

Cymru *Yfory*
Tomorrow's **Wales**



Evidence to the All Wales Convention

November 2008

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EXECUTIVE SUMMARY

Introduction

Cymru Yfory/Tomorrow's Wales warmly welcomes the commitment of the One Wales Government to holding a referendum on giving the Assembly primary law-making powers under the terms of Part 4 of the Government of Wales Act 2006 (GOWA 2006), and to do so before the end of the current Assembly term.

We also welcome the establishment of the All-Wales Convention and believe that the Convention provides a unique opportunity for a wide-ranging debate among the people of Wales about the governance of their country. We believe the Convention's terms of reference give it the scope for a wider consideration that allows it to take into account issues beyond the narrow confines of GOWA 2006.

An important reference point when looking at the Welsh devolution settlement is the report of the 'Richard Commission', which was published in the Spring of 2004 and whose recommendations remain the only set to have gained cross-party support.

We note that the trend in public attitudes has been increasingly in favour of a proper legislative parliament (with, notably, tax-raising powers) so that this option is now clearly the most favoured among those questioned, and has been so since 2001. Since the turn of the century there has been a consistent majority in favour of giving the Assembly more powers.

We base our recommendations for a satisfactory constitutional settlement on a number of interlinked fundamental principles which are compatible to a large extent with the principles of good governance identified by the European Commission in its 2001 White Paper on Good Governance. The principles are that the arrangements should be:

- stable;
- effective and efficient;
- comprehensible and transparent;
- encourage maximum participation;
- respect the autonomy of the National Assembly.

The Functioning Part 3 of GOWA 2006

We believe that the case for moving ahead to Part 4 is overwhelming based on the fact that there are a number of clear deficiencies in the current model of 'piecemeal' devolution and in the methods by which the Assembly's powers are extended. These are deficiencies both in principle and in practice.

It is clear to us that the current devolution model, based as it is on the piecemeal devolution of legislative powers through LCOs and Acts of Parliament, does not live up to the standards of good governance. We show that the experience of working under the terms of Part 3 to date proves that it does not meet the core principles that define an acceptable system of governance.

The process of conferring powers through LCOs and Acts of Parliaments is inherently unstable. Change in the powers of the Assembly and the role of the Assembly in the broader governance of Wales is built into the system. Part 3 of GOWA 2006 was designed to be a transitional mechanism, and as such it is unwieldy, though it works after a fashion. It cannot be sustained as the long-term basis for devolution for Wales, as it is so inherently flawed. It also makes routine policy issues constitutional ones, blurring the line between the fundamental issues and more day-to-day ones. Moving to Part 4 would create the basis for a stable settlement that could prove durable.

The present arrangements lack effectiveness and efficiency in themselves, and undermine the effectiveness and efficiency of the National Assembly. The legislative process becomes

lengthy and convoluted as a result, and is worsened by the confusion of responsibility between UK and devolved institutions for a wide range of policy matters.

The system provides poor comprehensibility and transparency. It is hard to understand which level of government is responsible for what, or why. This is worsened by the piecemeal way in which functions are devolved to the National Assembly and Assembly Government. The line between executive and legislative devolution is similarly unclear, and difficult to understand. Moreover, it is hard for those outside government to understand why things work in the way they do, or whom they should lobby to change things or whom they should hold accountable for the way policies presently work.

As a result of the above failings, the present arrangements are likely to deter people from becoming involved in matters of public concern, rather than encourage it. Whether citizens are being asked to take an active part in lobbying or forms of civic activity, or a more passive role as voters and users of public services, the present constitutional structure discourages rather than encourages public participation.

Part 4 and Beyond

Implementing Part 4 of GOWA 2006 would bring about a vast improvement on the current arrangements under Part 3. The extension of power that implementing it would bring about would constitute considerable progress toward the criteria we have identified as being necessary for an acceptable devolution settlement for Wales.

By conferring a clear and broad range of legislative powers on the National Assembly, implementing Part 4 would provide a settlement that had a meaningful prospect of being stable. It would also, in the view of Cymru Yfory, significantly improve the stability, efficiency and effectiveness, comprehensibility and transparency of devolution in Wales as well as encouraging wider public participation in the Assembly's activities. The autonomy of the National Assembly would also be respected under the new provisions.

For these reasons, Cymru Yfory supports the move to implement Part 4 of GOWA 2006, and will support a Yes vote in a referendum.

However, we note that GOWA 2006 is the outcome of pragmatic political compromises based on what was achievable at a particular point in time rather than a principled and reasoned response to the constitutional situation of the kind presented by the Richard report. Given the consequent imperfections of the Act, we do not believe that Part 4 of GOWA 2006 should be regarded as the end-point of the process of devolution in Wales.

We believe that a number of significant improvements will be needed in order to meet the fundamental criteria that we have set out in this submission. Each of these changes would all require Westminster legislation, and could be made either before or after a referendum.

The changes we regard as necessary are:

- an increase in the number of Assembly Members to 80;
- a review of the voting method;
- establishing Wales as a separate legal jurisdiction;
- a move to the 'reserved powers' model used in Scotland;
- a review of the Assembly's fiscal powers.

If these issues were resolved, the five principles we have identified would be satisfactorily met.

While revisiting these issues may pose some problems, the benefit would be the huge one that we would then have a constitutional settlement that was fit for purpose and that could meet the test of time. The sooner this can be done, the better it will be for the governance of Wales. We believe the Convention provides an unique opportunity for considered reflection

on the constitutional future of Wales and very much hope that it will take these issues into account.

Conclusion

We have identified five key principles that we believe should underpin such a satisfactory devolution settlement: stability; effectiveness and efficiency; comprehensibility and transparency; maximum participation; and autonomy. We have argued that the current arrangements clearly fail to meet the test of these principles.

