenever it wishes. Within the next six months or so this will also be the case with the powers in the list of Bills currently before Parliament.

The list of LCOs currently in draft (Table 2) show a very different story to the extent of the powers in the Acts of Parliament (Appendix 1) and the speed with which they can be implemented. The Environmental Protection and Waste Management, Affordable Housing and Welsh Language LCOs are all Assembly Government proposals and, apart from the Affordable Housing proposal, wide ranging. However, that is the total of the Assembly Government's current Assembly legislative proposals.

**Table 2: Current LCO proposals**

Assembly Government	Assembly Members
Environmental protection and Waste Management Affordable Housing Welsh Language	Domestic Fire Safety Mental Health Reform Displaying Flags and Motifs on Vehicle Registration plates Provision of Bus and Coach Services Carers Red Meat Industry Foundation Degrees Culture Traffic Free Routes Major Development Plans

Together with the generally highly specific character of LCO bids, there are problems occurring in the nature of the legislative powers given to the Assembly by Acts of Parliament. It can be seen from the list of Acts giving executive powers to the

Assembly Government, shown in Appendix 1, that it is not an automatic principle that legislative powers should also be given to the Assembly in the same Act. Such provisions are in the minority.

While some Assembly legislative powers in Acts can be wide, for example the local government powers in Field 12 of Schedule 5 ( given under the Local Government and Public Involvement in Health Act 2006), there can also be very specific powers. Examples here are the three limited powers relating to Town and Country Planning (Field 18) given by the Planning Act 2008, and the limited road charging provisions in Highways and Transport (Field 10), given under the Local Transport Act 2007.

Such specific powers are as restrictive as some of the draft LCO proposals – Traffic Free Routes, Domestic Fire Safety and Displaying Flags and Motifs on number plates being examples. If this is the way forward for Schedule 5, then it will begin to resemble a Legislative Transfer of Functions Order, on the lines of the original, highly complex Transfer Order which established the executive powers of the Assembly in 1999. This trawled through 450 Acts of Parliament to specify the Assembly’s executive powers, two-thirds of which did not even give all Ministerial powers under the Acts to the Assembly. It is doubtful whether such a future for Part 3 provides a firm and wide-ranging set of legislative powers for the Assembly.

The number of LCOs and Measures being promoted by AMs since June 2007 gives an impression of the range of legislative ambitions to date. The National Assembly holds three ballots per Assembly term (nine per calendar year) where AMs can propose ideas for LCOs and Measures. The winner is allowed to take forward a proposal for an LCO or a Measure, so long as the Assembly votes to approve the idea in principle. Table 1 shows, in summary, the LCOs proposed by AMs in each ballot between June 2007 and January 2009 (a more detailed breakdown is provided in Appendix 2):

**Table 3: Members Ballots for Legislative Competence Orders**

<b>Ballot</b>	June '07	Oct 2007	Dec 2007	Feb 08	Apr 08	June 08	Oct 2008	Jan 09
<b>LCO proposals</b>	21	21 12 new	21 5 new	17 3 new	12 1 new	12 1 new	10 3 new	12 2 new

The table shows a declining trend of new suggestions for legislation coming from members, and the same is true for proposals for Measures, as shown in Table 4 on the following page. Given that Measure making takes place entirely within the National Assembly and is therefore much swifter than the process of seeking powers through LCOs, it is perhaps surprising that ideas for them have not been more forthcoming. In recent months no proposals have been made at all. It should be noted that, unlike the Westminster system in which all MPs merely place their names in the ballots for time for Private Members legislation, in the Assembly the Presiding Officer has ruled that AMs must specify the LCO they wish to promote before being able to place their names in the equivalent ballot. Undoubtedly this has had the effect of diminishing the proportion of AMs who might otherwise participate. At the same time, according to Jonathan Morgan, proposer of the Mental Health LCO:

“Many AMs are simply not interested in suggesting legislation. They see it as their duty to represent their constituents, understandably so, but not to come up with new legislation.”<sup>20</sup>

**Table 4: Members Ballots for Measures**

<p><b>June 07</b></p> <p><b>3 proposals</b></p>	<p><b>Selected member: Jenny Randerson - Healthier School Meals</b></p> <p>Lorraine Barrett: Financial Literacy Education Peter Black; Mike Bates; Eleanor Burnham; Michael German; Ann Jones: School Meals</p>
<p><b>October 07</b></p> <p><b>1 proposal</b> <b>1 new</b></p>	<p><b>Selected Member: Mike German - School Closures (Consultation and Categories)</b></p>
<p><b>December 07</b></p> <p><b>3 proposals</b> <b>3 new</b></p>	<p><b>Selected member: Dai Lloyd - Impact Assessments for the Selling off of Playing Fields</b></p> <p>Mick Bates; Eleanor Burnham; Kirsty Williams: Anti-Social Behaviour and Bullying Peter Black: Youth Services</p>
<p><b>February 08</b></p> <p><b>4 proposals</b> <b>2 new</b></p>	<p><b>Selected member: Nerys Evans - Recycling</b></p> <p>Mick Bates - Sustainable New Builds Peter Black; Eleanor Burnham - Youth Services Kirsty Williams - Anti-Social Behaviour and Bullying</p>
<p><b>April 08</b></p> <p><b>2 proposals</b> <b>0 new</b></p>	<p><b>Selected member: Peter Black: Youth Services</b></p> <p>Mick Bates: Sustainable New Builds</p>
<p><b>June 2008</b></p>	<p><b>No proposals submitted</b></p>
<p><b>October 2008</b></p> <p><b>1 proposal</b> <b>1 new</b></p>	<p><b>Selected Member: Alun Cairns: Special Educational Needs</b></p>
<p><b>January 2009</b></p>	<p><b>No proposals submitted</b></p>

On the other hand, Marie Navarro and David Lambert feel that the declining number of proposals being made for LCOs, on the part of the Assembly Government as well as Assembly Members, reflects frustration at the slowness of their progress:

“The current Welsh Language LCO is likely to take some years before it finally sees an outcome in terms of a Measure passed. Examining the way by which new powers are to an increasing extent being devolved directly from Whitehall

<sup>20</sup> Jonathan Morgan, interview, 23 February 2009.

and Westminster to Assembly Government Ministers, it looks very much as though they are deciding this is the way to obtain powers, rather than go through the complicated and often difficult LCO process. But this means that the legislative agenda is not in the hands of the National Assembly. Instead the Assembly Government has to climb aboard available Bills that are part of Westminster's agenda."<sup>21</sup>

