Welsh devolution and the problem of legislative competence

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Abstract

With political consensus reached across Wales and Westminster that the current conferred powers model of Welsh devolution should be replaced with a reserved powers model as exists in Scotland and Northern Ireland, this article looks back at the systems instituted under the *Government of Wales Act (2006)* and compares it with the proposals contained within the *draft Wales Bill (2015)* and *Wales Bill* (2016). This involves an in-depth comparison of the consequences for legislative clarity and robustness of the shift in 2011 from Part III of GoWA 2006, which instituted a system for the *ad hoc* transfer of powers to the National Assembly, to Part IV, which provides the Assembly with direct primary powers over specific policy areas, and the subsequent comparison of the existing system with the draft bill's proposals. In doing so, two claims are advanced: (i) that the system instituted in Part III of GoWA was actually *preferable* to that unlocked with the shift to Part IV; and (ii) that this existing system was nevertheless preferable to the proposed reserved power model contained in the *draft Wales Bill* Ultimately, what the Welsh case illustrates is how constitution building should not be done; and furthermore, that there are inherent problems regarding legislative competence within conferred powers models of devolution, but a reserved powers model is no panacea either.

Key words: Devolution; Welsh Politics; Legislative Competency; Multi-Level Governance; Wales Bill

Devolution has returned to the foreground of UK politics following the 'No' vote in the September 2014 referendum on Scottish independence. While much of this debate has focused on delivering a 'devo-max' settlement for Scotland, plans for 'radical devolution to the great cities of England' (Osborne, 2015), and arguments about so-called 'English Votes for English Laws' within the Westminster Parliament, major changes are also imminent in Wales. In October 2015 the Conservative Government published the draft Wales Bill, the aim of which is to provide 'a stronger, clearer and fairer devolution for Wales that will stand the test of time' (Wales Office, 2015: 4); this was followed in June 2016 with the new Wales Bill (Wales Office, 2016). At its core, the Bill proposes a move to replace the current conferred powers model of Welsh devolution with a reserved powers model, as exists in Scotland and Northern Ireland.

In the former model, the central, 'sovereign' parliament (i.e. Westminster) *confers* powers to a devolved assembly, allowing it to legislate in specifically defined subject areas. In the latter, by contrast, the devolved body is granted the freedom to legislate on *any* subject area, provided it is not one specifically reserved to the central parliament. Or, simply put, a reserved powers model sets out what powers are *not* devolved, a conferred powers model sets out what powers *are* devolved.

This article focuses on an important distinction within the particular conferred powers model instituted by the *Government of Wales Act (2006)* (hereafter GoWA 2006). It does so by comparing the consequences for policy robustness and legislative clarity of the shift

in 2011 from Part III of GoWA 2006, which instituted a system for the *ad hoc* transfer of powers to the National Assembly via a mechanism known as Legislative Competence Orders (LCOs), to Part IV, which provides the Assembly with direct primary powers over specific policy areas. It then subsequently compares this system with the proposals initially contained within the *draft Wales Bill (2015)*. In doing so, this article advances two major claims, both of which are controversial: (i) that the system instituted in Part III of GoWA was in fact *preferable* to that unlocked with the shift to Part IV; and (ii) that *this system* is nevertheless still preferable to the system initially proposed in the *draft Wales Bill*.

The first claim, in particular, initially appears counterintuitive. GoWA 2006 has been criticised by academics, politicians and independent commissions already (Adams, 2014; Griffiths, 2000; Silk Commission 2012, 2014); however, while the new settlement's potential limitations were recognised (Miers, 2011; Stafford, 2011), as Wyn Jones and Scully (2012: 172) describe, in 2011 it was accepted that they would 'prove more adequate'. This article argues that even these low expectations – that the new system would *at least* be 'more adequate' – were not reached.

This is because the current devolution settlement falls victim to what might be dubbed the 'grey spots of GoWA', the 'silent subjects', or, to use the terminology of the UK Changing Union Partnership (2013: 7), 'areas in limbo'. That is to say, it is victim to not knowing what it can and cannot do. Despite its many flaws, the situation was not the same under

the preceding LCO model used during the Third Assembly (2007-2011). While these same ‘grey spots’ existed constitutionally under the LCO system, this article argues that their effects were mitigated by a number of benefits missing from the new system:

(i) It prescribed legislative certainty;

(ii) there was a presumption in favour of devolution;

(iii) and inter-governmental disagreements were ‘frontloaded’.

Stating this is not to advocate the cumbersome, opaque and circumlocutory LCO system as a general model, nor recommend its return to Wales. The importance is in illustrating the significant problems inherent to *any* conferred model of devolution – this overarching model hindering good governance.

At the same time, however, as demonstrated by the proposals contained within the *draft Wales Bill*, reserved power models of devolution are not *inherently* better than a conferred powers model. A devolved model based upon the draft Bill’s proposals would have entailed *another* step backwards, for three key reasons:

(i) the restriction of Assembly powers with regards to the Minister of Crown powers;

(ii) a decrease in legislative competence due to the proposal of extensive reservations; and

(iii) the introduction of a ‘necessity test’ related to changes in law on reserved matters and private and criminal law.

The article is structured in five parts. The first contextualises the subsequent analysis with a historical overview of the process of constitutional change in post-devolution Wales between 1998 and 2006. The second provides a detailed explanation of the LCO system instituted in Part III of GoWA 2006, outlining its flaws and benefits in comparison to the system that replaced it with the move to Part IV. The third section illustrates these flaws and benefits via an analysis of two major pieces of Welsh Government legislation created under the new system: the *Agricultural Sector (Wales) Bill* and the *Social Services and Well-being (Wales) Bill.* The fourth section outlines the draft Wales Bill, explaining how, far from clarifying the Welsh devolution settlement, it proposed another step backwards for the National Assembly's ability to legislate. Noting the improvements within the Wales Bill itself, the final section nevertheless concludes that while there are inherent problems regarding legislative competence within conferred powers models of devolution, as the draft Wales Bill demonstrated, reserved powers models are no panacea either.

THE ROUTE TO THE GOVERNMENT OF WALES ACT 2006

Multi-layered governance is notorious for being messy (Newton & Van Deth, 2005: 80-81). It is therefore the job of those constructing constitutions – codified or uncodified – to prescribe the least-worst option. In Wales, the construction of the constitution has been more a case of prescribing the least-worst option to keep the Welsh Labour Party happy as it sought to find a balance between those enthusiastic for, and those sceptical of, the further devolution of powers to Wales (Moon, 2013; 2014). Due to this, good constitution-making has often been forgotten in 'the deeply flawed process of Welsh constitution

building' (Wyn Jones & Scully, 2012: 56).

