

## **Supplementary Legislative Consent Motion in relation to the Localism Bill**

### Legal Briefing

Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



### **Context**

1. This legal briefing has been prepared because of the particular significance of this and the other Legislative Consent Motion (LCM) (relating to the Education Bill) currently before the National Assembly. They are significant for two reasons. Firstly, they are the first LCMs to come before the Assembly since it acquired its much broader legislative competence as a result of the referendum earlier this year. Secondly, they are the first LCMs to which the new Standing Order 29 applies.

2. Legislative Consent Motions became a feature of Assembly business in the Third Assembly following the acquisition by the Assembly of limited legislative competence in relation to matters set out in Schedule 5 to the Government of Wales Act 2006. They followed the precedent set in Scotland since 1999 where they were commonly referred to as Sewell motions. They indicate the agreement of the Assembly to legislation being made at Westminster on subjects for which legislative competence has been devolved. During the Third Assembly they became gradually more frequent as the Assembly's legislative competence grew. Following the extension of that competence to include all 20 subjects set out in Schedule 7 to the 2006 Act, it is likely that they will become an important feature of life in the Fourth Assembly as there is a much greater range of subjects on which the consent of the Assembly would be needed if the UK Parliament proposes to legislate on that subject in relation to Wales.

3. The new Standing Order 29 is based on Standing Order 26 of the Third Assembly, but contains one significant development in SOs 29.4 and 29.5, which provide that the Business Committee may refer a legislative consent memorandum to one or more committees for consideration and report (a legislative consent memorandum explains the background to the Bill and explains the basis for the LCM). As no committees (other than the Business Committee) have yet been established, it is not possible for these first two legislative consent memoranda to be given committee consideration. When LCMs are referred to committees, it is likely that legal advice such as this will

be given to the committees, and may be incorporated in the committee reports. In the absence of such committee consideration, this advice is being made available directly to all Members prior to the plenary debate.

### **The Localism Bill**

4. The Localism Bill received its formal First Reading in the House of Commons on the 13<sup>th</sup> December 2010, and has since completed its passage through the Commons. The Second Reading Debate in the House of Lords is scheduled for the 7<sup>th</sup> June.

5. The Bill generally applies to England only, but the National Assembly passed a Legislative Consent Motion on 8<sup>th</sup> February 2011 in relation to matters then relevant to Wales that came within the Assembly’s legislative competence –

*“To propose that the National Assembly for Wales, in accordance with Standing Order 26.4, agrees that the provisions relating to local government pay accountability, the abolition of the duty to promote local democracy, the abolition of the petitions duty, the discharge of homelessness duties into the private rented sector and the Tenant Services Authority reform in Part(s)1 and 6 of the Localism Bill, as introduced into the House of Lords on 13th December 2010, in so far as these provisions fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”*

6. Following the Referendum, the National Assembly has acquired much wider competence in relation to matters dealt with in the Bill, which nevertheless generally remains applicable to England. Accordingly the Welsh Government proposes a further LCM in relation to two aspects of the Bill - Fire and Rescue Authorities and “the community right to buy” (described in the Bill as “Assets of Community Value”).

### **Fire and Rescue Authorities**

7. The Bill contained provisions applicable to Fire and Rescue Authorities in England to provide a general power in relation to the exercising of their functions and purposes incidental to those functions. It also proposed to give them limited powers to charge for their services. A whole series of amendments were tabled by the UK Government to extend those provisions to Wales after legislative competence over Fire and Rescue Services was

transferred to the National Assembly as a result of the Referendum. It is therefore appropriate to propose a supplementary LCM.

8. The Explanatory Memorandum sets out the additional powers that the Bill would grant to Fire and Rescue Authorities, so they are not repeated here. However, it does not refer to the additional legislative powers, which are significant.

