

MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT

CONSTITUTIONAL LAW: DEVOLUTION, WALES

Draft Legislative Competence Order relating to Housing

Introduction

1. The Government of Wales Act 2006 (“the 2006 Act”) empowers Her Majesty, by Order in Council, to confer continuing legislative competence on the National Assembly for Wales (“the Assembly”) to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred on the Assembly and subject to the provisions of the 2006 Act.
2. The Order in Council to which this memorandum relates is a draft Order in Council under section 95 of the 2006 Act. This memorandum has been prepared in accordance with Standing Order 22.32 and 22.33. It explains the background to and context of the draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009.
3. The draft Order would confer further legislative competence on the Assembly in the field of housing (Field 11 within Schedule 5 to the 2006 Act). It would amend Part 1 of Schedule 5 to the 2006 Act to insert a Matter relating to the disposal by a social landlord of land held or used for housing purposes.

Background

4. New legislative powers in respect of the specified “matter” will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures, which are based on Welsh priorities and timescales. These Measures will be subject to thorough scrutiny and approval by the Assembly.
5. Housing has been a devolved subject area for many years and the Assembly Government has wide ranging powers under the Housing Act 1985 (as amended) and the Housing Act 1996 (as amended).
6. The Assembly Government’s National Housing Strategy sets out a vision “that everyone should have the opportunity to live in good quality, affordable housing; be able to choose where they live and whether buying or renting is best for them and their families”. The Strategy seeks to focus on quality, choice and promoting sustainable home ownership.

7. The Assembly Government has already used its powers to make secondary legislation to develop a distinctive approach tailored to the particular circumstances of Wales which differ in significant respects from those in England. The previous Assembly approved a number of Statutory Instruments concerning Low Cost Home Ownership schemes (such as the Right to Buy and the Right to Acquire) to:
 - a. reduce the maximum discount from £24,000 to £16,000,
 - b. extend the number of rural areas where restrictions may be placed on resale of former Right to Buy properties, and
 - c. allow landlords a “right of first refusal” to repurchase properties offered for resale within 10 years of the original purchase under the Right to Buy/Acquire.

8. The Assembly Government has also taken action in a number of other areas concerning affordable housing. These include:
 - a. revised Planning guidance on Affordable Housing and Joint Housing Land Availability Studies
 - b. a local Housing Market Assessment Guide
 - c. an Affordable Housing Toolkit (which identifies the full range of powers and tools available to local authorities and their partners to maximise the provision of affordable housing)
 - d. increasing the Social Housing Grant programme by 72% over 4 years, and
 - e. a protocol to encourage the disposal of surplus Assembly-owned land for affordable housing.

9. The proposal for these powers is also made in the context of the limitations to the current settlement, which in some respects restricts the Assembly Government from tackling Welsh priorities and issues. In a number of areas the Welsh Assembly Government’s existing powers are constrained. The main limit to the current arrangements is that the Assembly has no express statutory power to vary the qualification provisions of the Right to Buy and Right to Acquire in order to meet the particular housing needs of people and communities in Wales.

10. Over 70% of Wales can be regarded as rural in character. The Assembly Government has taken a number of actions to assist the development of affordable housing in rural areas including support for Rural Housing Enablers and Community Land Trusts. However, in some communities very few properties remain in the social housing stock. Almost 60% of properties in Powys and Ceredigion have been sold under the Right to Buy/Acquire.

11. Since the introduction of the Right to Buy (in 1980) and Right to Acquire (in 1997) over 140,000 dwellings have been purchased by tenants in Wales. This equates to almost half the original social housing stock (excluding any new builds). Although the immediate effect of a tenant exercising these rights is a change in tenure from tenant to owner-

occupier, dwellings that would otherwise have become available for re-letting for social housing have been sold on the open market. This has substantially reduced the amount of social housing available for rent by people in housing need. This is a particular problem in areas of housing pressure.