The result has been a system plagued by confusion over legislative competence to the detriment of good governance. Key here has been the conferred powers model that Wales has operated under. In the cases of Scotland and Northern Ireland, where devolution was based upon a reserved powers model, there was a clear split of responsibilities held by their legislatures and governments and the powers residing with the UK Government and Westminster. This has not been the case in Wales. As described by current First Minister Carwyn Jones (2012), the difference between these models is that:

> The Scottish Parliament's powers … are defined in law by what it *cannot do*; certain matters are 'reserved' to Westminster, but the Parliament can legislate in relation to Scotland on anything else. The Welsh Assembly's powers, on the other hand, are legally defined by what it is *permitted to do*: legislative competence is conferred on the Assembly in respect only of a range of specified subjects.

Further complication was added by the fact that the Assembly had to work within the legislative framework of UK Acts, with the Assembly only empowered to make secondary legislation within the fields specifically devolved under GoWA 1998, or where powers had been specifically granted in UK Acts. This already confusing picture was compounded by a lack of codification of the distinction between primary and secondary legislation – a fact manipulated by Westminster governments to either empower, or restrict, the furthering of the Assembly's powers (Laffin *et al*, 2000: 224).

The National Assembly for Wales has thus operated throughout its tenure within a form of 'cooperative federalism, with functions shared or concurrent between central and devolved government rather than divided between to two' (ibid). As Entwistle, *et al.* (2014: 321) suggest, this multi-level system of governance resembles a mixture of both 'layer cake' and 'marble cake' federalism: in the first, there are 'clearly demarcated spheres of activity' and thus 'little need for intergovernmental coordination'; in the second, there is 'an intermingling of roles and responsibilities such that different sectors are governed in some way by more than one and perhaps all tiers of governance at the same time' (ibid: 311). This complexity – and confusion over where legislative competencies subsequently lay – has seen a near continuous process of institutional development from the birth of Welsh devolution.

The journey of Welsh Devolution, 1998-2011

The narrative of the debates and key moments in Wales's constitutional development have been outlined in detail numerous times (Rawlings, 2007; Deacon, 2012; Cole & Stafford, 2015: 5-6). Indeed, as Laura McAllister (2015: 37) notes, the academic focus since devolution has been 'overwhelmingly' focused upon this 'journey', arguably to the detriment of analyses on the practical functioning of policy making processes and governance structures. Nevertheless, to make the latter possible, a broad overview is useful to understand the particular nature of the current devolved settlement. This is not only because Welsh devolution has a tendency to be overlooked in British political debate,

but because the aforementioned ‘journey’ is a vital part of explaining why the problems discussed exist.

The National Assembly for Wales established through the *Government of Wales Act 1998* (hereafter, GoWA 1998) was a body corporate conferred with limited executive powers over areas which had originally rested with the Welsh Office and Secretary of State for Wales. These included: health services; education and training; fire and rescue services; highways and transport; housing; local government; social welfare; planning (except major energy infrastructure); economic development; the environment; agriculture; fisheries; forestry; and culture, including the Welsh language and ancient monuments.

In February 2000, Alun Michael, the Assembly’s first First Secretary, resigned in an attempt to avoid a vote of no confidence. Michael was replaced by Rhodri Morgan who, in October 2000, formed a coalition between the Labour and LibDem Assembly Groups that would lead to major changes to the devolved administration. Thus, in 2002, AMs backed a set of reforms that, as Morgan himself put it, “stretch[ed] the elastic” of the 1998 Act (Trench, 2010: 123). Coupled with the renaming of ‘Secretaries’ as ‘Ministers’, there was a *de facto* “Westminster-style split” between the legislature – the National Assembly for Wales – and executive – the Welsh Assembly Government (Griffiths & Evans, 2012: 481).

Arguments that further powers than those included in GoWA 1998 should be devolved to Wales started before the Assembly even opened (Moon, 2014), and one of the first commitments of Morgan's new Government was the establishment of an independent commission to examine the powers and electoral system of the National Assembly. The resulting commission was chaired by the Labour Peer Ivor Richard who was damning in his critique of the existing "grotesque" system (Wyn Jones & Scully, 2012: 43). The new devolution settlement envisioned by his commission's report entailed: (i) the legal separation of the legislative and executive; (ii) an Assembly with full primary legislative powers; (iii) with 80 members elected by Single Transferable Vote (Richard Commission, 2004: 262).

The Labour Party's initial reply to these proposals – a report entitled *Better Governance for Wales* (Welsh Labour, 2004) – was a product of the party's internal divisions. It paid minimal attention to the devolution of primary legislative powers and emphasised that transferring any primary law making powers "would also require a fresh Government of Wales (Amendment) Act and would be subject to a post-legislative referendum" (Welsh Labour, 2004:7). Instead, it framed the topic of more powers in terms of how the Assembly's secondary legislative powers could be extended within the existing arrangements (ibid: 5-8).

Considering this response, the UK Government's subsequent White Paper, also named *Better Governance for Wales* and published following the 2005 General Election, was 'a

major surprise' (Wyn Jones & Scully, 2008: 63). The White Paper set out how the Assembly would be enabled to pass primary legislation in already devolved areas, subject to Parliament's consent, with, in the longer-term, the 'unlocking' of direct primary powers over all areas previously devolved in 1998, subject to a referendum (Wales Office 2005: 9). Primary legislative powers would thus be devolved to Wales – albeit on a piecemeal basis, under a different name.

The new mechanisms used to devolve powers were Orders in Council which conferred legislative competence on the Assembly – latterly, they would become known as Legislative Competence Orders (LCOs). These were a twisting, stretching and strengthening of a temporary mechanism suggested by the Richard Commission to enable the Assembly to gain vital experience in drafting legislation in preparation for the recommended transfer of full legislative powers by 2011 (Wyn Jones & Scully 2012: 45). Instead of being a temporary mechanism for improving the Assembly's skills in drafting legislation, however, it became the way the Assembly legislated for Wales.

Born out of *Better Governance for Wales* was the *Government of Wales Act 2006* (GoWA 2006), the second piece of devolution legislation for Wales in less than ten years. The 2006 Act put the UK Government's policy intent outlined in the White Paper into action and implemented the LCO system, marking a crossing of 'the Rubicon of primary legislative powers' (Wyn Jones & Scully 2012: 22). As well as implementing the more minor, uncontroversial reforms, it provided for a referendum to unlock the 'move to

another, more expansive, form of primary law making' (ibid) through the move to Part IV of GoWA 2006.