The bringing into force of Part 4 of GOWA 2006, preferably with the additional elements that we have proposed, is a matter of simple common sense as much as a recognition of Welsh nationhood. There can be no justification for remaining with the current unsatisfactory, essentially transitional, arrangements under Part 3 of the Act when Part 4 is available and already on the statute book.

The precise time for holding a referendum is a matter for others, but it is Cymru Yfory's strongly-held view that the establishment of a satisfactory system of democratic governance for Wales should not be long delayed.

1. INTRODUCTION

1.1 Cymru Yfory

As a body established to build support for the evolution of the National Assembly for Wales into a fully-fledged legislative parliament, Cymru Yfory/ Tomorrow's Wales warmly welcomes the commitment of the One Wales Government to the Assembly's acquiring 'further legislative powers' and to 'proceed[ing] to a successful outcome of a referendum for full law-making powers under Part 4 [of the Government of Wales Act 2006] as soon as possible, at or before the end of the [current] Assembly term'.¹

We also welcome the commitment, as part of the 'preparations for securing such a successful outcome' to establish an all-Wales Convention and the fact that this Convention, chaired by Sir Emyr Jones-Parry has now commenced its work. We believe that the Convention provides a unique opportunity for a wide-ranging debate among the people of Wales about the governance of their country. Whereas the terms of reference refer specifically to Part 4 of the Government of Wales Act 2006 (GOWA 2006), in accordance with the One Wales Agreement, the Convention's duty to 'facilitate and stimulate a widespread, thorough and participative consultation at all levels of Welsh society on the issue of primary law making powers'² clearly provides scope for a wider consideration, taking into account issues beyond the narrow confines of the Act. It is in that spirit that Cymru Yfory presents its evidence to the Convention.

We accept that the commitment in the One Wales Agreement concerns the bringing into force of Part 4 of GOWA 2006, and it is a commitment that we unequivocally support. However, as we argue below, we believe that further changes will soon be necessary in order to establish a model of government fit to meet the needs and aspirations of the people of Wales for the twenty-first century. In making our case, a key reference point will be the recommendations of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (the 'Richard Commission'), which were published in the Spring of 2004 and which remain the only set of recommendations to have gained cross-party support. It was this report which stimulated the formation of Cymru Yfory, and the GOWA 2006 was in effect the UK government's response to the Richard recommendations. This Act incorporated some of the Richard recommendations, but left several unimplemented.

The main recommendations of the Richard Commission

Implemented by GOWA 2006

- Replacement of National Assembly as a single body corporate with separate legislative and executive institutions;
- Provision under Part 4 to enable the Assembly to pass primary legislation;

Not implemented by GOWA 2006

- Enabling the National Assembly to legislate on everything save what is expressly reserved to Westminster, following the model of the Scotland Act 1998;
- 80 Assembly Members, to ensure the Assembly has the proper capacity to scrutinise legislation and hold Ministers to account;
- Single transferable vote, to ensure proper proportionality of representation and equality of status among AMs.

It is a notable fact that the decision to establish the Richard Commission was taken less than eighteen months after the establishment of the National Assembly in May 1999. Already the

¹ One Wales: A progressive agenda for the government of Wales, June 2007, p.6

² Report of the Establishing Committee of the All Wales Convention, March 2008, p. 5

deficiencies of the very limited model of democratic devolution provided for by the 1998 Government of Wales Act were becoming evident and the movement in favour of establishing a proper legislative parliament was beginning to acquire the momentum that has become increasingly evident over the years since Wales voted Yes by the tiny margin of 6,721 votes.

1.2 Growing Popular Support

The proportion of the population opposed to democratic devolution in Wales has shrunk from 40% in 1997 to 21% in 2003 to 15% in 2008³. We can therefore take it that the issue of whether Wales should enjoy some degree of democratic self-government is well and truly settled. There can be no going back to the days when Wales was governed by the personal appointee of the Prime Minister of the UK, and no mainstream political party supports such a move.

The table below shows the level of support over time for four options for the government of Wales, as measured by surveys conducted by the Institute of Welsh Politics at Aberystwyth. The trend has been increasingly in favour of a proper legislative parliament (with, notably, tax-raising powers) so that this option is now clearly the most favoured among those questioned, and has been so since 2001. If we take the current level of 39% support for the parliament option and add the minority favouring independence we arrive at a total of 49% who support primary legislative and tax-raising powers for Wales. Furthermore, the figures show that much of the present decade, there has been a majority for giving the Assembly such powers. While the exact percentages are bound to fluctuate over time, there is a clear trend since the National Assembly was established toward increased support for a legislative and tax-raising Parliament.

	1997	1999	2001	2003	2006	2007	2008
No elected body	40	25	24	21	21	17	15
Assembly	27	35	26	27	25	28	31
Parliament	20	30	39	38	42	44	39
Independence	14	10	12	14	12	12	10

Other data from the same source point strongly in the same direction. For example, in 2007 72% state that they trust the National Assembly to govern in Wales's best interests, compared with 36% who trust the UK Government to do so. Even more strikingly, 74% believe that the Assembly should have more influence than the UK Government over how Wales is run, with only 18% believing otherwise. In 2001 the comparative figures for this last question were 56% and 26% respectively.⁴

The same research further shows that opposition to devolution has fallen most amongst those groups and in those geographical areas where it was at its strongest in 1997. This means that support for devolution is now much more evenly distributed among the population compared to a decade ago. In 1997, over 57% of those who identified themselves as 'British' or 'more British than Welsh' were opposed to devolution; by 2007 the figure had more than halved to under 26%.⁵ Over the same period, opposition to devolution in those areas identified by Denis Balsom in his 'Three Wales Model' as comprising 'British Wales' had fallen from 47% to 19%. These figures suggest that a new devolution referendum would be much less divisive than the one in 1997.