From a Cardiff perspective, the number of proposals for LCOs may be declining. However, this is not the view at Westminster. In July 2008 the Welsh Affairs Select Committee, made up of MPs in the UK Parliament, claimed that the National Assembly was 'swamping' it with LCOs, and should supply a smaller number of higher quality LCOs. In response Lord Dafydd Elis-Thomas, the Presiding Officer of the National Assembly, commented:

"The system requires good will on both sides and does not need micro-management by Welsh members of the House of Commons. I believe that the way in which the proposed orders are scrutinised in the House of Commons has led to Welsh MPs becoming involved as second order legislators. They are not just looking at the powers to transfer but what measures might be enacted by the Assembly using those powers."<sup>22</sup>

Jonathan Morgan believes the current system of devolving powers through LCOs advantages the Assembly Government over backbench AMs. Commenting on his experience with his mental health LCO he observed:

"During the period from June to December 2008 there were discussions between Assembly Government officials and officials working at the UK Ministry of Justice, UK Department of Health and the Wales Office. It is a curious part of the process. Bearing in mind that this is my legislation I had no part to play, due to the fact that I am not a member of the Government, so in essence the whole thing was out of my hands for some time until these 'conversations' had been completed. It is different for Assembly Government LCOs because there is that direct link with UK Departments that non-government AMs do not have."<sup>23</sup>

Some AMs have expressed dissatisfaction with the time and resources required to pursue LCOs before passing laws. Helen Mary Jones AM, the proposer of the carers LCO, said:

"The scrutiny process is complicated and wasteful, with one piece of legislation being scrutinised by AMs, then by MPs, and then, in the form of a Measure, by AMs again."<sup>24</sup>

A further consideration is that the limitations of the LCO procedure are not well understood by the general public and particularly by those who make submissions during the pre-legislative scrutiny stages. Consultees are sometimes unclear about the distinction between conferment of additional legislative powers, which is the sole focus of the LCO process, and the separate process of enacting legislation once those powers are obtained. Provisions that relate to the possible content of Measures,

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<sup>21</sup> Interview, 5 February 2009.

<sup>22</sup> BBC Radio 4, Westminster Hour, 29 March 2009.

<sup>23</sup> Jonathan Morgan, 'The complexities of the LCO process', unpublished note, November 2008.

<sup>24</sup> Western Mail, 'Devolution process must be reformed – or it's the vulnerable who will suffer', 6 November 2008.

which for most is the principal consideration, are not uncommonly raised when the LCO is under scrutiny.

Moreover, Jenny Randerson AM, speaking in March 2009, criticised the fragmented nature of the system:

“We have become used to a make-do-and-mend approach to legislation, because of our limited powers. Governments have become very inventive as a result, but often, when that approach is applied, it is less than perfect, leaving gaps in the way that the policy can be implemented. [The Assembly Government] is right to say that obtaining an LCO is a lengthy process—that is why I always thought that the process would not work in the first place. However, it is our chance to expand our powers in this Assembly.”<sup>25</sup>

Legislative Competence orders, and the potential Measures that flow from them certainly provide the chance that Jenny Randerson identifies. However, it is a painfully slow process, and one that is not calculated to result in a coherent system of powers that the public will readily understand. It is noteworthy, too, that the Assembly Government has experimented very little in attempting to promote Legislative Competence Orders. The record shows that it prefers to rely on opportunistically ‘hitching a lift’ aboard Westminster-originated legislation to expand its powers. So far it has only promoted four Legislative Competence Orders, and only two of those are relatively wide-ranging – the LCOs for Environmental protection and the Welsh Language.

In contrast, LCOs proposed by AMs are usually very specific, on the whole unambitious, and do not give rise to the realising of more than one Measure. While this specificity is to be expected, as the AMs do not have the same resources and officials to assist them as the Assembly Government, the relatively few Assembly Government proposals means that Wales is not achieving the range of legislative powers foreseen in the *Better Governance for Wales* White Paper that preceded the 2006 Wales Act. For example this envisaged that from time to time the Assembly Government might promote wide-ranging, cross-cutting legislation, and instanced the protection and welfare of children:

“This would be a limited policy area, but one cutting across a range of the Assembly’s functions, such as education, local government and social care. Such a power could have been framed to have allowed the Assembly to make new provision setting up a Children’s Commissioner for Wales. This was done in response to the Waterhouse Report on child abuse in North Wales and needed urgent legislation. At the time of the report, the Care Standards Bill was going through Parliament and it was possible to do some of what was required as part of the Bill but not everything. As a result, it was necessary to have a Wales-only Bill in the next session to finish the job, absorbing valuable Parliamentary time and resulting in the legislation governing the Commissioner being quite complex. If Parliament could have conferred legislative powers on the Assembly to deal with this matter, the provision would have appeared in a single, more straightforward, piece of legislation.”<sup>26</sup>

In this example the White Paper conceded the argument in favour of the Assembly Government having the opportunity to promote a strategic, functionally cross-cutting approach to the legislation it wants. In the case it describes there was a combination

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<sup>25</sup> Assembly *Record of Proceedings*, Plenary session, 18 March 2009.

<sup>26</sup> Wales Office, *Better Governance for Wales*, 2005, Para. 3.18.

of Wales 'hitching a lift' aboard a piece of Westminster legislation that happened to be going through at the time, and afterwards shoring this up with some additional Wales-only legislation. As the White Paper concedes, this was unsatisfactory. And the record has continued to prove unsatisfactory since the passing of the 2006 Wales Act. In practice, little has changed under Part 3.

## 7. Response from Civil Society

As the Chairman of the All-Wales Convention Sir Emyr Jones Parry has observed, amongst the general public there is a great deal of confusion about the powers of the National Assembly. While people appreciated such Wales-only policies as free prescriptions and extra support for students, he said people were less clear about the way the Welsh government works:

“If you then ask people where primary legislation comes into this and how the Assembly gets its powers a great fog descends. There is a lot of confusion out there.”<sup>27</sup>

This reality was reflected in interviews and a survey of civil society and lobbying organisations, undertaken for this study – a list of those contacted is at Appendix 2. Very few had any thoughts about new legislation they would like to see the National Assembly enact, under its present powers or if it moved to Part 4. Assembly Members also said they were rarely contacted by lobbying groups with suggestions for legislation. As Jonathan Morgan said:

“I am surprised that – as the health spokesman for my party and National Assembly health committee chair – I cannot recall being approached by organisations from ‘civil society’ regarding legislation.”<sup>28</sup>

The evidence from the IWA’s survey suggests that people are not engaging with the law making process. A number of organisations we contacted said they wanted to canvass their membership before responding.