A central component of the 'One Wales' coalition agreement between the Labour and Plaid Cymru Assembly groups following the 2007 Assembly elections was the implementation of this referendum. Held in 2011, the referendum saw 63.49% of voters favouring the shift to Part IV. This vote subsequently ended the debate over whether the National Assembly *should* have primary legislative powers, igniting another debate over which model of legislative devolution was right for Wales – the existing conferred model, or a reserved powers model. These arguments have largely played out around the failures of the post-referendum system. To understand this system and why it was seen as an improvement over the LCO system, the following section outlines how both functioned and their major problems.

THE GOVERNMENT OF WALES ACT (2006)

GoWA 2006 marked a major watershed in Welsh devolution. For the first time it granted the National Assembly for Wales the ability to pass primary legislation without the requirement of a referendum, via 'Measures'; in effect Acts of the Assembly, albeit by a different name. The Assembly would be able to gain these new Measure-making powers via either an Act of the UK Parliament, or Legislative Competence Orders. (See Table 1 for a summary of key terminology related to GoWA 2006).

Table 1: Key Terminology regarding GoWA 2006.	
Part III	Set out system by which legislative competency for specific 'Matters' within a series of broad policy areas (labelled 'Fields' -listed in Schedule 5) could be transferred to the National Assembly via the LCO system, allowing it to pass laws, known as 'Assembly Measures', with regards to these Matters.
Part IV	Provides the National Assembly with full legislative competency over multiple, broad policy areas (labelled 'Subjects' – listed in Schedule 7) over which it can pass laws, known as 'Acts of the Assembly'.
Schedule 5	Listed the 20 'Fields' within which the National Assembly had powers to make laws on any "Matter" under Part III - was amended incrementally.
Schedule 7	Superseded Schedule 5 with move to Part IV; lists the 20 'Subjects' over which the National Assembly has full law making powers (excluding areas listed as an Exception under the Act).
Section 95	Section of Part III: detailed process for transferring powers to the National Assembly for Wales under the LCO system.
Section 109	Section of Part IV: allows for the legislative competence of the National Assembly to be modified by amending Schedule 7 via an Order in Council.

In the first case, powers could be transferred to the National Assembly through an Act of Parliament by changing the legislative competencies of the former via amendments to Schedule 5 of GoWA 2006, which listed the 20 fields over which the devolved body held legislative power. Although such changes could be made without the consent of the

Welsh Government, the UK Government sought the agreement of Welsh Ministers when conferring additional legislative competence on the National Assembly – a process set out in a pre-2011 referendum version of Devolution Guidance Note 9 (Ministry of Justice, n.d).

With regards to the LCO system, these were a form of subordinate legislation which would, on an *ad hoc* basis, add 'Matters' (i.e. confer responsibility for policy areas) into the fields listed in Schedule 5 over which Measures could subsequently be made by the Assembly (Griffiths & Evans, 2012: 482). This process, set out in section 95 of GoWA 2006, "was unique to Wales, having no exact parallel in the other devolved administrations of the UK or internationally" (Ibid). The system's purpose was ultimately as a stopgap, meant to ensure devolution would move forward in Wales, but at a pace decided upon by MPs in Westminster (Trench 2010: 129). It is upon this unique system that the subsequent discussion focuses.

Explaining the LCO System

As set out in Section 95 of GoWA 2006, the process for transferring powers to the National Assembly for Wales appeared clear-cut. In simple terms, the National Assembly must approve an Order to add a Matter, or Matters, to Schedule 5. If approved, the First Minister must inform the Secretary of State for Wales (National Assembly for Wales n.d) who must, in turn – within 60 days – either lay the approved Order before Parliament or inform the First Minister in writing as to "the Secretary of State's refusal to do so and the reasons for

that refusal" (GoWA 2006 s. 95(7)). In reality, the practices that grew up around the LCO system seem quite different to what is actually set out in Section 95. These processes are illustrated in figure 1 below: (i) there would be inter-governmental discussions over whether the UK Government was content in principle for competence to be transferred to the National Assembly – with a draft LCO being formulated; (ii) this draft would then undergo pre-legislative scrutiny in the National Assembly and at Westminster, with the Welsh Assembly Government making amendments to the draft Order as a consequence of the scrutiny reports – if deemed appropriate; and, (iii) the Order would be laid in the National Assembly for approval, and submission to Parliament for approval, followed by the consent of the Privy Council.

In the Assembly, Standing Orders were written so that the Welsh Assembly Government, an Assembly Committee, or an individual Assembly Member could initiate proposals for an LCO. In Westminster too, during Second Reading, it was confirmed that what had been suggested in the White Paper would be the norm; all LCOs would be "produced as proposals and available for pre-legislative scrutiny in both the Assembly and Parliament" (Griffiths and Evans 2012: 484). The draft Order would therefore undergo pre-legislative scrutiny by an Assembly committee, the Welsh Affairs Committee and the Lords Select Committee on the Constitution; the Welsh Assembly Government would then lay a revised Order (if necessary) before the Assembly for an affirmative vote.

Figure 1. LCO Process

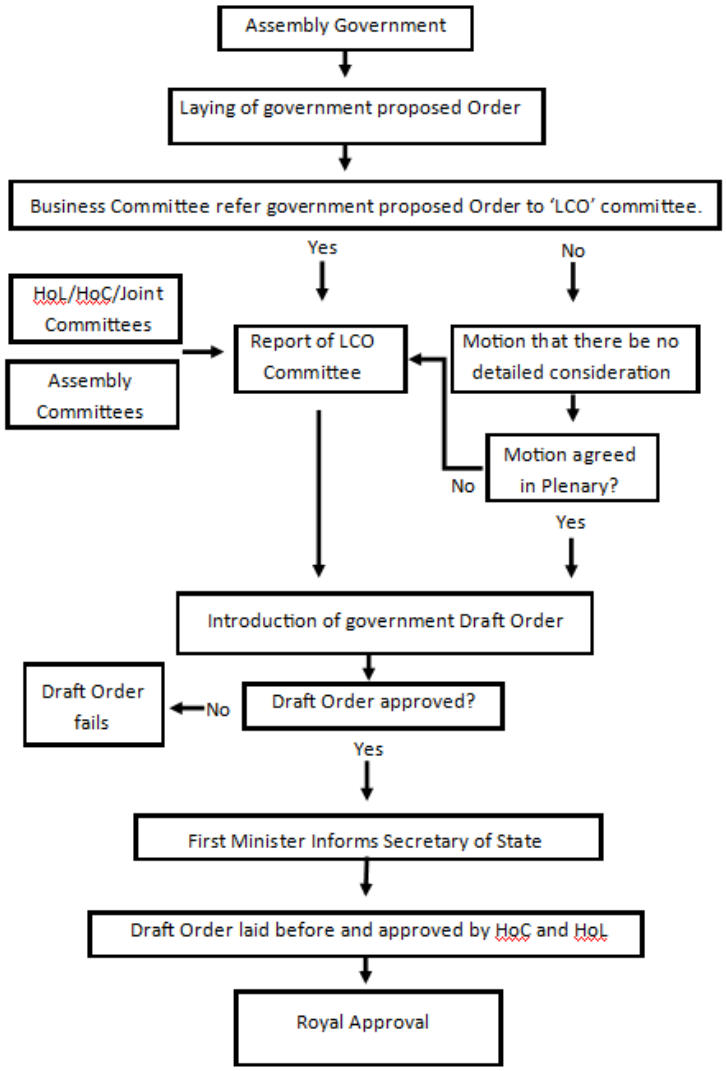

Figure adapted from National Assembly for Wales (nd. 2).

