

**MEMORANDUM FROM DEPUTY MINISTER FOR HOUSING**  
**CONSTITUTION LAW: DEVOLUTION, WALES**

**The National Assembly for Wales (Legislative Competence) (No.5) Order  
2008**

**Affordable Housing – Legislative Competence Order**

**Introduction**

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached government proposed Legislative Competence Order (LCO) which would confer additional legislative competence upon the National Assembly for Wales (“the Assembly”). The LCO is laid in accordance with SO 22.13 and this Memorandum explains the scope of the powers sought through the LCO.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government’s policy. The UK Government’s White Paper “Better Governance for Wales”, published in June 2005, set out its commitment to enhance the legislative powers of the Assembly as a democratically elected institution with its own detailed scrutiny procedures.
3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the Assembly to legislate by Assembly Measure on specified Matters. These Matters may be added to the Fields contained within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this Memorandum.
4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or a Legislative Competence Order, approved by the Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, via a Legislative Competence Order.
5. The proposed LCO would confer further legislative competence on the Assembly in the field of Housing (Field 11 within Schedule 5 to the 2006 Act). Attached at annex A is a copy of Schedule 5 showing the legislative competence that the Assembly has acquired to date and the mechanism by which it was conferred.

## Background

6. New legislative powers in respect of the specified “matters” will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures, which are based on Welsh priorities and timescales. These Measures will be subject to thorough scrutiny and approval by the Assembly.
7. Housing has been a devolved subject area for many years and the Assembly Government has wide ranging powers under the Housing Act 1985 (as amended).
8. The Assembly Government’s National Housing Strategy sets out a vision “that everyone should have the opportunity to live in good quality, affordable housing; be able to choose where they live and whether buying or renting is best for them and their families”. The Strategy seeks to focus on quality, choice and promoting sustainable home ownership.
9. The Assembly Government has used its powers to make secondary legislation to develop a distinctive approach tailored to the particular circumstances of Wales which differ in significant respects from those in England. The previous Assembly approved a number of Statutory Instruments concerning Low Cost Home Ownership schemes (such as the Right to Buy and Right to Acquire) to:
  - a. reduce the maximum discount from £24,000 to £16,000,
  - b. extend the number of rural areas where restrictions may be placed on resale, and
  - c. allow landlords a “right of first refusal” to repurchase properties offered for resale within 10 years of the original purchase under the Right to Buy/Acquire.
10. The Assembly Government has also taken action in a number of other areas concerning affordable housing. These include:
  - a. revised Planning guidance on Affordable Housing and Joint Housing Land Availability Studies
  - b. a local Housing Market Assessment Guide
  - c. an Affordable Housing Toolkit (which identifies the full range of powers and tools available to local authorities and their partners to maximise the provision of affordable housing)
  - d. increasing the Social Housing Grant programme by 72% over 4 years, and
  - e. a protocol to encourage the disposal of surplus Assembly-owned land for affordable housing.
11. 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. The main limit to the current arrangements is that the Assembly has no express statutory power to vary the qualification provisions of the Right to Buy and Right to Acquire in order to meet the particular housing needs of people and communities in Wales.

12. Over 70% of Wales can be regarded as rural in character. The Assembly Government has taken a number of actions to assist the development of affordable housing in rural areas including support for Rural Housing Enablers and Community Land Trusts. However, in some communities very few properties remain in the social housing stock. Almost 60% of properties in Powys and Ceredigion have been sold under the Right to Buy/Acquire.
13. Since the introduction of the Right to Buy (in 1980) and Right to Acquire (in 1997) over 140,000 dwellings have been purchased by tenants in Wales. This equates to almost half the original social housing stock (excluding any new builds). Although the immediate effect of a tenant exercising these rights is a change in tenure from tenant to owner-occupier, dwellings that would otherwise have become available for re-letting for social housing have been sold on the open market. This has substantially reduced the amount of social housing available for rent by people in housing need. This is a particular problem in areas of housing pressure. There were 1,206 RTB claims during the January to March 2007 quarter, an increase of 126 from the same quarter the previous year.
14. In the January to March 2007 quarter 1,666 households were homeless and in priority need while 3,152 households were in temporary accommodation (including Bed and Breakfast). Despite the actions outlined above, homelessness remains at a significant level while the size of the social housing stock continues to diminish.
15. To take further action concerning affordable housing, the Welsh Assembly Government believes that additional powers are required to enable it to legislate by means of an Assembly Measure under powers contained in the Government of Wales Act 2006.
16. The "One Wales" programme of government of the Welsh Assembly Government includes a commitment to draw down legislative power to the Assembly in order to suspend the Right to Buy in areas of housing pressure.
17. This follows on from manifesto commitments put forward by both parties in the 2007 Assembly elections. The Labour manifesto contained a commitment to seek new legislative powers to be able to retain the pool of housing available for rent in areas of high housing