1.3 Fundamental Principles And The Current Arrangements

³ NAFW Press Release, 'National Assembly for Wales survey shows 70% of Welsh Citizens Favour Devolution', 22 September 2008

⁴ Scully, R. & Wyn Jones, R (eds), Wales Devolution Monitoring Report, Ionawr 2008

⁵ Ibid

We base our recommendations for a satisfactory constitutional settlement on a number of interlinked fundamental principles. These principles are compatible to a large extent with the principles of good governance identified by the European Commission in its 2001 White Paper on Good Governance.

The first is the need for **stability**. It is not conducive to good government that the constitutional question needs to be constantly revisited. Wales urgently needs a constitutional settlement that will enable Government, the Assembly, the social partners and civil society at large to concentrate, for an extended period of time, on policy development and delivery rather than on the constitutional question.

Second, we need arrangements that enable government to be **effective and efficient**, enabling smooth progress from policy development through to legislation and implementation. Arrangements should make the best possible use of the time of ministers, AMs, civil servants and indeed those elements of civil society who seek to influence government policy and administration.

Third, we need a system that is **comprehensible and transparent**. The legislative process is by its nature complex, but there is nothing to be gained by making it unnecessarily so. Also, as far as is possible in a devolved system of government, the public at large should be able to identify clearly who is responsible for various decisions, and whom therefore should be held to account.

Fourth, our system of government should be such as to **encourage maximum participation** in political activity, both in electoral terms but also by way of participation in the policy-development and law-making processes.

Fifth, it should, within the inevitable limits of a devolved system of government, respect the **autonomy of the National Assembly** as the legitimate democratic voice of the people of Wales, within the policy fields in which the UK Parliament grants it competence.

GOWA 2006 is in a number of ways a vital step forward in the evolution of Welsh governance. Among the seminal changes introduced by it are:

- It establishes the principle, even under Part 3 but much more so under Part 4, that the National Assembly should be able to pass primary legislation. This is a matter of profound and far-reaching significance
- It provides a mechanism for moving from the current arrangements for legislation by the Assembly, which are conditional on the approval of Westminster (Part 3), to arrangements (Part 4) under which the Assembly will be able to legislate within the fields devolved, without such approval
- There are useful mechanisms to encourage popular participation in the legislative process, including petitions, which enable citizens to bring their concerns directly to the Assembly, which in turn has duty to consider them.

However, Cymru Yfory believes that GOWA 2006 falls short in a number of crucial ways of fulfilling the principles we have listed above as being essential to a satisfactory system of government. In the remainder of our submission we shall comment on the deficiencies of the Act as we see them and our suggestions for a system of national government for Wales compatible with our five fundamental principles.

2. THE FUNCTIONING PART 3 OF THE GOVERNMENT OF WALES ACT 2006

2.1 Main Provisions

The Government of Wales Act 2006 introduced three main reforms to the devolution settlement in Wales.

First, it fundamentally changed the nature of the Assembly by legally separating the Welsh Assembly Government (WAG) from the National Assembly for Wales (NAW). WAG Ministers are now appointed by the Crown rather than by the Assembly, and take responsibility for developing and implementing policies, taking decisions, exercising functions and making subordinate legislation. The Assembly is responsible for scrutinising Ministers' discharge of their functions, scrutinising and approving the budget, and making and scrutinising laws within the legislative competence of the Assembly. The governmental structure in Wales is therefore now much more similar to the Westminster/Whitehall model. This change was recommended by the Richard Commission and Cymru Yfory believes it to have been a crucial step in increasing the accountability and transparency of the system.

Second, Part 3 of GOWA 2006 conferred upon the Assembly the power to make laws, known as Assembly Measures, in certain fields. Measures have the same effect as Acts of Parliament and can amend, modify, extend or repeal any existing primary legislation in force relating to Wales as long as the matter falls within the Assembly's legislative competence. The passing of Measures is a matter for the Assembly alone and there is no involvement from Westminster.

The policy areas over which the Assembly has legislative competence are set out in Schedule 5 to GOWA 2006, which is divided into twenty broad 'Fields' such as environment, housing, highways and transport, within which the Assembly may have competence. The Assembly's exact competences are then listed as 'Matters' within these 'Fields'. Schedule 5 is not a static document; new Matters can be added in two ways - by means of an Act of Parliament at Westminster or through an Order in Council known as a Legislative Competence Order (LCO).

While the conferral of these law-making powers on the Assembly is to be welcomed, the current situation falls well short of the Richard Commission recommendation that Wales have a model of legislative powers on the same model as Scotland. As the main difference between Part 3 and Part 4 of GOWA 2006 is the scope of legislative powers devolved to the Assembly and the associated methods for extending that scope, it is on the functioning of that aspect of the current settlement that most of this section will focus.

Third, the Act brought in a ban on dual candidacy, which prevents candidates from standing for election in a constituency and on a regional list. This ban was introduced to solve the so-called 'Clwyd West Problem' whereby all four main party candidates in that constituency were elected in 2001: one as the constituency AM and the other three through their regional party lists. However it does not seem to be the case that this was a genuine issue for the electorate, and there is no such ban in other countries that use the additional member system, including Scotland. One effect has been to deprive the Assembly of some able politicians without increasing the body's democratic accountability nor giving the electorate greater choice.

2.2 The Legislative Process

The Assembly is still in its infancy as a legislative body after one year of operating the legislative powers granted by the Government of Wales Act 2006. The interim system whereby the Assembly is granted law-making powers over specific matters, which can be extended incrementally over time, is proving problematic. That is not to say that it is without

its merits; one of which is to allow the Assembly to gradually build its law-making capacity in readiness for when it acquires primary legislative powers under Part 4.

We believe that the case for moving ahead to Part 4 is overwhelming and can be made on both positive and negative grounds.