The pre-legislative scrutiny which was undertaken by MPs on the Welsh Affairs Committee was one of the major sticking points for the whole LCO system (Cole & Stafford, 2015: 39); the fact that this role was not enshrined in law goes someway to explaining why. An MP's role was uncodified and vague, creating a very real point of friction between MPs, AMs and both governments. As a consequence of this pre-legislative examination by MPs, LCOs were 'subject to greater scrutiny than almost any

other type of statutory instrument' (ibid: 489). This may have made for good Orders; indeed, the Welsh Affairs Committee argued that 'there is no doubt that almost all the LCOs passed into law have been improved as a result of the scrutiny process' (WAC, 2010: 3). Others, however, saw this as an overly long bureaucratic process that led to LCOs only being passed in non-controversial areas (Deacon, 2012: 141). Indeed, one criticism regularly levelled at the LCO process was its length. Due to the pre-legislative scrutiny in particular, but not exclusively, the whole process – from proposing an Order, to Schedule 5 being amended – could take between six months and two years to complete.

An attempt was made to clarify the roles and responsibilities of all stakeholders in the process itself in the form of Devolution Guidance Note 16 (DGN16); however, tensions remained over one key factor – scrutiny of Welsh Assembly Government policy. In both inter-governmental discussions and Parliamentary scrutiny the perceived inspection of Welsh Assembly Government policy was not deemed appropriate by AMs and the Welsh Assembly Government. Regardless, it occurred, despite DGN16 clearly stating that 'the primary aim of pre-legislative scrutiny for Parliament is to inform consideration of the appropriateness of conferring the legislative competence on the National Assembly' (Wales Office, n.d1). LCOs, as understood by the Welsh Assembly Government and DGN16, were a 'principles' argument – 'Is it right for the National Assembly to have the power to legislate?' (Interview senior civil servant in Constitutional Affairs department, 2014) – and as such could be separated out of the policy. However, some MPs scrutinising LCOs became notorious for asking directly about the Welsh Assembly

Government's policy aims – not something supposedly appropriate when following DGN16. This raised clear questions about the appropriateness of MPs, elected to a separate legislature, scrutinising the executive of a legislature in which they do not sit. However, it is admittedly no easy task to scrutinise the 'appropriateness of conferring the legislative competence' if actors do not know what is going to be done with those powers. This was the regular balancing act performed during the process of taking an Order through (ibid). During the Third Assembly, MPs were thus empowered to scrutinise the National Assembly and its executive in a way they had been unable to do during the period of 1999 to 2007 – explaining the 'significant and largely negative political comment' the system attracted (Griffiths & Evans, 2012: 482).

Welsh Government civil servants interviewed describe how, especially in the early period of the system's existence, there were cases where the UK Government wanted to know the policy purposes of the LCO; essentially, what the Welsh Assembly Government were going to do with the powers, in policy terms, once they were granted them (Interview with senior civil servant in Constitutional Affairs department, 2014). This aspect of the LCO system thus gave the UK Government an effective 'policy veto': if it did not like what the Welsh Assembly Government was proposing to do, it would not allow it. This was the case at a time when Labour were in power in both Westminster and Cardiff, raising questions as to whether the system would have survived long in a context of party political incongruence, where governments of different ideological hues governed in either place (see: McEwan, Swenden & Bolleyer, 2012).

There is some debate in the literature as to which method of amending the Assembly's legislative competence was used more frequently. The All Wales Convention's report stated that, '[s]ince May 2007, more Matters have been added to Schedule 5 through the UK Framework Bill route than through the LCO route' (2009: 27). This is challenged directly by the House of Commons' Welsh Affairs Select Committee in their 'Review of the LCO Process' who state that 'simply counting the number of Matters added to Schedule 5 by various means does not necessarily give a true picture of the extent of legislative competence transferred' (WAC, 2010: 32).

Both of these reports were written before Part IV of GoWA 2006 had been implemented; writing in 2012, however, Griffiths & Evans (2012: 485) note that the number of 'matters added by Act of Parliament were approximately the same in number as those added by LCOs.' It is also worth noting that possibly the most iconic piece of legislation passed during the Third Assembly – charging a five pence levy for single use carrier bags – was actually a regulation passed under powers granted to the National Assembly by an Act of the UK Parliament (*The Climate Change Act 2008*), thus, bypassing the LCO system entirely (Deacon, 2012: 141). Nevertheless, what this arguably shows is the inherent flexibility in GoWA 2006; competence could be devolved in a tailored fashion. What it certainly meant, however, was that whichever route was used, Schedule 5 clearly stated the legislative competence conferred upon the National Assembly.

Having outlined how the LCO process worked and critiques of the system, it is clear the system was flawed. Griffiths and Evans (2012: 482) celebrated its supersession with the shift to Part IV as 'a merciful end to a bureaucratic and cumbersome process'. Miers (2011: 27) characterised the new powers conferred by the referendum as representing 'a qualitatively different constitutional settlement for Wales', in comparison to that provided under Part III. What is also apparent, however, is that the main issues associated with the LCO system – pre-legislative scrutiny and 'policy vetoes' – were not part of the 2006 Act itself. Rather, it was the processes that grew up around the system which presented the biggest problems for the LCO system as a whole. Indeed, for all their flaws, one key thing the LCO system *did* provide was clarity around the powers held by the National Assembly. As the following section demonstrates in its analysis of the post-2011 political system, this was a major benefit for policymaking, ultimately lost with the shift to direct legislative powers unlocked in Part IV of GoWA 2006.

Benefits of the LCO System

Three key positives can be highlighted from the old LCO system:

(i) it prescribed legislative certainty;

(ii) there was a presumption in favour of devolution;

(iii) and inter-governmental disagreements were 'frontloaded'.

Each of these positives is explained below, detailing how they were lost following the unlocking of primary powers in 2011.

