

Quick guide

The Constitution – Legislative Competence Orders November 2009

What is a Legislative Competence Order (LCO)?

Under Part 3 of the *Government of Wales Act 2006* (“the Act”) the Assembly can pass legislation, known as “Assembly Measures”, on matters where it has legislative competence (see [Assembly Measures Constitutional Quick Guide](#)).

Section 95 of the Act, along with Schedule 5, set out the extent of the Assembly's legislative competence by listing devolved “Fields” and “Matters” within each Field. Schedule 5 may be amended to add “Matters” and so extend the legal competence of the Assembly. This may be done **either** by an Act of Parliament, **or** by a **Legislative Competence Order (LCO)** approved by the National Assembly for Wales and by both Houses of Parliament.

LCOs are a particular kind of Order in Council. Orders in Council are a form of secondary legislation made by the Monarch on the advice of the Privy Council and, where made under powers given in an Act of Parliament, sometimes requiring prior parliamentary approval and sometimes not. Typical uses of Orders in Council are legislation implementing treaty obligations and the transfer of responsibilities between Government Departments; or from Ministers of the UK Government to those of the devolved jurisdictions. Examples include the *National Assembly of Wales (Transfer of Functions) Order 1999*¹ and the current *Welsh Ministers (Transfer of Functions) (No.2) Order 2009* which has recently been approved by Parliament.

LCOs, therefore, are Orders in Council made specifically in relation to the legislative competence of the National Assembly for Wales under provisions in section 95(1) of the *Government of Wales Act 2006*.

¹ HC Factsheet, Statutory Instruments, L7, January 2007

Approval of Legislative Competence Orders

The Act provides for the Assembly and both Houses of Parliament to approve draft Orders in Council under section 95(1) before they are recommended to be made by the Monarch in Council.²

In circumstances where the Welsh Government has initiated the proposal, Explanatory Notes to the Act³ state that the main procedural stages will normally include:

- Preparation of a proposed Order following discussion between the Welsh Government, relevant Whitehall Departments, and the Wales Office. This will focus on ensuring there is clarity about the scope of the proposed Order and confidence that it will give the necessary legislative competence to enable the Welsh Government's policy objective to be achieved;⁴
- Scrutiny of a proposed Order by the Assembly and both Houses of Parliament. These processes are not prescribed in the Act;
- The formal (statutory) processes for the Assembly and both Houses of Parliament to give their approval to the final draft Order, modified as appropriate following the pre-legislative scrutiny processes. At this stage the draft Order will not be able to be amended as both the Assembly and Parliament will need to approve identical text;
- When a draft Order has been approved by the Assembly, the First Minister will be required, as soon as reasonably practicable, to give notice in writing of that fact to the Secretary of State, who must, by the end of 60 days either have laid the draft Order before both Houses of Parliament or have given the First Minister written reasons for not being prepared to do so;
- Once an Order conferring enhanced legislative powers (by adding a Matter or Matters into Schedule 5 to the 2006 Act) has been made, the competence conferred will be of a continuing character. This means that the Assembly can make whatever Measures it wishes, including Measures amending earlier ones, in relation to that Matter.

Assembly Procedures for approving Legislative Competence Orders

Standing Order 22 deals with the procedures for scrutinising Legislative Competence Orders and for the approval of LCOs by the Assembly.

Scrutiny of proposed Orders in the Assembly

Standing Order 22 includes procedures for the scrutiny of “**proposed Orders**” which may be laid by Members of the Welsh Government, a Committee or an individual Member.

At the same time as a Member lays a proposed Order, he or she must lay an **Explanatory Memorandum**. A proposed Order must not be laid unless it is in proper form in

² The Monarch in Council, or more commonly termed “Queen in Council”, refers to the practice of making Orders “by and with the advice of the Privy Council”.

³ *Government of Wales Act 2006* (Chapter 32), Explanatory Notes, para.317

⁴ These discussions are also necessary in order to ensure that Whitehall Departments have no fundamental objection to the proposed transfer of legislative competence.

accordance with any determinations made by the Presiding Officer.

The Business Committee must refer the proposed Order for detailed consideration to a Legislation Committee **or**, by motion in plenary, propose that there should be no detailed consideration of the proposed Order.

Where the proposed Order has been referred for detailed consideration, the Legislation Committee must consider and report on the proposed Order. In preparing its report on the proposed Order, the committee must, where reasonably practicable, take into account:

- any recommendation on the proposed Order that has been made by any other committee of the Assembly; and
- any recommendation on the proposed Order that has been made by any committee of the House of Commons or the House of Lords or any Joint Committee of both Houses of Parliament.

If the motion to bypass detailed consideration is agreed, the Member in charge of the proposed Order may introduce a draft Order relating to that proposed Order (see below). If the motion is not agreed, the Business Committee must refer the proposed Order for detailed consideration to a Legislation Committee.

The passage of draft Orders through the Assembly

Once a proposed Order has either received detailed consideration or such consideration has been bypassed, the proposed Order (as amended) is introduced as a **draft Order**. The text of the draft Order **cannot** be amended.