need, as one measure to improve the availability of affordable housing. The Plaid Cymru manifesto contained a commitment to repeal the “Right to Buy” in housing hot spots where there is a shortage of rented accommodation.

18. The proposed LCO would confer on the National Assembly for Wales the power to pass Assembly Measures in relation to the disposal of dwellings and dwelling houses by social landlords. This would enable the Assembly to develop Welsh solutions to address Welsh priorities.

### **Scope**

19. It is proposed that Part 1 of Schedule 5 to the Government of Wales Act 2006 Act be amended to add a Matter under Field 11: housing. Matter 11.1 (Disposal by a social landlord of the following –
  - (a) a dwelling-house within the meaning of Part 5 of the Housing Act 1985;
  - (b) a dwelling within the meaning of section 63 of the Housing Act 1996.)

This would enable the Assembly to bring forward a Measure under Part 3 of the 2006 Act relating to disposal of dwellings held by a social landlord. The scope of the LCO therefore includes the suspension of the Right to Buy and the Right to Acquire in areas of housing pressure.

20. It is proposed the following statutory provisions be encompassed – Part V of the Housing Act 1985 and sections 16-17 of the Housing Act 1996. Disposals of dwelling-houses and dwellings under Part II of the Housing Act 1985 and Chapter II of Part I of the Housing Act 1996 will be within competence but not any other type of land. In present circumstances, where there can be localised shortages of social housing, the matter would enable the Assembly to legislate so as to permit the suspension of the Right to Buy/Acquire in certain areas and for certain periods and to define the circumstances or conditions which would have to be met in order for such a suspension to be considered or permitted.
21. The principal purpose, therefore, of this LCO is to empower the Assembly to make Measures under Part 3 of the 2006 Act that will give effect to whatever policy decisions are taken forward in due course by the Welsh Ministers to improve the availability of affordable housing in Wales. Increasing the supply of affordable housing for both rent and purchase is an area of priority for the Welsh Assembly Government.

## **Geographical limits of any Assembly Measure**

22. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly's legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.
23. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales.

## **Minister of the Crown functions**

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

## **Conclusion**

25. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the provisions of the government proposed LCO to which this Explanatory Memorandum relates.

**Jocelyn Davies**  
**Deputy Minister for Housing**  
**December 2007**

**SCHEDULE 5**  
**ASSEMBLY MEASURES**

**Part 1**

**Matters**

*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*

*Matter 5.1*

Provision about the categories of school that may be maintained by local education authorities.

*Matter 5.2*

Provision about the establishment and discontinuance of schools maintained by local education authorities, their change from one category to another and their alteration in other respects.

*Matter 5.3*

Provision about the admission of pupils to schools maintained by local education authorities.

*Matter 5.4*

Provision about the curriculum in schools maintained by local education authorities.

*Matter 5.5*

Provision about school attendance, the behaviour of pupils at school, school discipline and the exclusion of pupils from school (including the duties of parents in connection with those matters).

*Matter 5.6*

Provision about the making of arrangements for the provision of education for persons of compulsory school age who have been excluded from schools or who for any other reason would not otherwise receive suitable education.

*Matter 5.7*

Provision about entitlement to primary, secondary and further education and to training.

*Matter 5.8*

Provision about the provision of services that are intended to encourage, enable or assist people—

- (a) to participate effectively in education or training,
- (b) to take advantage of opportunities for employment, or
- (c) to participate effectively in the life of their communities.