In some cases organisations voiced aspirations for fiscal interventions that are beyond the National Assembly’s powers. For example, Peter Finch, chief executive of the writers’ organisation Academi, said:

“A big thing that we can't do now is to offer tax breaks for artists and, in particular, for writers. This has been in operation in the Republic of Ireland for many years. It is a way of linking subsidy for writers directly to their earnings. The more you earn, the less tax you pay, the more benefit you accrue.”<sup>29</sup>

Other organizations were more concerned with current legislation being pursued at Westminster that will affect Wales. For example, Sylvia Davies, Head of Public Affairs with Fforwm, the Further Education representative organisation, said:

“The Apprenticeships, Skills, Children and Learning Bill currently going through Parliament was criticised by the First Minister at the consultation stage because it proposed changes to structures in England only that would have affected the England-and-Wales Apprenticeships Framework.

“The Departments involved [Innovation, Universities and Skills and Children, Schools and Families] had not consulted Welsh organisations like ourselves - nor even the Assembly Government. Wales was not mentioned in the draft Bill, even though the Bill would have affected Wales. The First Minister wrote to the

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<sup>27</sup> Western Mail [www.walesonline.co.uk](http://www.walesonline.co.uk), 12 March 2009.

<sup>28</sup> Jonathan Morgan interview, 23 February 2009.

<sup>29</sup> Peter Finch, Academi, e-mail communication, 1 April 2009.

Department of Innovation, Universities and Skill and subsequently the Welsh government did get involved. Wales is now mentioned in the Bill.

“However, for us as a lobbying organisation, it means that we have already missed out on one lobbying opportunity - as Wales wasn't included in the original consultation (though the delivery of the England-and-Wales Framework was affected by the proposals in the consultation). In addition, there are no Welsh MPs on the Committee of MPs that is scrutinizing the Bill. The Assembly's Enterprise and Learning Committee has recently noted this issue, too. It means that Wales - the Welsh government, Welsh MPs, AMs and lobbying organisations like ourselves - doesn't have an obvious route for trying to make changes to the Bill even though the Bill would introduce changes to apprenticeships in Wales.”<sup>30</sup>

Some organisations we contacted, mainly in the business world, simply opposed the National Assembly enacting legislation in their own areas of activity. For instance, David Leron, Director for Wales with the Institute of Chartered Accountants, said:

“We feel it is essential that no additional regulatory burdens should be placed on business through the actions of the National Assembly and that there should be a presumption in favour of maintaining a common legislative basis with the rest of the UK wherever possible in matters that affect Welsh business.”<sup>31</sup>

Leighton Jenkins, CBI Wales had similar thoughts:

“Our view is more around the Welsh Assembly Government doing more within their existing remit than any specific request for legislation. As a result, we are not calling for any legislation at the moment.”<sup>32</sup>

Other organisations expressed reluctance to get involved with political matters. The Welsh NHS Confederation said:

“Given the scope and nature of the people and organisations that make up our membership it would be impossible for us to gain a consensus on a question as politically charged as that of more powers for the National Assembly.”<sup>33</sup>

Only one organisation we contacted, NFU Cymru, volunteered a specific idea for legislation that could be pursued if the Assembly achieved Part 4 powers. Its Policy Officer, Huw Thomas, told us:

“Food labelling is a contentious area for our members. One area where we believe that a National Assembly with full lawmaking powers might be able to make a difference to Wales' farmers and food producers is through the introduction of clearer food labelling and also compulsory country of origin labelling. We would like to see the following areas prioritised for legislative action were the National Assembly to gain full law making powers:

- Clear concise labelling to allow consumers to make an informed choice about the food they buy.

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<sup>30</sup> Sylvia Davies, e-mail communication, 7 April 2009.

<sup>31</sup> David Leron, e-mail communication, 6 April 2009.

<sup>32</sup> Leighton Jenkins, CBI Wales, e-mail communication, 31 March 2009.

<sup>33</sup> Welsh NHS Confederation, e-mail communication, 31 March 2009.

- This is especially true of country of origin labelling. We would like to see an end to the misleading practice of food being labelled as originating from the country in which it last underwent significant change. An example would be sausages that are made in Wales with pork imported from abroad being labelled as Welsh.
- If a product undergoes processing in various countries clear statements such as ‘packed in’, ‘processed in’ and ‘from animals reared in’ should be used so as not to mislead consumers.
- Describing beef as Aberdeen Angus might imply that the meat is from Scotland, but this refers only to the breed of the animal and not its country of origin. This again can mislead consumers
- Label presentation, branding or graphics should not mislead consumers. An example would be a photograph of the Welsh countryside dominating a product’s packaging when in fact it has been imported.
- Food labelling in the hospitality sector is also a major concern and we would support mandatory country of origin labelling on meat served in restaurants.”

## **Petitions system**

The National Assembly has a system allowing petitions from the public to be lodged in writing or on line. The process, which began operation at the beginning of the Assembly’s third term in June 2007, allows for ideas for legislation to be aired. As Lord Dafydd Elis-Thomas, the Assembly’s Presiding Officer, said:

"I find the idea of the public petitioning the assembly very exciting and I am keen for the system to be as open, responsive, effective and efficient as possible."<sup>34</sup>

All of the petitions deemed admissible are passed to the committee for assessment. An analysis of the petitions that have been received to date shows that only a very small number of petitions would require legislative action. In the majority of cases, the requests have called for Assembly Government action, either on its own account or to press another organization, such as the UK Government, to act. As Table 5 on the following page shows, 80 out of 104 petitions reviewed for this research fell into this category.

In most of these cases, the petitions relate to localised issues, about the provision of a particular public service, a planning application or local road infrastructure. The category calling the National Assembly to act (8 petitions) contained most of the ideas for legislative proposals. These include the following that would require legislative action:

- Kidney Wales’ petition, supporting an investigation into presumed consent on organ donation.
- Banning plastic bags.
- Sustrans proposal for traffic-free routes.

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<sup>34</sup> BBC News, online, ‘People power comes to the Assembly, July 2007

- Guide Dogs for the Blind’s proposal to lay specific responsibility on local authorities to be aware of their duties under the Disability Discrimination Act and Disability Equality Duty.

However, such proposals requiring legislation have been very few. From the petitions submitted so far there appears to have been little demand from the public or civil society for new legislation. However, given the widespread lack of knowledge and confusion about Assembly procedures – ‘fog’ as the Chairman of the All-Wales Convention has described it – this should come as no surprise.