(i) Legislative certainty

As emphasised throughout, devolution in Wales has, since the 1998 Act, been based on the conferred powers model. The National Assembly's legislative competencies are listed in GoWA 2006. Initially, these competencies were increased at *ad hoc* intervals under Schedule 5 with the precise nature of these competencies – i.e. the specific 'Matters' within a broad 'Field' over which power was conferred – clearly set out as part of the completion of the LCO process (Trench, 2010: 129). With the move to Schedule 7, however, the post-2011 model sets out the legislative competence of the Assembly in broader terms (see Silk Commission, 2014: 17) introducing ambiguity into the system. As Welsh Government civil servants involved in the LCO system agreed when interviewed, the move to Schedule 7 has, thus, not reduced the scope for inter-institutional disagreement within the policy making process. In fact, it has actually increased it. What has changed is the nature of the disagreement – from a principled argument over whether the Assembly *should* have the powers, to an argument over whether the Assembly *has* the powers.

This is because Schedule 7 does not clearly express the legislative competence of the National Assembly; with its multiple exceptions and presumptions 'there can be uncertainty as to whether a particular matter is devolved or not' (Silk Commission, 2014: 17-18). The current system thus does not prescribe legislative certainty – a problem which has presented the National Assembly and Welsh Government with many challenges when in the process of legislating, as the case studies outlined later demonstrate.

(ii) Presumption in favour of devolution

The unofficial 'policy veto' awarded to the UK Government and MPs under the LCO system was arguably contrary to the intended policy aims of GoWA 2006. Nevertheless, a constitutional cleverness of the 2006 Act was that it put into law that the National Assembly's competence would grow and not be a constant (Griffiths & Evans, 2012: 499). Schedule 7, by contrast, has only been amended twice since 2011 – in 2014 and 2015. The former of these amendments arguably reduced the National Assembly's competence and was done through a UK Parliamentary Act without the consent of either the National Assembly or Welsh Government (Welsh Government, 2014). The second amendment was done via a mechanism known as a Section 109 Order in Council[i] (see Table 1), in relation to legislative competence on sustainable development (Thomas, 2014). This shows that the Assembly's competence has more or less stayed the same, with it either being amended for a technical reason or without the consent of the National Assembly.

What the move to Schedule 7 thus, arguably, achieved was to create a scenario where there is no longer an expectation that amendments to the competence of the National Assembly should take place. It is true that the lack of flexibility seen during the Fourth Assembly could be put down to the work of the Silk Commission, which – as detailed below – had been looking at Wales' devolution settlement – and subsequently not wanting to change the settlement until their work was completed. Yet, even if this is the case, devolution following the 2011 referendum became more rigid; and while rigidity is not

necessarily a bad thing, in terms of Wales, with its imperfect conferred powers model, rigidity was clearly something to avoid. This is even more the case during periods of party political incongruence (McEwan, *et al*. 2012), when different parties are in power at the central and sub-national levels.

(iii) Frontloading of disagreements

Positive and constructive inter-governmental relations are essential in any constitutional system where powers are shared between different layers of government (Keating, 2012). The major difference between the LCO system and today's set up is *the timing* of when these relations become important. As addressed earlier, the difficulties of the LCO system did create problems for the effective working of the policy making process. The problems in the new post-2011 system, however, are arguably more intractable.

Under the LCO system, the UK Government remained 'a major governmental player in its own right' (Trench, 2007: 11), increasingly taking on a role 'policing' Wales' devolution settlement. The concept of an 'unofficial veto' at Westminster is meant to have evaporated with the powers unlocked by the 2011 referendum. As previously discussed, however, what has changed is the nature of the disagreements: specifically from a question of *should* the Assembly have these powers, to the question of whether the Assembly *has* these powers. Also changed is the time at which these arguments occurred. It is within these shifts in the question asked and its timing that the aforementioned veto has simply re-emerged in the form of a 'competence dispute'.

With regards to sound policy making, under the previous system, any 'should' argument would always take place at the beginning of the process. This could lead to inter-governmental disagreements over competencies, and subsequently delays between government departments (WAC, 2010: 26). As addressed earlier, there could be problems with piloting an LCO through the pre-legislative scrutiny. Nevertheless, the recurring theme was that all disagreements were exclusively at the *beginning* of the process and settled at its conclusion (Interview with senior civil servant in the Constitutional Affairs department, 2014).

By contrast, currently disagreements can occur at any point in the policy making process; be this during initial discussions over a Bill, if Minister of the Crown consent were required, or after a Bill is published and the UK Government becomes aware of it (maybe having issue with the content). It is also possible that, at the end of the process and once a Bill has been passed by the National Assembly it will be referred to the Supreme Court by the UK Government – as has indeed been the case. This is quite different from the LCO system, when all the disagreements over what powers the devolved body should and would subsequently have, were ironed out in the process of devolving competencies and the National Assembly and Welsh Assembly Government would be given the 'green flag' to actually legislate (Interview, 2014).

CASE STUDIES: BILLS IN THE BAY

The problems that have arisen in the policy-making process following the loss of these positive elements of the LCO system are illustrated through two major cases of Welsh Government legislation created under the new post-referendum system, in which it is questionable if the problems faced by the National Assembly and Welsh Government would have been averted if the they were still working under the arrangements set out in Part III of GoWA 2006. These are the cases of the *Agricultural Sector (Wales) Bill* and the *Social Services and Well-being (Wales) Bill.*

This study seeks to explain the sources of contention in each case and why they would not necessarily have happened before the 'unlocking' of powers following the 2011 referendum. In examining each case in detail, the inadequateness of the current system as a means of policy legislation is demonstrated alongside the need for a new system that allows the National Assembly to regain the three key positives lost from the move away from the LCO system, without abandoning the full and direct law making powers it has gained.

Agricultural Sector (Wales) Bill

The Agricultural Wages Board (AWB) for England and Wales was established by the *Agricultural Wages Act 1948*. The AWB had powers to set wages, holidays and terms and conditions for those who worked in the agricultural sector in England and Wales

(Agricultural Wages Act 1948 s3(1)). Quite apart from the *National Minimum Wages Act 1998*, wages set under the 1948 Act are categorised into six bands with workers being paid the band which corresponds best to their skills and qualifications (Research Service, 2013: 1).

In 2010, the then Secretary of State for Environment, Food and Rural Affairs, Caroline Spelman, announced in a written statement that the UK Government would 'be seeking agreement with the Welsh Assembly Government to abolish the Agricultural Wages Board' and that they too were 'discussing with the Welsh Assembly Government the arrangements they wish to propose in respect of Wales' (Defra, 2010). The written statement also stated that the abolition of the AWB would be via the *Public Bodies Act 2011* (ibid.). Following consultation, despite the previous assurances that the Board would be abolished via the *Public Bodies Act*, in December 2012 the UK Government tabled an amendment to the *Enterprise and Regularity Reform Bill* which sought to abolish the AWB – circumventing the need for both consent from Welsh Ministers and the National Assembly (Welsh Government, 2012).