*Matter 5.9*

Provision about food and drink provided on school premises or provided for children at a place where they receive education or childcare.

*Matter 5.10*

Provision about the travel of persons receiving primary, secondary or further education or training to and from the schools or other places where they receive it.

This does not include provision about any of the following—

- (a) the regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used;
- (b) road traffic offences;
- (c) driver licensing;
- (d) driving instruction;
- (e) insurance of motor vehicles;
- (f) drivers' hours;
- (g) traffic regulation on special roads, pedestrian crossings, traffic signs and speed limits;
- (h) public service vehicle operator licensing;
- (i) the provision and regulation of railway services, apart from financial assistance which—
  - (i) does not relate to the carriage of goods,
  - (ii) is not made in connection with a railway administration order, and
  - (iii) is not made in connection with Council Regulation (EEC) 1191/69 as amended by Council Regulation (EEC) No. 1893/91 on public service obligations in transport;
- (j) transport security;
- (k) shipping, apart from financial assistance for shipping services to, from or within Wales;
- (l) navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation;
- (m) technical and safety standards of vessels;

- (n) harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for communications between places in Wales;
- (o) registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

*Matter 5.11*<sup>1</sup>

Provision for and in connection with securing the provision of facilities for post-16 education or training.

*Matter 5.12*

Provision for and in connection with the establishment and dissolution of—

- (a) institutions concerned with the provision of further education, and
- (b) bodies that conduct such institutions,

including the circumstances in which an educational institution becomes or ceases to be an institution concerned with the provision of further education.

Provision about—

- (a) the conduct and functions of such institutions and bodies that conduct such institutions;
- (b) the property, rights and liabilities of such institutions and bodies that conduct such institutions;
- (c) property held by any person for the purposes of such an institution;
- (d) the governance and staff of such institutions.

*Matter 5.13*

Provision for and in connection with securing collaboration—

- (a) between bodies that conduct institutions concerned with the provision of further education, or
- (b) between one or more such bodies and other persons or bodies that have functions relating to education or training in Wales,

including, in particular, provision for and in connection with the establishment of bodies for the purpose of discharging functions on behalf of one or more persons or bodies that are party to arrangements for collaboration.

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<sup>1</sup> Matters 5.11 – 5.16 of this Schedule have been inserted by the Further Education and Training Act 2007 and will come into force on the 23<sup>rd</sup> December 2007.



*Matter 5.14*

The provision of financial resources for and in connection with—

- (a) education or training provided by institutions concerned with the provision of further education;
- (b) post-16 education or training provided otherwise than by such institutions;
- (c) the carrying out of research relating to education or training falling within paragraph (a) or (b).

*Matter 5.15*

The inspection of—

- (a) education or training provided by institutions concerned with the provision of further education;
- (b) post-16 education or training provided otherwise than by such institutions;
- (c) the training of teachers and specialist teaching assistants for schools;
- (d) services of the kinds mentioned in matter 5.8.

*Matter 5.16*

The provision of advice and information in connection with, and the carrying out of studies in relation to, any of the kinds of education, training or services mentioned in matter 5.15.

*Interpretation of this field*

In this field—

“post-16 education” means—

- (a) education (other than higher education) suitable to the requirements of persons who are above compulsory school age, and
- (b) organised leisure-time occupation connected with such education;

“post-16 training” means—

(a) training suitable to the requirements of persons who are above compulsory school age, and

(b) organised leisure-time occupation connected with such training.

References in this field to an institution concerned with the provision of further education are references to an educational institution, other than a school or an institution within the higher education sector (within the meaning of the Further and Higher Education Act 1992), that is conducted (whether or not exclusively) for the purpose of providing further education.

Expressions used in this field and in the Education Act 1996 have the same meaning in this field as in that Act.

*Field 6: environment*

*Field 7: fire and rescue services and promotion of fire safety*

*Field 8: food*

*Field 9: health and health services*

*Matter 9.1*

Provision for and in connection with the provision of redress without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales.