The positive argument is that we believe that it is already clear, and will be even more so by 2010, that both the Assembly and WAG can successfully use their legislative powers. The approach of proving the Assembly's readiness for more powers by showing it has successfully used those currently available to it is one advocated by, amongst others, the First Minister:

Therefore, the faster that we move up that learning curve, the stronger—not the weaker—the case will be for a referendum on full legislative powers. It should be based on the successful use of the powers in the Government of Wales Act 2006, not on the lack of success of using those powers.⁶

The negative case for moving ahead to further powers is made on the grounds that the current system fails to satisfy the core principles of good government set out in our introduction, and cannot therefore constitute an acceptable long-term settlement. Below, we will look at both the positive and negative aspects of the current arrangements, and demonstrate why moving on to implementing Part 4 as soon as possible is highly desirable.

2.3 Conferring Powers on the National Assembly for Wales

There are two methods of conferring the power to legislate over a particular matter to the National Assembly:

- Legislative Competence Orders (LCOs)- whereby powers to make Measures are conferred on the Assembly by Order in Council following approval by the Assembly and both Houses of Parliament;
- Acts of Parliament - where powers are conferred upon the Assembly directly by Acts of the Westminster Parliament, with no involvement by the Assembly;

It is significant that though LCOs have received much more attention and scrutiny from politicians and media alike, it is Acts of Parliament that have been responsible for adding the great majority of Matters to Schedule 5 since May 2007.

As of August 2008, there were a total of 29 Matters listed in Schedule 5, divided among ten of the twenty Fields in Schedule 5. Of these, 28 were conferred through Acts of Parliament, and only one through LCOs. A further 5 Matters will be conferred through Bills currently under consideration, while 14 Matters are contained in proposed LCOs. Of a total of 48 Matters either already conferred or under consideration therefore, only 15 will have followed the LCO route.

A positive feature of Assembly legislation thus far is that backbench AMs have been particularly active in initiating legislation, more so indeed than the government itself. In the first year there have been 12 proposed LCOs, 6 by WAG and 6 from backbench AMs selected through the ballot. This is down in no small part to the fact that ballots have, at the Presiding Officer's initiative, been held every two months. The situation is even more marked when it comes to Measures, with WAG having proposed 3 Measures and backbench AMs 5. However, there can be few better examples of the constraints and frustrations of the current powers than the fact that at the most recent backbench ballot in June 2008 there were no proposals forthcoming for Measures while eighteen AMs put proposals forward for the LCO ballot.

2.4 Deficiencies of the System: Principles

⁶ National Assembly for Wales Record of Proceedings, 15 July 2008

We believe that there are a number of deficiencies in the current model of 'piecemeal' devolution and in the methods by which the Assembly's powers are extended. These are deficiencies both in principle and in practice.

On the matters of principle, it is clear to us that the current devolution model does not live up to the standards of good governance. It does not provide long-term stability. It is less effective and efficient, comprehensible and transparent, than it should be. It cannot therefore be said to encourage maximum participation and it certainly does not respect the autonomy of the National Assembly for Wales. We believe these to be problems inherent to the current system, which can only be resolved by moving to the implementation of Part 4. The reasons include:

- Having to seek Westminster's approval to legislate means that the Government of Wales is unable to act expeditiously to address Welsh needs as it must first go through the LCO process before even starting to legislate. The system therefore lacks effectiveness and efficiency;
- Though they are formally debated and approved by the Assembly and Parliament, the most crucial part of the LCO process takes place behind closed doors between WAG and Whitehall. It is in these inter-governmental negotiations that the scope of the LCO is really decided. The system therefore lacks transparency;
- The current system of devolving specific Matters to the Assembly while retaining other legislative powers at Westminster mean that it is not always clear where the power and accountability over specific issues lie. It is difficult therefore for the public and civil society, without recourse to specialist advice, to know at which level of government they need to engage. This raises issues of transparency and participation;
- Finally, under the current system issues of policy and constitution inevitably become linked, leading to a blurring of the debate that is not conducive to good policy-making or with proper engagement from civil society. There is a danger that LCOs are judged not on constitutional principles as they should be, but on the merits of the likely policy. Each policy issue becomes a constitutional one, and *vice versa*.

We believe this final point to be particularly pertinent. Discussions on LCOs, both in the Assembly and Parliament have often strayed onto possible Measures rather than discussing the conferral of powers alone. Also, it can be difficult for civil society organisations and charitable interest groups to formulate a view on the merits of a conferral of powers, as this could be seen as an overtly political issue, whereas they are more comfortable commenting on Measures which deal only with policy issues.

2.5 Deficiencies of the System: Piecemeal policy-making

The intention of the current system as outlined in the 2005 White Paper 'Better Governance for Wales' is "to permit the Assembly to develop the capacity to deal with enhanced legislative powers".⁷ The examples given in Para 3.18 of the White Paper suggested that the Assembly would be given a substantial subject area, ranging from specific - such as Ombudsmen in Wales - to very broad,- such as the structure of the NHS in Wales. This would allow the Assembly to make such legislation as it considered necessary for the purpose of implementing its objectives within that particular subject area.

However, the Matters currently in operation or proposed for Schedule 5 do not seek to give the Assembly broad powers to make law and arguably therefore do not reflect the intentions in the White Paper. The one clear exception to this is the proposed Matter 6.2 included in the Proposed LCO on Environmental Protection and Waste Management which proposes the following broad-ranging matters:

Matter 6.1

⁷ White Paper, *Better Governance for Wales*, White Paper, 2005

Collection, management, treatment and disposal of waste.

Matter 6.2

Environmental protection, including pollution, nuisances and hazardous substances.

It is disappointing therefore that this LCO, which in our view is an example of best practice in terms of devolving a suitably broad policy area to the Assembly, should have been held up for over a year as Whitehall considers whether or not to proceed as the Assembly has requested. The proposed Welsh Language LCO has similarly been held up within the UK Government.