These moves by the UK Government to abolish the body through primary legislation marked the beginning of a major inter-governmental dispute over the abolition of the AWB. Consequently, the Welsh Government was forced to lay a Legislative Consent Motion (LCM) as required by the post-2011 Devolution Guidance Note 9 (Ministry of Justice, n.d.) - namely, that when a 'provision in a parliamentary Bill which is within the

legislative competence of the Assembly the Welsh Ministers will need to seek the Assembly's consent via a LCM' (Wales Office, n.d3: 9). The Welsh Government advised that the National Assembly should not agree to the LCM and consequently it was voted down – meaning that the Assembly did not give consent to the UK Parliament for it to legislate on its behalf (National Assembly for Wales, 2013a).

The major disagreement here was explicitly to do with legislative competence. The UK Government stated in October 2012 that it acknowledged that 'agriculture is devolved, but wage control is not' (Hansard, 2012). As a consequence, there was no need, as the UK Government saw it, to seek the Assembly's consent to abolish the AWB. On the other hand, both the Welsh Government and the Presiding Officer (2013) of the National Assembly, believed that the provisions relating to the abolition of the AWB (and subsequently the ability to create a new board) are within the National Assembly's legislative competence (Welsh Government, 2013a: 2). This is a prime example of what can be called the 'grey spots of GoWA' creating an inability to prescribe *legislative certainty*. The fact that the two governments could not agree over the interpretation of a constitutional Act would not have occurred previously when Schedule 5 clearly stated the National Assembly's legislative competence.

After the UK Government continued with the abolition of the AWB, the Welsh Government introduced the *Agricultural Sector (Wales) Bill* which aimed 'not to replicate the existing AWB for England and Wales but to create a modern and effective mechanism for

facilitating the Welsh Government's aspirations for the sector' (Welsh Government, 2013b: 6). The Bill would grant Welsh Ministers the power to set the wages of agricultural workers in Wales (National Assembly for Wales, 2013b). Yet, as previously outlined, the UK Government did not believe that provisions relating to the setting of wages for agricultural workers were devolved.

Ultimately, the argument over whether the *Agricultural Sector (Wales) Bill* fell within (or outside of) the legislative competence of the National Assembly – as noted by Elisabeth Jones (2013), the National Assembly's Director of Legal Services – is not "straightforward". The confusion stems directly from problems in the conferred powers model. When attempting to establish whether a provision of an Act of the Assembly is within the legislative competence of the Assembly, tests are required. These tests – the 'purpose' and 'effect' tests – are set out in section 108(7) of GoWA 2006. This holds that a provision is within legislative competence if: (i) it relates to a heading in Schedule 7; (ii) is for a devolved purpose; and, (iii) has an effect which is within a devolved area. These tests to see whether a provision is devolved or not are far from clear cut. Welsh Government civil servants interviewed describe the tests as getting "really confusing" (Interview, 2014).

The Agricultural Sector (Wales) Bill is a prime example where the two aforementioned tests were stretched to their limit. The Welsh Government argued the Bill relates to the devolved topic of agriculture, the purpose and effect of the provisions being within the

competence of the Assembly. Elisabeth Jones (2013: 2), director of Legal Services in the National Assembly, agreed, stating that there are credible arguments that the provisions are within competence when the purpose and effect tests are applied, while also giving credit to the UK Government's argument that the National Assembly has no competence over the topic of agricultural wages (ibid: 3). This is because Schedule 7 does not explicitly set out employment conditions and wages as a devolved matter. Therefore, as one of the main purposes of the Bill is to grant Welsh Ministers the power to set agricultural wages, it is clear how it could be argued that the Bill's provisions fall outside the legislative competence of the Assembly. It is these questions over the competence which meant that, following the Bill's passage, the Attorney General referred it to the Supreme Court to decide whether its provisions were within the legislative competence of the National Assembly (Clancy, 2013).

The Supreme Court heard the case on February 17 and 18 2014 (Supreme Court, 2014a) and delivered its ruling on 9 July 2014 supporting the Welsh Government's position, finding the Bill to be within the competence of the National Assembly for Wales. In their unanimous decision they stated that, as the field of agricultural wages is not explicitly excepted from the competence of the National Assembly, then the Bill and its provisions are devolved (Supreme Court, 2014b: 20-21). This can actually be interpreted as enabling a broader reading of Schedule 7, essentially giving the National Assembly *'the benefit of the doubt'* when it comes to legislating within those 'grey spots' and 'silent subjects'. This ruling provided an expansive interpretation of where and how the Assembly could legislate; what the example shows, however, is the difficulties faced when trying to

establishing legislative competence and the fact that inter-governmental disagreements can appear at any point during the legislative process in the National Assembly. By ending the *frontloading* of disagreements, the move to Part IV of the 2006 Act presents new challenges when legislating in Wales.

The 'grey spots' of GOWA 2006 also impacts on how UK legislation relates to Wales. As the AWB case shows different actors interpret the devolutions stature differently. A recent case of this has been in relation to the UK Government's *Trade Union Bill* where the UK Government insists that provisions relating to threshold for strike action are non-devolved, even if they impact on devolved services of health and education. The Welsh Government consequently brought forward the appropriate LCM and the National Assembly voted it down on 26 January 2016 (The Record, 2016). The Welsh Government has subsequently said that if the *Trade Union Bill* is passed in its current form, it will bring forward legislation to the National Assembly to repeal the provisions that it disagrees with, as they apply to Wales (BBC, 2016). The issue could thus end up in the Supreme Court because the matter (in relation to trade union laws) is neither explicitly devolved nor reserved in relation to Wales.

Social Services and Well-being (Wales) Bill

The *Social Services and Well-being (Wales) Bill* has not been subjected to the same amount of disagreement as the *Agricultural Sector (Wales) Bill*. It is another case, however, where the move to Part IV of the 2006 Act has created difficulties for supposedly uncontroversial Bills. The Bill aims to integrate and improve social services in Wales, as well as codify all social service legislation into one Act of the Assembly (Explanatory Memorandum, 2013c: 4). The Bill's provisions are devolved to the National Assembly under the headings of *Local Government* and *Social Welfare* in Schedule 7 to the 2006 Act – both areas being nearly wholly devolved to the National Assembly. It might consequently be expected, therefore, that the Bill would be able to progress through the Assembly with minimal chance of a competence dispute or need for discussions to be had with UK Government departments.