**Table 5: Analysis of Petitions Received by the National Assembly since June 2007**

<b>Action</b>	<b>Number</b>	<b>Example</b>
Assembly Government to pressure another organisation	20	The petition would require the Assembly Government to press Environment Agency to ensure environmental assessment of sand dredging from Helwick Bank (P-03-117)
National Assembly to pressure another organisation, including Assembly Government	5	For National Assembly to press Health Minister to consider health services in Llanelli (P-03-180)
Assembly Government to act	60	For the Assembly Government to review buffer zones between residential developments and opencast coal mine (P-03-061)
National Assembly to act	8	Calls on Assembly to ban plastic bags (P-03-063)
Deemed by committee to be the business of another organisation	12	To ‘call in’ a planning application (P-03-070)
Petitions deemed not to be appropriate for National Assembly involvement	4	For the National Assembly to organise a panel debate with the Prince of Wales to discuss the monarchy’s future (P-03-154)

## 8. Strategic Law Making Opportunities under Part 4

The process set in train by Part 3 of the Government of Wales Act 2006 means that powers will be devolved to Wales in an incremental way within each of the 20 policy Fields, with the extent of each new power varying considerably. The implementation of Part 4, on the other hand, would devolve comprehensive powers to the National Assembly across the same fields (with only some listed exceptions). This would, of course, immediately increase the scope of laws the National Assembly could make.

Section 4 of this report considered how the Scottish Parliament, with greater powers, has addressed areas in which the National Assembly has requested more limited powers. Part 4 powers would give the National Assembly greater freedom to pass laws along Scottish lines within shorter timescales.

To illustrate the potential of Part 4 powers to allow the Assembly and the Assembly Government to pursue a more strategic and holistic approach, we set out below three examples. They are not entirely hypothetical, since they convey ideas that are already under active discussion in civil society in Wales, both within academia and in some public agencies. It would be difficult to enact such proposals under current powers or perhaps to encompass the necessary powers under a single LCO, without in some cases risking acting *ultra vires*.

These examples are considered suitable for legislation for two reasons. First because of the need for a co-ordinated, cross-cutting response to the policy arena in question. And, secondly, to enshrine principles in law and make them the business of the body of elected AMs in the National Assembly rather than solely that of Welsh Ministers. In late March 2009, during a debate in the National Assembly about a proposed travel plans LCO there was disagreement between an AM and a Minister over the need to legislate rather than rely on the current Ministerial powers to provide guidance. Jenny Randerson AM said:

“These proposals are not something that Ministers could do if they wished and succeeding Ministers could undo if they did not – but would be something that lasted and that were obligatory... guidance, although authoritative, is not of the same weight as legislation.”<sup>35</sup>

### i) Public Health Legislation

Proposal for wide-ranging legislation in the field of public health have been drawn up by John Wyn Owen, a former Director of NHS Wales.<sup>36</sup> Under the current Part 3 system there are Measures and an LCO being pursued that could fall under such a public health Measure’s remit. However, the nature of the Part 3 system means they are being pursued separately. Consequently, they are not part of a co-ordinated policy programme. The first proposal relates to healthy eating and the second to playing fields:

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<sup>35</sup> Assembly Record of Proceedings, Plenary session, March 18, 2009.

<sup>36</sup> See John Wyn Owen, ‘Legislating for the Health of the People’, in *The Welsh Health Battleground: Policy Approaches for the Third Term*, IWA/Academy Health Wales, January 2008.

### **Healthy Eating in Schools Measure**, proposed by Jenny Randerson AM

This Measure aims to address the eating habits of schoolchildren, to ensure the promotion of healthy eating and to encourage take up of free school meals. The draft memorandum explaining the Measure says:

“The proposed Measure addresses more than just food eaten in schools. It reflects the need to educate the minds of young children as well as their palates. It intends to impose a duty on schools and local education authorities to promote healthy eating generally, and that has implications for the curriculum.”

### **Playing Fields (Community Involvement in Disposal Decision)** proposed by Dai Lloyd AM

This Measure places a duty on local authorities to consider the impact on communities of selling playing fields, in terms of health, well-being and social inclusion. Authorities (including National Parks and community councils) would be bound by duty to prepare and consult on impact statements when they plan to dispose of playing fields.

Desirable though these proposals may be, they are not part of a strategic approach to legislation for improving public health. Arguably, such an approach is needed because in many instances improvements can only be achieved by addressing the interconnected causes and symptoms of health problems within the whole population. Lawrence Gostin, who helped draft the England and Wales Mental Health Act said about the importance of public health law:

“It is a neglected tool in furthering public health and it should not be seen as an arcane, indecipherable set of technical rules buried deep within state health codes but as the authority and responsibility of government to assure the conditions for the public health and as such has transcending importance in how we think about government, politics and policy.”<sup>37</sup>

In Sweden public health legislation has identified eleven key determinants of public health:

1. Participation and influence in society: strengthening democracy, participation and trust in society.
2. Economic and social prerequisites: equality in society, good living conditions and security.
3. Conditions during childhood and adolescence: support for parenting and pre-school.
4. Health in working life.
5. Environments.
6. Health-promoting health services.
7. Protection against communicable diseases and conditions, such as HIV, healthcare related infections and preparations for extraordinary measures for outbreaks.

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<sup>37</sup> Lawrence Gostin, *Public Health Law: Power, Duty and Restraint* (University of California Press, 2000).

8. Sexual health.
9. Physical activity.
10. Eating habits and food.
11. Reducing consumption and use of tobacco, alcohol, illicit drugs and also gambling.

Together these underlying determinants have a very great effect on public health and must be tackled at the same time to achieve great gains in public health.

The first purpose of a Welsh Public Health Act would be to establish such a list of key determinants of Welsh public health, with a requirement that all legislation from the National Assembly should consider – through a public health assessment – how laws will affect the health of the public and the key determinants of public health. This would enshrine in Welsh law the strategic approach that successive Welsh Assembly governments and Assembly Members would take when approaching public health and law making.

For example, the Act might contain provisions to tackle obesity and Type 2 diabetes, both connected. In Wales obesity is an especially striking public health problem. Research by Dr Foster Intelligence, a public-private partnership that aims to improve health and social care through better use of information, showed that Welsh areas had nearly all of the highest obesity rates in the whole of the UK.<sup>38</sup>

In 2006, the Chief Medical Officer for Wales mentioned the need for a strategic approach to obesity:

“The rising epidemic of obesity in children and adults needs to be strategically addressed by working on all the factors which contribute to our obesogenic society which encourages a sedentary lifestyle, and over-consumption of convenience foods and sugary drinks.”<sup>39</sup>

However, it would be difficult to take legislative action to tackle strategically all the contributory factors without very broad powers that would stretch across several existing fields of policy. Part 4 would allow the National Assembly and Assembly Government, if it so wished, to address all the factors in one measure. This might include:

- Prescribing caps on the salt, fat and sugar content of food sold in Wales.
- Specifying or strengthening food labelling requirements.
- Making provision for building physical activity inescapably into lifestyles by requiring new developments of a given size to publish and implement a travel plan as a condition of planning permission.