9. These additional legislative powers will enable Welsh Ministers to make orders modifying existing legislation with a view to removing restrictions which would otherwise limit the new general power of FRAs referred to in paragraph 7, and. They are set out in what will be a new section 5C of the Fire and Rescue Services Act 2004. These include power for Welsh Ministers by order to amend, repeal, revoke or disapply statutory provisions that prevent or restrict the relevant FRAs from exercising the general power or overlap with that general power. There is also a power to prevent FRAs doing anything specified in the order or to make it subject to conditions. A series of procedural provisions relating to consultation etc. follows.

10. There are also novel and highly significant provisions in the new section 5G which provide machinery for determining what Assembly procedure (negative, affirmative and super-affirmative) should apply to certain orders under section 5C. The usual arrangement is that the primary legislation specifies the procedure will apply to all delegated legislation made under particular powers. This approach has been criticised, however, because it takes no account of the substance of particular pieces of delegated legislation. If the affirmative procedure applies then it must always be followed even if the change to be made by the instrument is limited and gives rise to no issues of principle. Similarly, particular orders subject to negative procedures may give rise to important policy issues which can only be debated on a motion to annul.

11. The novelty of the new arrangements which would apply to orders relating to FRAs under the new section 5C is that when a draft order is laid before the Assembly it must be accompanied by a memorandum from the Welsh Ministers providing a reasoned recommendation as to whether negative, affirmative and super-affirmative procedures should apply and it will be open to the Assembly to decide on a case by case basis. This will be done by the Assembly, within 30 days (not including recesses or dissolutions) of the draft order being laid, imposing a requirement that affirmative or super-affirmative procedure should apply. If no such requirement is imposed, then negative procedure will automatically apply.

12. A requirement that affirmative or super-affirmative procedure should apply will be imposed by a resolution of the Assembly or a recommendation of an Assembly committee. The new clauses set out details of these alternative procedures and the calculation of time periods.

13. This is an interesting innovation of which Assembly Members should be aware, not merely because of its use in this particular case, but also because there may be moves to adopt it in future in the case of Assembly Bills where different procedures may be appropriate in relation to different statutory instruments made in reliance on the same power. This is a matter in which the new committee(s) that will be responsible for Constitutional Affairs under Standing Order 21 might well have taken a particular interest, and may wish to do so at a later date. This new approach may call for consequent changes to Assembly procedures as laid down by Standing Orders.

14. The charging power will be in the form of a new section 18A to be inserted in the Fire and Rescue Services Act 2004, and will be subject to limitations set out in the Act. The most significant of these is that there can be no charging for extinguishing fires, or protecting life and property in the event of fires, except in respect of fires “which are at sea or under the sea.” (section 18B(1)). Again there is an order making power for Welsh Ministers to disapply the charging power in relation to actions of a particular kind or for a particular period.

### **Assets of Community Value**

15. Chapter 4 of Part 4 of the Bill is headed “Assets of Community Value”; the LCM refers to “the Community Right to Buy”. Nevertheless, it is clear that they refer to the same thing.

16. The Welsh Government Memorandum in support of the LCM refers to an amendment to the Bill relating to the provision of advice and assistance by Welsh Ministers in relation to community right to buy provisions. This now appears as clause 89 of the Bill. This forms part of Chapter 4 (Assets of Community Value) of Part 4 (Community Empowerment) of the Bill. The remainder of Chapter 4 deals with list of assets of community value and lists of land nominated by unsuccessful community nominations. It provides for a moratorium on disposals of listed land and the payment of compensation as well as advice and assistance.

17. Whilst the Memorandum in support of the LCM refers only to the advice and assistance provisions, the Motion itself refers to “the community

right to buy” generally. This appears to express the scope of what the Assembly is asked to consent to more widely than is intended. The Government’s approach appears to be that the Motion itself is drafted in broad terms i.e. referring to whole Parts or Chapters of Bills in so far as they are within the Assembly's competence. The detail of exactly which elements of those Parts or Chapters are considered by the Government to be within competence and therefore covered by the Motion (in this case the advice and assistance elements of the CRB provisions) is explained in the Memorandum. It is understood that this practice is also followed by the Scottish Government in relation to its Legislative Consent Motions & Memos.

## **Legal Services**

### **National Assembly for Wales**

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