With this exception, the Matters seem to be expressed much in the same terms as sections of Acts of Parliament which were included in Transfer of Functions Orders for executive powers to the Assembly under GOWA 1998. A prime example of this are Matters 5.1-5.10⁸ which are now in operation. These Matters are very narrowly defined and the constraints of Matter 5.10 have already become clear as the Learner Travel Measure progresses through the Assembly.

The contrast with Field 5 in Schedule 7 of GOWA 2006, which sets out what the Assembly's powers in this area would be after a referendum to bring Part 4 of the Act into force, could not be clearer:

5. Education and training

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

Exception—

Research Councils.

The danger of the current approach is that the problems created by the series of Transfer of Functions Orders, particularly the first one in 1999, are being repeated. One of the aims of the Better Governance for Wales White Paper was to remedy the problems caused by this issue as 'experience has shown that the Assembly's current legislative powers are too fragmented to enable the Assembly Government to implement its policies as effectively as it should.'⁹ This problem was exacerbated, according to the White Paper, by the fact that the Assembly's powers arose from many different Acts and were varied in their scope and significance and did not amount to a coherent whole.

However the current system is reproducing the same fragmented model of powers leading to exactly the same problems being experienced. The principle expressed in Devolution Guidance Note (DGN)16 at paragraph 24 is that:

"Orders should not give the National Assembly powers over the whole of any of the fields listed in Schedule 5 in one go, nor should subjects normally be imported wholesale from Schedule 7 into Schedule 5 unless a clear case for doing so is made. 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."

This shows a divergence between aspiration as set out in the White Paper and the application of the current settlement. DGN 16 principle iii. (Para. 21) also states that 'Orders will normally have sufficient flexibility to allow the delivery of other policy aims in the future within the subject area.' This principle is to be welcomed, and should discourage either Whitehall or Parliament from demanding to know the substantive contents of any Measure that will follow from an LCO before approving it. However, the present tendency is to seek LCOs only for such specific Matters that only one Measure could be made within the restrictive purpose of the Matters. The best example of this very narrow definition of competences is the Proposed

⁸ See current version of Schedule 5, available at <http://new.wales.gov.uk/about/constitutional/govwalesact2006/schedule5?lang=en>

⁹ White Paper, *Better Governance for Wales* (June 2005), para 3.5

LCO on Domestic Fire Safety which would expand the Assembly's legislative competence in only the following very specific way:

In Field 11 (housing) insert—

Matter 11.1

Provision for and in connection with a requirement that a sprinkler system be installed in new residential premises.

The result is that the Measures made under such Matters will be so limited in their scope that they will be no different to some wider executive powers in Transfer of Functions Orders (TFOs) made under the GOWA 1998 or Acts between 1999-2006 – leading in effect to executive devolution being disguised as legislative devolution. This is an inherent deficiency of the current system that can only be alleviated, and not solved, by drafting Matters in a broader way. The problem would be avoided completely by bringing Part 4 of GOWA 2006, with its generally wide enabling powers under Schedule 7, into force.

2.6 Practical problems: the LCO method

2.6.1 Time-consuming

The main problem caused by the current need to secure the agreement of Parliament to an LCO before the Assembly can legislate on a particular topic is that it is time consuming and puts an unnecessary burden on the resources of those bodies involved, including WAG, the Assembly and the Welsh Affairs Select Committee

During the past year, 2 LCOs have completed their process, taking ten and eleven months from the original proposal to Royal Assent. Other LCOs will take significantly longer. The delay with processing the LCO on Environmental Protection and Waste Management has already been referred to but the proposed LCO on the Welsh Language is also a significant case in point. First announced in June 2007, the LCO has still not been laid before the Assembly and its content continues to be subject to discussions between WAG and Whitehall. That is 15 months (and counting) of Ministers and civil servants' time that could have been spent developing and implementing policy that has instead been spent on trying to reach agreement on what powers exactly should be devolved to the Assembly. And this in a policy area that one could reasonably expect to be devolved in its entirety anyway.

Devolution Guidance Note 16, which sets out guidelines for civil servants in dealing with LCOs sets out seven principles which must be adhered to. LCOs should:

- i. Deepen not broaden the settlement
- ii. Allow scope for policy divergence
- iii. Ensure the case for powers is made
- iv. Have a clearly defined scope
- v. Have an appropriate Breadth of Matters
- vi. Ensure coherence of law
- vii. Respect UK powers and interests

The need to constantly make a detailed robust case for new powers by reference to the 7 principles in the DGN means WAG and the Assembly must devote a considerable amount of time and energy which might better be devoted to considering the nature of the laws the Assembly should be making (i.e. the contents of potential Measures under the sought Matters). Such resources would be freed up if the Assembly already had full competence in these Fields under Part 4 and Schedule 7 of GOWA 2006.

2.6.2 Diversion of time and resources

With only 60 AMs in total, and just over 40 backbenchers, the Assembly's resources are seriously stretched by the need to scrutinise LCOs. This in turn allows less time for scrutiny of actual legislation in the form of Measures and for proper scrutiny of WAG Ministers. This has implications for the principles of efficiency, effectiveness and transparency.

It is not only the Assembly that is affected by this. The Welsh Affairs Select Committee too is put under pressure by the current system, in having to deal with LCOs on top of their normal workload.

There are some signs that progress is being made. The government's legislative programme for 2008/09 includes 5 Measures and 4 LCOs, showing a shift in balance from the previous year when 6 LCOs and only 3 Measures were proposed. It is an inevitable consequence of the current system however that the first phase of any legislative programme will be dominated by LCOs as the Assembly seeks those powers that will allow it to implement its priorities. The Measures being brought forward this year under powers gained through LCOs could have been enacted a year earlier were it not for the need to go through the LCO process to gain those powers in the first place.