This was not the case, however, due to Parts 2 and 3 of Schedule 7. These note that 'an Act of the Assembly cannot remove or modify, or confer power… of a Minister of the Crown' unless it is 'incidental to, or consequential on any other provision contained in the Act of the Assembly' (GoWA 2006). This presented the *Social Services and Well-being (Wales) Bill* with substantial obstacles to overcome, as it resultantly required consent from several UK Secretaries of State in 'seven different departments' (Jones, C. 2013: 5). Under the LCO system, when a draft Order was being discussed the need for consent to amend Minister of the Crown functions would be discussed as part of the course (Interview, 2014). Now, however, there is still an imperative for the Welsh Government to discuss its Bills with the UK Government, even if the provisions of said Bill fall well within the competence devolved under Schedule 7. A key criticism often levelled at the LCO

system was that it was not built for a “mature”, “grown-up” devolved institution (Moon, 2014); the current system, wherein consent from a Minister of the Crown is required for certain provisions, is arguably not actually an improvement over the LCO system in this regard.

Because consent from the Ministers of the Crown had not been forthcoming (The Record, 2013), the *Social Services and Well-being (Wales) Bill* itself had to be amended prior to introduction on 29 January 2013, to make sure it fell within the legislative competence of the National Assembly. This is despite the Welsh Government beginning discussions over consents in February 2012, *eleven months prior* to the Bill’s introduction (Jones, C., 2013: 5). This is in marked contrast to Scotland, where no requirement exists for the Scottish Government to seek consent when amending Minister of the Crown functions.

Disputes over Minister of the Crown consents also saw the first Bill passed by the Assembly referred to the Supreme Court. The *Local Government Byelaws (Wales) Act 2012* was referred to the Supreme Court by the Attorney General for England and Wales before it could receive Royal Assent because it removed the functions of the Secretary of State for Wales – a Minister of the Crown – to confirm local government byelaws (George, 2012). The Court ruled in favour of the Welsh Government’s position, judging the removal of these powers – without the consent of the Secretary of State – as incidental to, and consequential on, the main purposes of the Bill – to streamline the making of local government byelaws by removing the need for their confirmation by a Minister (ibid.).

What the *Social Services and Well-being (Wales) Bill* and *Local Government Byelaws (Wales) Act 2012* highlight is the remaining anachronistic requirement to seek Minister of the Crown consent from when LCOs were the norm. Faced with an end to the presumption favouring continued devolution, Whitehall can now be slow to accept modifications and removals – as seen – or reject them altogether. This requirement under GoWA 2006 thus actually *prevents* the clean break between Westminster and Cardiff Bay promised by campaigners for a 'Yes' vote in 2011.

THE DRAFT WALES BILL (2015)

While the positives within the LCO system – at least relative to the post-2011 system – have yet to be recognised, the flaws in the current arrangement, illustrated by the previous legislative case studies, are widely accepted. In 2014, the independent Silk Commission published its second report, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, concluding that the existing devolution settlement created uncertainty over legislative competencies, advocating a move from a conferred model to a reserved model of devolution (Silk Commission, 2014: 38). As the Welsh Government's own submission to the Silk Commission claimed, '[a] reserved powers model would do away with most limbo areas. It would mean much more certainty about the basic subject-matter competence of the Assembly' (ibid: 30).

This argument was picked up by the Coalition Government in Westminster, which, in February 2015, produced a command paper entitled *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (UK Government, 2015). This set out what the Secretary of State for Wales, Stephen Crabb MP, called 'a strong blueprint for a new Wales Bill in the next Parliament' (ibid: 7), including consensus on the need to move to a reserved powers model of devolution in Wales. Following the 2015 election, on 20 October, the Conservative Government published the *draft Wales Bill* (Wales Office, 2015), based on these proposals.

Robert Thomas (2015) provided a comprehensive briefing on the draft Bill. The National Assembly for Wales (2015) Constitutional and Legislative Affairs Committee also published an extensive, critical report on the proposals. A report from the Wales Governance Centre at Cardiff University and Constitution Unit at UCL (2016) went further than the Constitutional and Legislative Affairs Committee by recommending Assembly Members reject the Bill. What became clear reading the draft Bill is that, in seeking to solve the problems caused by a lack of clarity over competence, instituting the proposed system would not have constituted an improvement over the conferred powers model existing under GoWA 2006.

This is because, while a move to a reserved powers model was to be generally welcomed, in trying to solve one problem, the Government created others, producing a set of proposals that would *decrease* the areas over which the National Assembly has

legislative competence, while introducing *new points of conflict* over devolved legislating. As Robert Thomas (2015) reports:

> 'The Welsh Government has published an analysis of 14 previously enacted Assembly Acts and concluded that they would have been outside competence under the draft Wales Bill. By comparison, the Wales Office has published its analysis and concluded that 20 of the 25 Assembly Acts could have been made in exactly the same way under the draft Bill. When the Welsh Government and the Wales Office arrive at such directly contradictory views … it can be legitimately asked whether anyone knows for certain what the implications of the draft Bill will actually be.'

A complex and intricate document, within the context of this article's argument, three problems with the draft Bill's proposals are key:

(i) the restriction of Assembly powers with regards to the Minister of Crown powers;

(ii) a decrease in legislative competence due to the proposal of extensive reservations; and.

(iii) the introduction of a 'necessity test' related to changes in law on reserved matters and private and criminal law.

These issues have been discussed in detail in Thomas' briefing document (ibid), but concise overviews of each are given below, explaining how they relate to the problems surrounding legislative competence discussed in the previous sections.

Problems with the draft Wales Bill

First, in relation to the Assembly's powers regarding Minister of the Crown powers, unlike GoWA 2006, the draft Bill did not include provision for removing or modifying a UK Minister's function in a devolved area where doing so would be incidental to or consequential on any provision within an Act of the Assembly, as is currently the case. Under the draft Bill consent would have been required whenever a Minister of the Crown power was altered. This change would reduce the Welsh Government's room to legislate by effectively reversing the judgement of the Supreme Court regarding the case of the *Local Government Byelaws (Wales) 2012* as described above. Further complexity was introduced by the fact that gaining such consent would be based on UK Ministerial discretion over whether or not to grant it – a decision that may change over time and with different Ministers – rather than a clear set of statutory rules. As such, space for confusion and conflict over the ability of the National Assembly to legislate would remain.