The provisions in this Act could also tackle many of the key determinants of public health, as defined by the Measure itself (following the Swedish list of determinants). These include increasing physical activity, addressing nutrition and helping the environment. They might also help achieve:

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<sup>38</sup> [www.drfoosterhealth.co.uk/features/obesity-map.aspx](http://www.drfoosterhealth.co.uk/features/obesity-map.aspx)

<sup>39</sup> Chief Medical Officer for Wales, *Annual Report 2006*.

- **Better opportunities for participating in society:** allowing people in urban and rural settings to access public transport easily, to make it a viable and convenient transport choice.
- **Economic and social factors:** Ensuring that the elderly, disabled or those who cannot afford to drive can be more easily mobile and involved with society.
- **Conditions during childhood and adolescence:** allowing walking and cycling to school and around the neighbourhood to be safe and convenient for children. The provisions would also encourage children to be able to start and sustain healthy habits for life. If reduced car use does occur conditions in developments could encourage safer playing and recreation outdoors for children and young people.
- **Health in working life:** to allow walking, cycling and public transport as more viable options for commuting.

## ii) Integrated Transport Measure

This Measure could provide for improvements to public transport in an integrated fashion, as far as the Part 4 powers allows, to make public transport an attractive, affordable and convenient form of transport in Wales.

The Measure might create a body, Transport Wales (Cludiant Cymru), to oversee the development of an integrated public transport system across Wales. Currently the Assembly Government oversees some aspects of national transport in Wales, with a national role in roads and a role in rail. Public transport policy generally in Wales is determined by the UK Department for Transport and the Assembly Government. However, with the implementation of Part 4, new Welsh legislation could establish Transport Wales with the responsibility of co-ordinating public transport in Wales.

The Measure could also set out the first steps towards integrating Wales's transport as a whole:

### Roads

Road construction, investment and maintenance is already an area in which the Assembly Government has significant powers. Transport Wales would be required to liaise with consultees, such as Sustrans (the Sustainable Transport Charity), bus providers, local authorities, regional transport boards (see 'Buses' below) and motorists about the maintenance and investment in Wales's roads.

### Buses

The next section of the Measure would deal with Transport Wales's responsibility for bus services in Wales. There is an existing LCO (proposed by Huw Lewis AM) to ask for powers to require local authorities 'to ensure that communities are well served by a regular, modern and safe bus service' and to enable alternative models of ownership for bus services, including private, public, co-operative and mutual. Using the Part 4 system, the provisions regarding bus services would be allowed to address this issue with much wider powers.

Transport Wales would have a role in the regulation and planning of bus services, by liaising with 'strategic transport boards' that are based on the existing regional transport consortia, together with representatives from the Assembly Government and local authorities. The Measure could empower Transport Wales to devise at all-Wales, regional and local level the bus routes required and to determine the frequency of these bus routes. The routes and timing would be chosen to ensure integration with rail links.

The Measure could also set out the mechanism that Transport Wales would use to regulate the contracts for providing these services. It might be allowed to subsidise routes deemed necessary but unprofitable. Transport Wales would thus be able to invite bids and introduce competition into the supply of bus services. This emulates bus service provision in London, which is highly regarded as an exemplar of bus service integration.

To enable swifter, more integrated payment the current Freedom of Wales Flexipass scheme could be adapted into an electronic card for use across Wales on public transport. Transport Wales could oversee the management of the Flexipass system and extend it across all Transport Wales-managed transport. Existing concessions, such as the free over 60s travel, could be administered via the Flexipass also.

#### **Safety, accessibility and sustainability**

Transport Wales could also be empowered to set requirements as a condition of contract bidding to provide reasonably for passengers with mobility impairments and for the safety of pedestrians and transport users.

#### **Rail**

Part 4 powers do not allow for the provision and regulation of railway services but there are some existing powers that Transport Wales could adopt. It could liaise with Network Rail, which maintains rail infrastructure across the UK, and be involved with discussions about rail investment and contracts with operators in Wales, such as Arriva Trains Wales and First Great Western. However, with the other powers that Transport Wales had it would be able to integrate the timing of buses, for example, with trains when required.

### **iii) A New Legislative Approach to the Welsh Landscape**

There is a developing debate amongst those concerned with environmental protection in the National Parks, the Environment Agency, Countryside Council for Wales and others on a new approach to the Welsh landscape. This presents an opportunity for examination of the legislation governing the use and care of the landscapes of Wales, not just those in protected areas.

There is a consensus that this should be based on the European Landscape Convention, adopted at Florence in October 2000 and which Britain signed in 2007. In addition to treating landscape as an environmental resource to be protected and managed, the Convention identifies its economic and social values, determining the quality of people's lives rather than just an environmental accessory. The Convention outlined three major principles:

- All landscapes matter, not just those that are designated.

- All people have rights regarding the landscape, and not just the owners of the land.
- Policy should entail an inter-action between protection, management and planning.

Professor Adrian Phillips, former Chair of the World Commission on Protected Areas IUCN, has argued that Wales has an opportunity to develop a distinctive approach to land management, based on the European Landscape Convention, for the following reasons:

- Our planning system is simpler than in England.
- We have developed a deeper understanding of the historical, cultural and biological importance of our landscape.
- There is potential to revive a culture of co-operation among Welsh land managers.
- Wales is small enough to bring the key actors in government together.<sup>40</sup>

Over the past two years, in collaboration with the Countryside Council for Wales, Institute of Welsh Affairs has engaged in a major project to develop new thinking on managing the landscape of Wales, which has brought together key stakeholders in the field, including representatives from the Environment Agency, National Parks, Forestry Commission Wales, local authorities, Council for the Protection of Rural Wales, National Trust, RSPB and a number of specialist academics.