2.6.3 Complex: blurs accountability

The current model of devolution is inherently complex in that it leads to confusion about who has legislative responsibility for what. It is difficult to know with confidence which government or institution is responsible now for making legislation in Wales in areas such as health and education: split as those areas are between those Matters devolved to the Assembly and the remainder which rest at Westminster. Whilst lawyers can look at the detailed provisions of Schedule 5 and give a technical answer, voters too need to be confident when they go to the ballot box, that they are properly holding their elected representatives to account. There must be clarity as to who is responsible for what if politicians are to be properly accountable. At the moment that is very far from being the case.

While Schedule 7 devolves policy fields in their entirety, with some limited exceptions, the extent of Matters under Schedule 5 can be so restrictive as to leave legislative competence in a fairly limited area of policy divided between Cardiff and London, making it difficult to know who is accountable for which decisions.

The debate surrounding the Learner Travel Wales Measure, recently approved by the Assembly provides a good example of how the current settlement blurs accountability, with confusion over whether the Assembly's powers allowed it to control the issue of vehicle standards and safety. The Minister for Economy and Transport had been advised by WAG lawyers that he did not have the power to do this by legislation, while the Chair of the Committee responsible for scrutinizing the Measure was advised by Assembly lawyers that it could be done, albeit by other (non-legislative) means. The present system leads to the use of multiple methods to achieve what should be straightforward goals, in turn weakening comprehensibility and transparency and often efficiency and effectiveness as well.

Unfortunately, there is no sign that Parliament will allow Matters **which** will confer powers in a more consistent or transparent manner in future. The Welsh Affairs Select Committee's report on the proposed Affordable Housing LCO, for example, approved of the principle of conferring the power to suspend the right to buy on the Assembly, but recommended that 'the ability of the Welsh Assembly Government to abolish the Right to Buy/Right to Acquire should therefore be specifically excluded from the scope of the proposed Order, as the Committee has received assurance that abolition is not Welsh Assembly Government policy'¹⁰. Such an approach imposes an often-arbitrary division of powers, limits the policy options of future Assemblies and Governments, and does not allow clear lines accountability for the resulting policy outcomes.

¹⁰ The House of Commons Welsh Affairs Committee, The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008 Seventh Report of Session 2007–08, para. 35

Such arbitrary division of responsibilities between the National Assembly and Westminster makes it well-nigh impossible for the people of Wales to hold their politicians to account, when it is far from clear who is responsible for specific policy decisions. It is also difficult for civil society organisations to contribute to the policy making process, as expressed by one organisation in evidence to the Environmental Protection and Waste Management LCO Committee. The following extract from the RSPB's evidence to the Committee consultation on the LCO highlights the problems encountered by civil society in dealing with the current settlement:

"If the only way to understand the powers of the Assembly is to commission expensive legal opinion, or take test cases to the courts, then this disenfranchises the voluntary sector and the wider public from the governance of Wales. This seems to work against a principal aim of devolution, i.e. to bring government decision making closer to the people affected by those decisions."¹¹

2.7 Conferral through Acts

It has already been noted that the majority of Matters conferred upon the Assembly have come through Acts rather than LCOs. Conferring powers through Acts of Parliament means that, while significant conferrals are occurring, they are fragmentary and are not tailored to the Assembly's specific legislative requirements. Further, the predominance of conferrals through Acts of Parliament mean that Schedule 5 reflects legislative priorities at Westminster rather than Cardiff.

Another fundamental problem with amending Schedule 5 by means of Acts of Parliament is that there is no machinery available whereby the Assembly can liaise directly with either the Wales Office, Whitehall or Parliament in the formulation of proposals in draft Bills giving powers to WAG. The Assembly therefore has only a very limited role in determining the powers that are devolved to Wales. In practice, it is the Assembly Government and not the Assembly that is in charge of the process, as it is the only body in Wales to be in a position to know about or negotiate Schedule 5 amendments by Parliamentary Acts, and it is left in sole charge of executive functions that are devolved.

This increases the role of the Assembly Government at the expense of the National Assembly, and undermines both the role of the elected National Assembly and the constitutional principle of the supremacy of the legislature over the executive. Under current arrangements, the National Assembly as a legislature is not in control of which legislative powers are devolved to it by Acts of Parliament. This is detrimental both to the transparency of the process and to the Assembly's autonomy.

Powers conferred through Acts of Parliament can also have a knock-on effect for the Assembly and WAG's workload as it requires detailed secondary legislation to bring the Act's provisions into effect in Wales – much more detailed than the secondary legislation required in England, where much of the substance will have been contained in the Act itself. Conferral through Acts can also lead to a legislative deficit, where Wales lags behind England in bringing Acts into effect due to the workload involved and the lack of resources to deal with it.

2.8 Conclusion

We believe that the evidence outlined in this section shows clearly that the current arrangements, as provided for by Part 3 of GOWA 2006, fail to satisfy the core principles of good governance and cannot therefore constitute a lasting settlement for Wales. The following are, in our view, the key points:

¹¹ Proposed National Assembly for Wales (Legislative Competence) (No.2) Order 2007 (Relating to Environmental Protection and Waste Management) Committee Consultation Responses. EPWM6, Royal Society for the Protection of Birds, para 1.6