Second, the draft proposals would have cleaned up the 'grey spots of GoWA' that, as this article outlines, have been a key problem within the devolved legislative process – exacerbated by the move from Part III to Part IV of GoWA 2006 – as they produced confusion and conflict about what policy areas the Welsh Government actually has legislative competence over. This problem was demonstrated in the inter-governmental argument over the *Agriculture Sector (Wales) Bill 2014,* discussed above. In that case, a Supreme Court ruling decided that, while not specifically defined in Schedule 7, since agricultural wages were not explicitly exempt from the competence of the National Assembly, the Welsh Government could legislate on them. Nevertheless, whilst indicating

that the Assembly was to be given the 'benefit of the doubt' in such cases, the shift to a reserved powers model *should* provide clarity and end arguments over competence.

Here, the draft Bill *would* have produced greater clarity over legislative competence, but with the price of reducing the Assembly's freedom to legislate. This is due to the expansive and stringent nature of the proposed reserved powers, which included a number of general reservations – foreign affairs and defence, the Constitution, the Civil Service, the single legal jurisdiction of England and Wales, and political parties – as well as a list of more than 200 specific policy reservations. These reservations were seemingly drawn-up based on the Secretary of State for Wales, Stephen Crabb, asking Whitehall what *they* thought was conferred:

> "In terms of the specifics of the reservations, it was an iterative process right across Whitehall; the first time, actually, that every single Government department across Whitehall has been engaged in an exercise thinking about devolution in a structured and coherent way. The request that we put out to our colleagues in Whitehall was, 'What is your interpretation of the current devolution boundary in your departmental areas given the existing legislation?' Now, some of the information we had back—I took a decision to push back on them, saying, 'Do you really think that's reserved?' So, there was a bit of, you know, to-ing and fro-ing. So, the list that has been arrived at is not a fresh draft list, it has been worked through a bit, but I accept that there's probably quite a lot of scope for looking at that again and simplifying it…" (Crabb, quoted in NAW, 2015: 10)

Unsurprisingly, when Westminster/Whitehall were asked to interpret their own competence, the result was an extensive list that goes much further than the interpretation of the Welsh Government, National Assembly and arguably Supreme Court. The result of the proposed policy reservations would thus be to claw back power over a range of

‘silent subjects’ which the National Assembly had previously been granted ‘the benefit of the doubt’ over following the Supreme Court’s 2014 ruling. It must also be noted that even if the proposed reservations did go someway to improve clarity over what is and is not devolved, the additional tests and requirements set out in the draft Bill would actually have made it even harder to determine whether an issue is devolved.

This relates to the third major issue with the draft Bill - the ‘necessity test’, which would be applied ‘whenever the Assembly legislates to change the law on reserved matters and private and criminal law’ (Thomas, 2015). Such changes are necessary because, for the Assembly’s legislation to be effective, it needs to be legally enforced. The aim of the necessity test is, ostensibly, to provide the latitude necessary for the Assembly to make such changes where deemed necessary, while introducing a boundary that ensures that any modification of private or criminal law by an Assembly Act ‘could not go any further than is necessary to achieve its (devolved) purpose’ (ibid), preserving the single, unified legal jurisdiction of England and Wales.

If the goal is to decrease the confusion and conflict over where the National Assembly has legislative competence, this proposal was a failure. As Thomas (ibid) describes: ‘The applicable test is one of necessity, but what does this mean in practice? What would happen when the Welsh Assembly and UK Government arrive at different conclusions as to what is necessary? Which view should prevail?’ The ambiguity over what constitutes necessity and how the test would subsequently be interpreted and applied would have

left Assembly Acts open to legal challenge before the Supreme Court – one of the key problems with the existing settlement. Thus, by reducing the areas of legislative competence, new forms of confusion and the continued likelihood of legal challenges, the reserved powers model proposed in the draft Wales Bill would not have solved the problems introduced by the shift from Part III to Part IV of GoWA. Rather, a bad situation would be worse; it is hard to disagree with the Presiding Officer of the National Assembly's statement that the proposals, if implemented, would have amounted 'to a backwards step for the National Assembly and would not deliver a lasting constitutional settlement for Wales and the UK as a whole" (quoted in Thomas, 2015).

CONCLUSION

Debates around the division of powers within a devolved system are inevitable – even in federal systems such as the United States and Germany. However, the level of scope for disagreement within the current system has severely hampered Welsh governance. Faced with problems of clarity over competencies, the LCO system, flawed as it was, made the best of a bad situation by allowing powers to be conferred on the National Assembly in an *ad hoc* but detailed fashion that diminished the remit for inter-governmental disagreements and effective post-legislative vetoes by the UK Government. Under Part IV of the *Government of Wales Act 2006,* however, Schedule 7 is drafted in too general terms to provide clarity regarding competencies; the devolution settlement in Wales thus becomes less clear, more conflict prone and increasingly rigid.

The legislative lesson, lived daily in Cardiff Bay, has been that if powers are to be defined, they must be so as clearly, closely and as unambiguously as possible. LCOs were flawed in many ways; nevertheless, despite their cumbersome nature they provided significant certainty – a point ignored by most critics. The 'grey spots of GoWA' are a produce of Schedule 7 codifying increased ambiguity into the system. Westminster's repeated testing of the National Assembly's legislative competence in the Supreme Court is a clear sign of a failure of the system.

Recognising these facts is not to advocate a return to the *also* flawed LCO system. That this cumbersome and complicated mechanism provided greater clarity over legislative competence than a system where powers are held directly is symptomatic of the conferred powers model's failings and illustrates it as inferior to reserved powers models. As the Scottish and Northern Irish examples demonstrate, clearer means exist to provide clarity to Wales' devolution settlement. If the referendum in 2011 ultimately led to one step forward, two steps back, the *next* step towards clarity and avoiding conflict should be the long recommended (Silk Commission, 2013) and promised (UK Government, 2015) move to a reserved powers model – but one free of the problems identified in the draft Wales Bill.

Thankfully when the Wales Bill (Wales Office, 2016) was finally introduced at the House of Commons in June, it conceded ground on the three key problems in the draft Bill: The list of reserved matters was reduced; the need to gain Minister of the Crown consents to

govern lessened; and the necessity test abandoned. Critics identify new and continuing problems (George & Pritchard, 2016; Wyn Jones, 2016); nevertheless, the Wales Bill finally appears a step forward – if not a leap – for clarity over legislative competency.

The constitutional development of Welsh devolution is particularly troubled. The issues raised provide a more general lesson, however, important for current discussions over further devolution within England (Carter, 2014): some systems may deal with them better than others, but there are inherent problems regarding legislative competence within conferred powers models of devolution; nevertheless, reserved powers models are no panacea either.

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[i] "Section 109 Orders must be approved in draft by both Houses of Parliament and the National Assembly for Wales before they are made at a meeting of the Privy Council" (Wales Office n.d2,1)