Broadly there is a consensus emerging around three major themes:

1. Wales should be considered as a whole in any new approach to landscape planning and management. National Parks and other designated areas will retain a special importance, but in the words of Professor Phillips, “less as islands of special landscape attention in a sea of landscape mediocrity, and more as flagships showing the rest of the fleet – that is, the non-designated landscapes – low landscape can be made a central consideration in policy and practice.” It needs to be acknowledged, too, that there are growing pressures and movements for more areas to be given special status, including: (i) formation of the Cambrian Mountains Society in 2005 to campaign for greater legislative protection in the mid Wales uplands; (ii) proposals for the creation of a Valleys Regional Park; (iii) the Clwydian Hills Pathfinder Project; and (iv) the Dyfi Biosphere project.
2. The responsibilities of National Park Authorities should be extended, with appropriate financial adjustments, to include the local management of nationally designated nature and historical/cultural sites as well as being agents for the implementation of national countryside management strategies. In March 2007 an Assembly Government policy statement suggested an enhanced role for the National Parks in promoting renewable energy, sustainable transport, and sustainable use of their natural resources. Examples given were collaboration with Coed Cymru in the sustainable use of Park woodlands, support for local farmers’ markets, food fairs and other initiatives promoting Park produce, green transport initiatives like the Beacons bus, support under the Sustainable Development Fund for

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<sup>40</sup> Adrian Phillips, *Landscape – New Perceptions and New Opportunities for Wales*, address to IWA conference ‘Living With Our Landscape’, Cardiff, 19 March 2009.

community-level recycling and renewable energy ventures, and utilisation of local stone and other sustainable materials in building projects.<sup>41</sup>

3. We need to develop a ‘new contract’ between predominantly urban taxpayers and those who manage rural land, acknowledging that in the process all will benefit. Wales’s rural space is not just the source of food and other raw materials; it supplies a wide range of environmental services to society that the market alone cannot be expected to deliver. A well cared for rural environment is a social and economic asset, vital to the well-being of Wales’s citizens and to our future prosperity. Land managers should be rewarded from public funds where there are no markets for the provision of services going beyond agreed environmental standards. Wales requires a rural policy geared to encouraging and rewarding the supply of these environmental services and helping rural communities make the most of their environmental assets in a sustainable way.

Taken together these three themes provide the basis for strategic Welsh legislation under Part 4. It could provide an over-arching, cross-cutting approach to placing landscape management in Wales central to the Assembly Government’s responsibilities to deliver sustainable development, as laid out in the 1998 and 2006 Wales Acts.

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<sup>41</sup> Assembly Government, *Policy Statement for National Parks and National Park Authorities in Wales*, March 2007, para. 13.

## **9. Part 4 and a Welsh Jurisdiction**

In making the suggestions in the previous section as to possible opportunities for a strategic approach to legislation that would be available to the Assembly Government if Wales moved to Part 4 of the 2006 Act, one important caveat should be noted. This is the 'Exceptions' to powers that are listed in Parts 1 of Schedule 5 and Schedule 7 to the 2006 Act. These apply to both Part 3 and Part 4 powers. Additionally, there is Part 2 of Schedule 7, 'General Restrictions'. These prevent the National Assembly trespassing, through legislation, on the functions of a Minister of the Crown exercisable in Wales, unless the Minister consents.

This will place restrictions on the Assembly Government's ability to act, even after the Assembly has acquired Part 4 powers. For example, an LCO allowing the Assembly Government to pass into law a Measure requiring seat belts to be fitted to school buses – which has been contemplated as a result of a tragic accident in the Vale of Glamorgan - would require the agreement of the Department of Transport. This is because it remains a Ministerial power, albeit one that this is not immediately obvious from a reading of the Exceptions under the Highways and Transport Field in Part 1 of Schedule 7.

Issues of this kind would have to be dealt with on a case by case basis once the Assembly had moved to Part 4. It is a reflection of the disadvantages of the powers of National Assembly being conferred specifically, sometimes subject to specified exceptions, rather than everything being devolved in broad terms subject to stated exceptions, as is the case with Scotland. There is a considerable difference between the Scottish Parliament being able to legislate on everything unless it is specifically prevented from doing so and the Welsh Assembly not being able to legislate on anything unless it is given the power to do so.

While Parts 3 and 4 of the 2006 Act specifically set out certain exceptions to its stated powers, the uncertainty lies in not clearly knowing what powers UK central Government Ministers retain in devolved areas in relation to Wales. There is no agreed statement of such powers. This problem was illustrated by the Assembly's wish to legislate to prevent the smacking of children. There would have been a legal sanction imposed against smacking. However, in the absence of an agreed list of UK central Government functions exercisable in Wales, the criminal law was claimed by the Attorney General's Office as a matter entirely UK Government Ministers in relation to both Wales and England. Yet this overlooked the express powers of the Assembly to create criminal sanctions to underpin its legislation of up to two years imprisonment or up to a £6,000 fine.

Nevertheless, a by-product of moving to Part 4 would be to move Wales a long way to being in a position to adopt the Scottish devolution model. This is because acquiring direct primary legislative powers would enhance developments already underway for establishing a distinctively Welsh legal jurisdiction, as is the case in both Scotland and Northern Ireland. The fact that Wales is incorporated in a single England and Wales jurisdiction is a major reason why Wales has not followed the Scottish model, in which specified matters are reserved to Westminster and everything else is devolved. Instead, Schedule 7 of the 2006 Wales Act specifies or confers those powers that are devolved to Wales. The explanation is given in a Joint Memorandum from the Secretary of State for Wales and the First Minister to the Welsh Affairs Committee of 10 November 2005, which is cited in the Explanatory notes to the 2006 Government of Wales Act:

“If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions. ... In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects.”

Of course, moving to Part 4 would be a major step in the Scottish direction. To a large extent it would fulfill the first requirement of establishing a Welsh jurisdiction, as laid down by the Presiding Judge of the Wales Circuit, Sir Roderick Evans:

1. The repatriation to Wales of law making functions.
2. The development in Wales of a system for the administration of justice in all its forms which is designed to serve the social and economic needs of Wales and its people.
3. The development of institutions and professional bodies in Wales which will provide a proper career structure for those who want to follow a career in Wales in law or in related fields.
4. Making the law and legal services readily accessible to the people of Wales.
5. The development of a system which can accommodate the use of either the English or Welsh language with equal ease so that in the administration of justice within Wales the English and Welsh languages really are treated on a basis of equality.<sup>42</sup>

Some of the requirements listed here are already being achieved or on the way to being so. As Sir Roderick put it, speaking in 2006:

“While it is too early to hail the emergence of a Welsh jurisdiction there can be little doubt that the seeds of such a jurisdiction are planted, germination is taking place and they will develop... As Legal Wales advances the panorama widens; changes which even eight or ten years ago were little more than pipe dreams are now upon us.”<sup>43</sup>

The major step will be the ‘repatriation of law making functions’. Once this is attained to a significantly greater extent than is already the case, with the implementation of Part 4 of the 2006 Wales Act, a route will open for creating a legal jurisdiction distinctive enough to allow devolution of powers to Wales on the Scottish model. That would be a major enhancement of Wales’s legislative authority.