Draft Orders may be introduced by members of the Welsh Government, a Committee or an individual Member.

At the same time as a draft Order is introduced, an **Explanatory Memorandum** must be laid, which must include:

- an explanation of how account has been taken of any recommendation made by any Assembly committee or committee of either House of Parliament that considered the proposed Order; and
- the reasons for any significant differences between the draft Order and the proposed Order to which it relates.

Not later than 40 working days after a draft Order has been introduced, the Assembly must consider a motion that the draft Order be approved.

Members' Ballot for a Member proposed Order

The Presiding Officer must, from time to time, hold a ballot to determine the name of a Member, other than a member of the Welsh Government, who wishes to lay a Member proposed Order.

The Presiding Officer must include in the ballot the names of all those Members who have

applied to be included and who have provided an outline proposed Order and an Explanatory Memorandum. If successful in the ballot, a Member must seek the agreement of the Assembly to lay a proposed Order.

Westminster Procedures for approving Legislative Competence Orders

Pre-legislative scrutiny in Westminster

Processes for the pre-legislative scrutiny of **proposed** Orders in Westminster are not prescribed in the Act. Neither are there provisions in the Standing Orders of the House of Commons or House of Lords relating to procedures for proposed Orders.

It should be noted that whilst a proposed Order is laid before the Assembly for formal scrutiny, proposed Orders are not laid in Westminster until they are draft Orders; they are presented in the form of a Command Paper in accordance with established convention.

Although proposals must be presented to both Houses by the Secretary of State, there is no obligation on either House to consider or report on them. It is not a statutory pre-requisite before a draft Order can be introduced that formal pre-legislative scrutiny has occurred; only that the opportunity has been given for both Houses to consider the proposed Order.

Custom and practice has developed whereby the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee are invited by the Secretary of State for Wales to undertake pre-legislative scrutiny of proposed Orders. This scrutiny takes place once the proposal for an Order together with an accompanying Explanatory Memorandum has been presented to Parliament by the Secretary of State for Wales.⁵

The passage of draft Orders through Westminster

When a **draft Order** has been approved by the Assembly, the First Minister must give notice in writing of that fact to the Secretary of State.

By the end of 60 days, the Secretary of State for Wales must either have laid the draft Order before both Houses of Parliament or have given the First Minister written reasons for not being prepared to do so.

Once laid before Parliament, the draft Order will be subject to scrutiny by the Joint Committee on Statutory Instruments, which may prepare a report on it in order to inform Members of both Houses about technical issues such as the accuracy of the drafting and whether there are any doubts as to whether the draft Order is within the powers delegated by Parliament. Draft Orders are also considered by the Lords' Merits of Statutory Instruments Committee.

To complete its legislative passage, the draft Order (which is not amendable) must be approved by both Houses of Parliament under the affirmative resolution procedure. In

⁵ The UK Government has undertaken to provide Parliament with the opportunity to undertake pre-legislative scrutiny on each proposal for an Order, unless a need for urgent legislation makes this impractical.

practice, debate on a draft Order usually takes place in a delegated legislation committee of the Commons though it has also taken place in the Welsh Grand Committee⁶. In the case of the House of Lords, debate usually takes place in Grand Committee or on the floor of the Chamber. In all cases, the debates must be followed by a formal vote on the floor of each Chamber.

If the draft Order is approved by both Houses, the Secretary of State for Wales will recommend to Her Majesty that the Order in Council be made.

Dissolution of Parliament and LCOs in progress

Dissolution terminates the life of a Parliament, ending all business in the House of Commons and the House of Lords. This occurs prior to any Westminster general election.

Following dissolution, all formal business activity ceases, and all incomplete business is terminated, including that which relates to primary and secondary legislation. It will be a matter for the UK Government to decide to allocate time in both Houses for any outstanding Legislative Competence Orders to be approved before Parliament is dissolved for a general election.

Proposed Orders at dissolution

Any **proposed** Orders which have not been approved at dissolution will fall in Westminster. The decision to re-introduce a proposed Order which has fallen in the previous Parliament will lie with the next UK Government.

Draft Orders at dissolution

A **draft** Order will still be in the possession of Parliament following dissolution. It would then be open to a UK Government Minister to decide whether or not to re-table the motion to approve it, or to withdraw it.

If a draft LCO has been approved by both Houses before Parliament is dissolved but has not received royal approval, there is no necessity for it to undergo any further parliamentary procedures before going to the Privy Council.

There would usually be no Privy Council meeting to deal specifically with outstanding Orders in Council instruments before dissolution; they would simply go, should that be appropriate and UK Government Ministers so decide, to the next convenient meeting, whether that be before or following Parliament re-convening.

⁶ The Welsh Grand Committee met on the 14 October 2009 to debate the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009.

Further information

For further information on the Legislative Competence Order process, please contact **Llinos Madeley** (Llinos.Madeley@Wales.gsi.Gov.UK), Procedures Clerk.

For further information about any of the titles in the constitution series, please contact **Alys Thomas** (Alys.Thomas@Wales.gsi.Gov.UK), Members' Research Service.

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