- The process of conferring powers through LCOs and Acts of Parliaments is inherently unstable. Change in the powers of the Assembly and the role of the Assembly in the broader governance of Wales is built into the system. Part 3 of GOWA 2006 was designed to be a transitional mechanism, and as such it is rather clumsy but works after a fashion, but it cannot be sustained as the long-term basis for devolution for Wales, as it is so inherently flawed. It also makes routine policy issues constitutional ones, blurring the line between the fundamental issues and more day-to-day ones. Moving to Part 4 would create the basis for a stable settlement that would prove durable.
- These present arrangements are not effective or efficient in themselves, and undermine the effectiveness and efficiency of the National Assembly. The legislative process becomes lengthy and convoluted as a result, and is worsened by the confusion of responsibility between UK and devolved institutions for a wide range of policy matters.
- The system provides poor comprehensibility and transparency. It is hard to understand which level of government is responsible for what, or why. This is worsened by the piecemeal way in which functions are devolved to the National Assembly and Assembly Government. The line between executive and legislative devolution is similarly unclear, and difficult to understand. Moreover, it is hard for those outside government to understand why things work in the way they do, or whom they should lobby to change things or whom they should hold accountable for the way policies presently work.
- As a result, the present arrangements are likely to deter people from becoming involved in matters of public concern, rather than encourage it. Whether citizens are being asked to take an active part in lobbying or forms of civic activity, or a more passive role as voters and users of public services, the present constitutional structure discourages rather than encourages public participation.

3. PART 4 AND BEYOND

3.1 Strengths

Implementing Part 4 of GOWA 2006 would bring about a vast improvement on the current arrangements under Part 3. The extension of power that implementing it would bring about would constitute considerable progress toward the criteria we have identified as being necessary for an acceptable devolution settlement for Wales. Implementing Part 4 would, in the view of Cymru Yfory, significantly improve the stability, efficiency and effectiveness, comprehensibility and transparency of devolution in Wales as well as encouraging wider public participation in the Assembly's activities. The autonomy of the National Assembly would also be respected under the new provisions.

These would all arise from the conferring on the National Assembly of the broad range of legislative powers that are set out in Schedule 7 to the Act. That in turn would improve the clarity of the division of powers between UK and devolved institutions, and so enabling each set of institutions in London and Cardiff to undertake their tasks properly. Removing the need for the Assembly to seek consent from the UK Parliament for many of its legislative proposals, would mean that behind-the-scenes bargaining about legislative powers – as well as the more public confusion between the powers of Parliament and the Assembly – would come to an end. This would greatly reduce the scope for either set of institutions to interfere with the functions of the other, which would improve the transparency and comprehensibility of the settlement and reduce the scope for disputes between them. By conferring a clear and broad range of legislative powers on the National Assembly, implementing Part 4 would provide a settlement that had a meaningful prospect of being stable.

This is why Cymru Yfory supports the move to bring Part 4 into force and will support a Yes vote in a referendum.

3.2 Weaknesses

However, we note that GOWA 2006 is in fact the outcome of pragmatic political compromises based on what was achievable at a particular point in time rather than a principled and reasoned response to the constitutional situation of the kind presented by the Richard report. Given the consequent imperfections of the Act, we do not believe that Part 4 of GOWA 2006 should be regarded the end-point of the process of devolution in Wales.

It is our view that a number of significant improvements will be needed in order to meet the fundamental criteria that we have set out in this submission. These changes could be made either before or after a referendum, and would all require new Westminster legislation, either by way of amendments to GOWA 2006 or a new Bill. The changes that will be needed are as follows:

3.2.1 The number of Assembly Members

The 2006 Act leaves the number of Assembly Members at 60. The Richard Commission called for there to be 80, to ensure proper scrutiny of legislation and Ministers.¹²

An Assembly with only 60 Members means that only about 45 AMs do not have front-bench responsibilities as ministers or opposition party leaders. That is a very small number to scrutinise legislation properly, or to ensure that the growing number of Assembly committees have enough members to do their work properly. It is also clear, at least anecdotally, that many AMs feel extremely stretched by their duties, and that many Assembly committees lack the number of members or the time to consider and deliberate that is necessary to do their job

¹² See Commission on the Powers and Electoral Arrangements of the National Assembly for Wales *Report of the Richard Commission* (Cardiff: National Assembly for Wales, 2004), chapter 14.

effectively. Exhorting AMs to 'work harder' or use their time more efficiently simply does not address the real issue.

Such concerns extend beyond Wales. Several committees at Westminster (including the House of Lords Constitution Committee) have already expressed their concern about the implications of such a small number of members for a proper legislature's ability to carry out its duties effectively. An increase in the number of AMs will help ensure, and demonstrate, the ability of the Assembly effectively to exercise devolved legislative powers and ensure the proper use of devolved executive ones.

3.2.2 Changes to the voting method

The Richard Commission report acknowledged that there were problems with having two classes of Assembly Member – some elected directly from a constituency, others from the regional lists. The Additional Member System had a number of merits, including maintaining 'co-terminosity' (as constituencies in the National Assembly and the UK Parliament share the same boundaries), while introducing a degree of proportionality to the composition of the National Assembly. The system had the further merit of being the same in both Scotland and Wales. The Richard Commission also acknowledged the difficulties of using the existing Additional Member System to elect more than 60 AMs.¹³

To deal with these objections, and ensure that all AMs had the same electoral mandate while also having a direct tie to a constituency, it recommended using the Single Transferable Vote system (STV) in large multimember constituencies instead. It therefore directly linked arguments for 80 Members with those for STV.

GOWA 2006 did not follow this recommendation either. It aimed to prevent list and constituency members competing with each other by allowing candidates to stand only under one heading, not both. This does not however solve the alleged problem, and in some ways makes electoral competition worse. It is not an approach that has been adopted for Scotland, and breach of 'co-terminosity' between Westminster and Scottish Parliament seats means that the electoral systems for devolved elections in Scotland and Wales are now significantly different.

Various electoral systems would deliver the key requirement of providing for a representative membership of the National Assembly, and of putting all AMs on the same footing. Cymru Yfory is agnostic about which alternative electoral system should be chosen to achieve this, but does consider that there needs to a review of the electoral system used for National Assembly elections as part of the process of bringing in Part 4.