On the other hand, the separation of a Welsh jurisdiction distinct from that for England can only be brought about by legislation of the UK Parliament, followed by the addition to Part 4 of subjects giving the Assembly the necessary legislative powers. Such a change would significantly simplify the devolution process, make it capable of being much better understood, and contribute to lifting the “fog of understanding” that currently surrounds it.

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<sup>42</sup> Law Society Eisteddfod lecture, ‘Legal Wales - the Way Ahead’, August 2006.

<sup>43</sup> *Ibid.*

## **Appendix 1**

### **Powers Transferred to the Assembly Government and National Assembly under Westminster Legislation during 2007-08 and 2008-09**

#### **2007-08**

##### **Executive Powers only:**

Mental Health Act 2007  
Consumers, Estate Agents and Redress Act 2007  
Offender Management Act 2007  
Sale of Student Loans Act 2008  
Criminal Evidence (Witness Anonymity) Act 2008  
Human Fertilisation and Embryology Act 2008

##### **Executive and Assembly +/- Statutory Instrument resolution procedures:**

Rating (Empty Properties) Act 2007  
Concessionary Bus Travel Act 2007  
Tribunals, Courts and Enforcement Act 2007  
Statistics and Registration Service Act 2007  
Regulatory Enforcement and Sanctions Act 2008  
Housing and Regeneration Act 2008  
Health and Social Care Act 2008  
Serious Crime Act 2007  
Dormant Bank and Building Society Accounts Act 2008  
Climate Change Act 2008

##### **Executive and Legislative Powers:**

Further Education and Training Act 2007  
Local Government and Public Involvement in Health Act 2007  
Education and Skills Act 2008  
Local Transport Act 2008  
Planning Act 2008

##### **Transfer of Function Orders:**

The Welsh Ministers (Transfer of Functions) Order 2008 No 1786

**2008-09**

**Executive Powers only:**

None so far

**Executive and Assembly +/- Statutory Instrument resolution procedures:**

Apprenticeships, Skills, Children and Learning Bill  
Coroners and Justice Bill  
Health Bill  
Policing and Crime Bill  
Welfare Reform Bill

**Executive and Legislative Powers:**

Local Democracy, Economic Development and Construction Bill  
Marine and Coastal Access Bill

**Not published yet:**

Child Poverty Bill  
Equality Bill

**Transfer of Function Orders:**

The Welsh Ministers (Transfer of Functions) Order – Building Regulations

Source: Wales Legislation Online

## Appendix 2

### Members Ballots for Legislative Competence Orders

<p><b>June 07</b></p> <p><b>21 proposals</b></p>	<p><b>Selected Member: Ann Jones - Domestic Fire Safety</b></p> <p>Mick Bates: Proposed Building Guidelines  Peter Black: Proposed Youth Services  Eleanor Burnham: Welsh Language Act  Angela Burns; Paul Davies; Jonathan Morgan; Brynle Williams: Language Commissioner  Alun Cairns; William Graham; Darren Millar; Nick Ramsay: St David's Day  Andrew RT Davies: Community Midwifery Services  Jocelyn Davies; Elin Jones: Sale of Woodland Subplots  Nerys Evans: Welsh Language  Chris Franks; Bethan Jenkins: Improving Access to Financial Services  Mike German: Local Government Finance  Lesley Griffiths; Janet Ryder: Homelessness  Mark Isherwood; David Melding: Change Current Duty by Which Local Authorities Investigate Intentional Homelessness  Alun Ffred Jones: Housing Tenure Law  Gareth Jones; Leanne Wood: Safety of School Transport  Helen Mary Jones Rhodri Glyn Thomas: Carers  Dai Lloyd: Tanning Devices  Sandy Mewies: Telecommunication Masts  Jenny Randerson: Organ Consent  Karen Sinclair: Town and Country Planning  Kirsty Williams: National Park Authorities</p>
<p><b>October 07</b></p> <p><b>21 proposals</b></p> <p><b>12 new</b></p>	<p><b>Selected Member: Jonathan Morgan: Mental Health Reform</b></p> <p>Mick Bates: Building Guidelines  Peter Black; Mark Isherwood; Bethan Jenkins: Intentional Homelessness  Eleanor Burnham: Welsh Language Act  Angela Burns: Language Commissioner  Alun Cairns; William Graham; Darren Millar: St David's Day  <b>Christine Chapman: Banning the Physical Punishment of Children</b>  <b>Andrew RT Davies: Renewable Power Planning</b>  Paul Davies: Language Commissioner  <b>Nerys Evans: Promotion of Breastfeeding</b>  Mike German: Building Regulations  <b>Alun Ffred Jones: Housing Tenure Law</b>  Helen Mary Jones: Carers  <b>Huw Lewis: Provision of Bus and Coach Services</b>  <b>Dai Lloyd; Jenny Randerson: Presumed Consent for Organ Donation</b>  <b>David Melding: Official Language Status</b>  <b>Sandy Mewies: Telecommunication Masts</b></p>

	<p><b>Janet Ryder: Displaying of National Flags and Motifs on Vehicle Registration Plates</b>  <b>Karen Sinclair: Town and Country Planning</b>  <b>Joyce Watson: Protective Headgear for Young Cyclists</b>  <b>Kirsty Williams: Use of Highways by Cyclists and Pedestrians</b>  Leanne Wood: Safety of School Transport</p>
<p><b>December 2007</b></p> <p><b>21 proposals</b></p> <p><b>5 new</b></p>	<p><b>Selected Member: Helen Mary Jones: Carers</b></p> <p><b>Mohammed Asghar - Preservation of Trees and Woodlands</b>  Mick Bates - Walking and Cycling Paths  Peter Black - Intentional Homelessness  Eleanor Burnham - Welsh Language Act  Angela Burns; Paul Davies - Language Commissioner  Alun Cairns; William Graham; Darren Millar - St David's Day  Christine Chapman - Outlawing the Physical Punishment of Children  <b>Andrew Rt Davies - Community Health Services</b>  <b>Nerys Evans - Work Planning for Health Organisations</b>  Michael German - Building Regulations  <b>Bethan Jenkins; Leanne Wood - Access to Automated Tele Machines</b>  Alun Ffred Jones - Housing Tenure Law  Huw Lewis - Provision of Bus and Coach Services  Dai Lloyd - Presumed Consent for Organ Donation  David Melding - Official Language Status  Sandy Mewies - Telecommunication Masts  Jenny Randerson Organ Consent  Janet Ryder - Displaying of National Flags and Motifs on Vehicle Registration Plates  <b>Kirsty Williams - National Park Authorities</b></p>
<p><b>February 2008</b></p> <p><b>17 proposals</b></p> <p><b>3 new</b></p>	<p><b>Selected Member: Huw Lewis Provision of Bus and Coach Services</b></p> <p>Mick Bates; Eleanor Burnham - Walking and Cycling Paths  <b>Peter Black - Local Government Electoral Arrangements</b>  Angela Burns; Paul Davies - Language Commissioner  Alun Cairns; Darren Millar - St David's Day  Christine Chapman - Banning the Physical Punishment of Children  Andrew RT Davies - Community Health Services  Nerys Evans; Dai Lloyd - Presumed Consent - Organ Donation  Michael German; Leanne Wood - Walking and Cycling Paths  William Graham - St David's Day  <b>Bethan Jenkins - Increasing Student Loan Threshold</b>  David Melding - Official Language Status  Sandy Mewies - Telecommunication Masts  <b>Jenny Randerson - Provision of Public Toilets</b>  Janet Ryder - Displaying of National Flags and Motifs on Vehicle Registration Plates  Kirsty Williams - National Park Authorities</p>