*Interpretation of this field*

In this field-

“the health service in Wales” means the health service continued under section 1(1) of the National Health Service (Wales) Act 2006;

“illness” has the same meaning as in that Act;

“patient” has the same meaning as in that Act;

“personal injury” includes any disease and any impairment of a person’s physical or mental health;

“qualifying liability in tort” means liability in tort owed in respect of or consequent upon personal injury or loss arising out of or in connection with

breach of a duty of care owed to any person in connection with the diagnosis or illness or the care or treatment of any patient.

*Field 10: highways and transport*

*Field 11: housing*

*Field 12: local government*

*Matter 12.1<sup>2</sup>*

Provision for and in connection with—

(a) the constitution of new principal areas and the abolition or alteration of existing principal areas, and

(b) the establishment of councils for new principal areas and the abolition of existing principal councils.

“Principal area” means a county borough or a county in Wales, and “principal council” means a council for a principal area.

*Matter 12.2*

Provision for and in connection with—

(a) the procedure for the making and coming into force of byelaws, and

(b) the enforcement of byelaws.

“Byelaws” means those of a class which may be confirmed by the Welsh Ministers (but the provision which may be made includes provision to remove a requirement of confirmation).

*Matter 12.3*

Any of the following—

(a) the principles which are to govern the conduct of members of relevant authorities,

(b) codes of conduct for such members,

(c) the conferral on any person of functions relating to the promotion or maintenance of high standards of conduct of such members (including the establishment of bodies to have such functions),

(d) the making or handling of allegations that members (or former members) of relevant authorities have breached standards of conduct, including in particular—

(i) the investigation and adjudication of such allegations and reports on the outcome of investigations,

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<sup>2</sup> Matters 12.1 – 12.5, Paragraph 2A of Part 2 and Paragraph 7A of Part 3 of this Schedule have been inserted by the Local Government and Public Involvement in Health Act 2007 and come into force on the 30<sup>th</sup> December 2007.

(ii) the action that may be taken where breaches are found to have occurred,

(e) codes of conduct for employees of relevant authorities.

For the purposes of this matter—

“relevant authority” has the same meaning as in Part 3 of the Local Government Act 2000, except that other than in paragraph (d) it does not include a police authority,

“member” includes a co-opted member within the meaning of that Part.

*Matter 12.4*

Provision for and in connection with strategies of county councils and county borough councils for promoting or improving the economic, social or environmental wellbeing of their areas or contributing to the achievement of sustainable development in the United Kingdom, including provision imposing requirements in connection with such strategies on other persons with functions of a public nature.

*Matter 12.5*

Provision for and in connection with—

(a) the making of arrangements by relevant Welsh authorities to secure improvement in the way in which their functions are exercised,

(b) the making of arrangements by relevant Welsh authorities for the involvement in the exercise of their functions of people who are likely to be affected by, or interested in, the exercise of the functions, and

(c) the assessment and inspection of the performance of relevant Welsh authorities in exercising their functions.

The following are “relevant Welsh authorities”—

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

(b) a National Park authority for a National Park in Wales,

(c) a fire and rescue authority in Wales constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies,

(d) a levying body within the meaning of section 74(1) of the Local Government Finance Act 1988 in respect of which the county council or charging authority referred to in section 74(1)(b) of that Act was a council or authority for an area in Wales,

(e) a body to which section 75 of that Act applies (special levies) and which as regards the financial year beginning in 1989 had power to levy a rate by reference to property in Wales.

*Field 13: National Assembly for Wales*

*Matter 13.1.*

Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly.

*Matter 13.2.*

Conferral of functions on the Assembly Commission for and in connection with facilitating the exercise by the Assembly of its functions (including the provision to the Assembly of the property, staff and services required for the Assembly's purposes).

*Matter 13.3*

Provision for and in connection with the payment of salaries, allowances, pensions and gratuities to or in respect of Assembly members, the First Minister, any Welsh Minister appointed under section 48, the Counsel General and any Deputy Welsh Minister.

*Matter 13.4*

Provision for and in connection with the creation and maintenance of a register of interests of Assembly members and the Counsel General.

*Matter 13.5.*

Provision about the meaning of Welsh words and phrases in-

- (a) Assembly Measures,
- (b) subordinate legislation made under Assembly Measures, and
- (c) subordinate legislation not so made but made by the Welsh Ministers, the First Minister or the Counsel General.