3.2.3 Establishing Wales as a separate legal jurisdiction

As the National Assembly uses its powers to apply different policies compared to England, a body of distinctively Welsh law is building up.¹⁴ There are practical constraints on the full exercise of devolved powers as a result of the existence of a single legal jurisdiction that incorporates England and Wales. The existence of a single legal system also gives rise to an assumption on the part of many (including many legal practitioners) that the law is the same in England as it is in Wales, resulting in considerable confusion.

This difficulty does not arise in Scotland or Northern Ireland, which have for a long time been separate legal jurisdictions within the United Kingdom. (The existence of separate legal jurisdictions corresponding to the territorial limits of constituent-unit legislatures is also normal in federal systems based on the common law, such as Australia, Canada or the United States of America).

¹³ *Ibid*, chapter 12.

¹⁴ See T.H. Jones and J. Williams, 'Wales as a jurisdiction' [2004] *Public Law*, pp. 78–101.

It appears to Cymru Yfory that creating a separate legal jurisdiction for Wales would resolve these problems in the most straightforward way. It would not alter the relationship between devolved and non-devolved powers, but would both improve the comprehensibility of the settlement outlined by Part 4 of GOWA 2006, and the workability of the powers which the 2006 Act proposes be devolved.

3.2.4 The 'reserved powers' model

The Richard Commission was clear in recommending a model of legislative powers similar to that in Scotland, where the devolved Parliament has power to legislate for all matters which are not expressly reserved to Westminster (and without affecting the sovereignty of the UK Parliament). Instead, GOWA 2006 uses a different approach, defining the legislative powers conferred on the National Assembly rather than reserved matters. Present circumstances (the relationship between Parts 3 and 4 of the 2006 Act, and the practical problems arising from the fact that Wales and England are a single legal jurisdiction) mean this approach is the only practicable one. However, this means that in cases of doubt it is likely that the courts will construe legislation passed by the Assembly narrowly rather than broadly (as would be the case for Scottish Parliament or Northern Ireland Assembly legislation). It would be desirable for practical reasons to ensure that Assembly legislation falling within the overall ambit of devolved powers was indeed valid. The 'Scottish model' would be a better way to do this, but would necessitate extensive rewriting of the Government of Wales Act to enable that to happen.

3.2.5 Fiscal powers

The financial issues arising from devolution are now clearly on the agenda, thanks to the establishment of the Holtham Commission in Wales, as well as the work of the Calman Commission in Scotland and scrutiny by the Finance Committee in the Northern Ireland Assembly and a select committee in the House of Lords. Over the next few years, it is likely that there will be very significant changes to the UK's system of territorial finance, which may well result in the devolution of fiscal powers to the devolved legislatures. If that is proposed and requires a referendum, it would make a good deal of sense to hold it at the same time as a referendum on primary legislative powers. Although this would require authorisation by an Act of Parliament, Cymru Yfory/Tomorrow's Wales think that it would be better to deal with the two issues at the same rather than at some later date.

3.3. Conclusion

Each of these problems undermines the principles identified at the outset. The limited number of AMs weakens the effectiveness and efficiency of the Assembly and also, as a consequence, discourages participation. The present electoral system also discourages participation (by limiting the choice of candidates for whom the public may vote) as well as constraining the autonomy of the National Assembly. The continued entanglement of Wales in an England and Wales legal jurisdiction, when laws are already substantially different in Wales, harms effectiveness and efficiency, comprehensibility and transparency, and harms the stability of the present arrangements. The model of powers similarly weakens effectiveness and efficiency and comprehensibility and transparency, as well as constraining at the margin the autonomy of the National Assembly. The issue of fiscal powers may need to be addressed in order to ensure stability of the new arrangements, as well as ensuring comprehensibility and transparency by ensuring that the Assembly is accountable financially as well as electorally for the decisions it makes.

In order for these improvements to be put in place, GOWA 2006 will need to be revisited. While this may pose some problems, the benefit would be the huge one that we would then have a constitutional settlement that was fit for purpose and that could meet the test of time. The sooner this can be done, the better it will be for the governance of Wales.

Cymru Yfory very much hopes that the All Wales Convention will take these matters into account as part of its deliberations. Part 4 of GOWA 2006 reflects an exercise in pragmatic politics rather than a considered reflection on the constitutional future of Wales. The latter is a task appropriate for the Convention, and we believe that it should grasp what is a unique opportunity to map out the kind of stable constitutional settlement that Wales both needs and deserves.

4. CONCLUSION

Attempts to establish a system of devolved government in Wales have a long history, extending from the 'Cymru Fydd' campaign, instigated within the Liberal Party by Tom Ellis and Lloyd George, in the 1890s; through the first steps of administrative devolution under the Conservatives in the 1950s and the establishment of the Welsh Office and the creation of a Secretary of State under Labour in 1963; and culminating in the arrival of limited democratic devolution, also under Labour, through the establishment of the National Assembly in 1999.

Cymru Yfory is convinced that it is now high time to establish a satisfactory system of governance for our nation by granting primary legislative powers to the National Assembly. We have identified five key principles that we believe should underpin such a settlement: **stability; effectiveness and efficiency; comprehensibility and transparency; maximum participation; and autonomy.** We have argued that the current arrangements fail to meet the test of these principles.

The bringing into force of Part 4 of GOWA 2006, preferably with the additional elements that we have proposed, is a matter of simple common sense as much as a recognition of Welsh nationhood. There can be no justification for remaining with the current unsatisfactory, essentially transitional, arrangements under Part 3 of the Act when Part 4 is available and already on the statute book.

The precise time for holding a referendum is a matter for the National Assembly and its government and the UK Parliament, and a number of factors will inevitably impinge on their decision. It is Cymru Yfory's strongly-held view however that the establishment of a satisfactory system of democratic governance for Wales should not be long delayed.