<p><b>April 2008</b></p> <p><b>12 proposals</b></p> <p><b>1 new</b></p>	<p><b>Selected Member: Peter Black Local Government Electoral Arrangements</b></p> <p>Mick Bates; Eleanor Burnham; Michael German - Walking and Cycling Paths</p> <p>Alun Cairns; Darren Millar; Leanne Wood - St David's Day</p> <p>Christine Chapman - Banning the Physical Punishment of Children</p> <p>Andrew RT Davies - Community Health Services</p> <p>Paul Davies - Language Commissioner</p> <p>Nerys Evans; Dai Lloyd - Presumed Consent - Organ Donation</p> <p><b>Bethan Jenkins - Local Government Finance (Council Tax)</b></p> <p>David Melding - Official Language Status</p> <p>Jenny Randerson - Provision of Public Toilets</p> <p>Janet Ryder - Displaying of National Flags and Motifs on Vehicle Registration Plates</p> <p>Kirsty Williams - National Park Authorities</p>
<p><b>June 2008</b></p> <p><b>12 proposals</b></p> <p><b>1 new</b></p>	<p><b>Selected Member: Janet Ryder - Displaying of National Flags and Motifs on Vehicle Registration Plates</b></p> <p>Nicholas Bourne; Alun Cairns; Leanne Wood - St David's Day</p> <p>Eleanor Burnham; Michael German; Mick Bates - Walking and Cycling Paths</p> <p>Andrew RT Davies - Community Health Services</p> <p>Paul Davies - Language Commissioner</p> <p>Nerys Evans; Dai Lloyd - Presumed Consent - Organ Donation</p> <p>Bethan Jenkins; Alun Ffred Jones - Local Government Finance (Council Tax)</p> <p>David Melding - Official Language Status</p> <p><b>Darren Millar - Preferential Parking Scheme</b></p> <p>Jenny Randerson - Provision of Public Toilets</p> <p>Janet Ryder - Displaying of National Flags and Motifs on Vehicle Registration Plates</p> <p>Kirsty Williams - National Park Authorities</p>
<p><b>October 2008</b></p> <p><b>10 proposals</b></p> <p><b>3 new</b></p>	<p><b>Selected Member: David Melding – Official Language Status</b></p> <p>Nicholas Bourne: St David's Day</p> <p><b>Eleanor Burnham: Maintenance of Railway Stations</b></p> <p><b>Alun Cairns: Public Service Vehicles</b></p> <p>Andrew Rt Davies - Community Health Services</p> <p>Paul Davies: Language Commissioner</p> <p>Nerys Evans, Dai Lloyd: Presumed Consent - Organ Donation</p> <p><b>Chris Franks, Gareth Jones, Rhodri Glyn Thomas, Leanne Wood: Fuel Poverty</b></p> <p>Bethan Jenkins - Local Government Finance (Council Tax)</p> <p>David Melding: Official Language Status</p> <p>Darren Millar: Preferential Parking Scheme</p> <p>Kirsty Williams: National Park Authorities</p>

<p><b>January 2009</b></p> <p><b>12 proposals</b></p> <p><b>2 new</b></p>	<p><b>Selected Member: Jenny Randerson: Major Development Travel Plans</b></p> <p><b><i>Mick Bates, Mike German - Energy Development</i></b>  Nicholas Bourne - St David's Day</p> <p><b><i>Eleanor Burnham - Maintenance of Railway Stations</i></b>  Alun Cairns - Public Service Vehicles  Andrew RT Davies - Community Health Services  Nerys Evans; Dai Lloyd - Presumed Consent - Organ Donation  Chris Franks; Gareth Jones; Rhodri Glyn Thomas; Leanne Wood  - Fuel Poverty  Bethan Jenkins - Local Government Finance (Council Tax)  Darren Millar - Preferential Parking Scheme  Joyce Watson - Hard Surfaces  Kirsty Williams - National Park Authorities</p>
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## Appendix 3

### Interviewees and organisations contacted in the IWA's survey

#### Interviewees

Nick Bennett, Director, Community Housing Cymru and member of the All Wales Convention  
David Lambert, Cardiff Law School  
Marie Navarro, Cardiff Law School  
Keith Patchett, Emeritus Professor of Law, University of Wales  
Keith Bush, Legal Adviser to National Assembly Commission  
Stuart Cole, Wales Transport Research Centre  
Paul Griffiths, Former Special Adviser, Welsh Assembly Government  
Daran Hill, Director, Positif Politics consultancy  
Helen Mary Jones AM  
Dai Lloyd AM  
Dr Stephen Monaghan, Cardiff Local Health Board  
Jonathan Morgan AM  
Jenny Randerson AM  
Lee Waters, Director, Sustrans Cymru  
John Wyn Owen, Academy Health Wales

#### Organisations

Fforwm  
Academi  
CBI Wales  
Welsh NHS Confederation  
WWF Cymru

Institute of Chartered Accountants in England and Wales  
Royal College of Nurses Cymru  
Institute of Directors, Wales  
NFU Wales  
FUW

#### Organisations approached that did not respond

Forestry Commission  
Tir Enterprises  
Countryside Council  
CWYVS  
Arts and Business Cymru  
FSB Wales  
Office of the Children's Commissioner Wales  
Office of the Older Person's Commissioner Wales  
Disability Wales  
General Medical Council Wales  
Mind Cymru  
Groundwork Wales  
Friends of the Earth Cymru  
RSPB Cymru  
Environment Agency  
NUT Wales  
Community Enterprise Wales  
Business in the Community  
Menter a Busnes  
House builders' Federation  
Welsh Tenants Federation