*Matter 13.6.*

Provision for and in connection with the procedures for dealing with proposed private Assembly Measures, including, in particular-

- (a) procedures for hearing the promoters of, and objectors, to proposed private Assembly Measures,
- (b) the persons who may represent such promoters and objectors, and the qualifications that such persons must possess,
- (c) the imposition of fees for and in connection with the promotion of proposed private Assembly Measures, and
- (d) the assessment of costs incurred in connection with proposed private Assembly Measures.

*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*

## **PART 2**

### **GENEAL RESTRICTIONS**

#### *Functions of Ministers of the Crown*

1 (1) A provision of an Assembly Measure cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a Minister of the Crown.

(2) A provision of an Assembly Measure cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.

#### *Criminal offences*

2 (1) A provision of an Assembly Measure cannot create, or confer power by subordinate legislation to create, any criminal offence punishable-

- (a) on summary conviction, with imprisonment for a period exceeding the prescribed term or with a fine exceeding the amount specified as level 5 on the standard scale, or
- (b) on conviction on indictment, with a period of imprisonment exceeding two years.

(2) In sub-paragraph (1) "the prescribed term" means-

- (a) where the offence is a summary offence, 51 weeks, and
- (b) where the offence is triable either way, twelve months.

#### *Police areas*

2A A provision of an Assembly Measure cannot make any alteration in police areas.

#### *Enactments other than this Act*

3 A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the Table below:

TABLE

<i>Enactment</i>	<i>Provisions protected from modification</i>
European Communities Act 1972 (c.68)	The whole Act
Data Protection Act 1998 (c.29)	The whole Act
Government of Wales Act 1998 (c.38)	Sections 144(7), 145, 145A and 146A1
Human Rights Act 1998 (c. 42)	The whole Act
Civil Contingencies Act 2004 (c.36)	The whole Act
Re-Use of Public Sector Information Regulations 2005 (S.I. 2005/1505)	The whole set of Regulations

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

5 A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, any functions of the Comptroller and Auditor General.

*This Act*

6(1) A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in this Act.

(2) Sub-paragraph (1) does not apply to sections 20, 22, 24, 36(1) to (5) and (7) to (11), 53, 54 and 156(2) to (5).

(3) Sub-paragraph (1) does not apply to any provision-

- (a) making modifications of so much of any enactment as is modified by this Act, or
- (b) repealing so much of any provision of this Act as amends any enactment, if the provision ceases to have effect in consequence of any provision of, or made under, an Assembly Measure.

## **PART 3**

### **EXCEPTIONS FROM PART 2**

#### *Functions of Ministers of the Crown*

7 Part 2 does not prevent a provision of an Assembly Measure removing or modifying, or conferring power by subordinate legislation to remove or modify, any function of a Minister of the Crown if the Secretary of State consents to the provision.

#### *Police areas*

7A Part 2 does not prevent a provision of an Assembly Measure making an alteration to the boundary of a police area in Wales if the Secretary of State consents to the provision.

#### *Comptroller and Auditor General*

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

#### *Restatement*

9 Part 2 does not prevent a provision of an Assembly Measure-

- (a) restating the law (or restating it with such modifications as are not prevented by that Part), or
- (b) repealing or revoking any spent enactment,

or conferring power by subordinate legislation to do so.

#### *Subordinate legislation*

10 Part 2 does not prevent an Assembly Measure making modifications of, or conferring power by subordinate legislation to make modifications of, an enactment for or in connection with any of the following purposes-

- (a) making different provision about the document by which a power to make, confirm or approve subordinate legislation is to be exercised,
- (b) making provision (or no provision) for the procedure, in relation to the Assembly, to which legislation made in the exercise of such a power (or the instrument or other document in which it is contained) is to be subject, and
- (c) applying any enactment comprised in or made under an Assembly Measure relating to the documents by which such powers may be exercised.

#### *Data Protection Act 1998*

11. Part 2 does not prevent an Assembly Measure making modifications of, or conferring power by subordinate legislation to make modifications of, section 31(6) of the Data Protection Act 1998 so that it applies to complaints under any Assembly Measure relating to matter 9.1 in Part 1.