12. There were 1,525 Right to Buy claims during the year from July 2007 to June 2008. However, in the quarter from April to June 2008 1,581 households were homeless and in priority need while 2,874 households were in temporary accommodation (including Bed and Breakfast). Despite the actions outlined above, homelessness remains at a significant level while the size of the social housing stock continues to diminish.
13. To take further action concerning affordable housing, the Welsh Assembly Government believes that additional powers are required to enable it to legislate by Assembly Measure under powers contained in the 2006 Act.
14. The "One Wales" programme of government of the Welsh Assembly Government includes a commitment to draw down legislative power to the Assembly in order to suspend the Right to Buy in areas of housing pressure.
15. This follows on from manifesto commitments put forward by both parties in the 2007 Assembly elections. The Labour manifesto contained a commitment to seek new legislative powers to be able to retain the pool of housing available for rent in areas of high housing need, as one measure to improve the availability of affordable housing. The Plaid Cymru manifesto contained a commitment to repeal the Right to Buy in housing hot spots where there is a shortage of rented accommodation.
16. The draft Order would confer legislative competence on the National Assembly for Wales to enable it to pass Assembly Measures in a defined area of policy relating to disposal by a social landlord of land held or used for housing purposes. This would enable the Welsh Assembly Government to develop Welsh solutions to address Welsh priorities.

Reports from Assembly and Parliamentary Committees on the Proposed Order

17. This draft Order has been prepared following scrutiny of the proposed Order to which this draft Order relates. The Proposed Affordable Housing Legislative Competence Order Committee of the National Assembly for Wales was established on 12 December 2007. It published its main report on 18 April 2008, and following revisions to the Order it published a supplementary report on 17 July 2008.
18. The Committee's main report made suggestions about the terminology in the document and requested that the Order should

specifically refer to Registered Social Landlords. The majority of the Committee agreed that the legislative competence sought should be conferred on the Assembly, and recommended that the Order should have a broader scope including provisions relating to affordable housing more generally. The Committee also requested that the Assembly Government consider how the planning system could support the expansion of affordable housing.

19. Following receipt of the Assembly Committee's main report, and with the agreement of the UK Government, revisions were made to the Order. These broadened the scope to include stock transfer, to amend the definition of social landlords; and to make some further technical changes.
20. The Welsh Assembly Government has recognised the need for planning policy to support measures to increase the supply of affordable housing. In addition to the actions set out in paragraph 8 above, the Assembly Government has recently requested that local authorities in Wales should prepare Affordable Housing Delivery Statements to bring together planning policy and housing delivery mechanisms. It is therefore considered that the requisite policies and powers are in place to use the planning system to deliver affordable housing.
21. The supplementary report of the Assembly Committee welcomed the redraft and the broadening of its scope but considered that this did not go far enough. However, the Welsh Assembly Government considers that the Order covers a defined area of competence which is sufficient to implement its current policy intent, while allowing some flexibility for future legislation.
22. The Welsh Affairs Committee published its report on the proposed [draft National Assembly for Wales \(Legislative Competence\) \(Housing\) Order 2008](#) on 14 October 2008. It supported the aim of the proposed Order but made a number of recommendations the thrust of which was to restrict the legislative competence to implementation of the immediate policy intent.
23. The Committee recommended that abolition of the Right to Buy/Right to Acquire should be specifically excluded from the scope of the draft Order. The Committee also made a number of other recommendations to amend the Order to reflect the policy intention including:
 - a. that suspension should only apply in areas of extreme housing pressure, and not across the whole of Wales;
 - b. the period of suspension should be time limited; and
 - c. applicants should demonstrate measures to improve the long-term prospect of meeting housing need.

24. The Welsh Assembly Government and the UK Government have agreed that it remains appropriate for the scope of the legislative competence conferred on the Assembly to cover all disposals of land held or used for housing purposes by social housing landlords. This is a discrete area of housing policy for which the Welsh Ministers already have executive responsibility. At the same time, power to abolish the Right to Buy was not an objective of the Welsh Assembly Government in seeking powers for the Assembly in relation to this area of policy. Amendments have been made in the draft Order in response to the Committee's recommendation to exclude abolition of the Right to Buy/Right to Acquire from its scope. The effect of these amendments is to limit the circumstances in which the Assembly could abolish the Right to Buy, to those where the Welsh Ministers and the Secretary of State are both in agreement. However the amendments do not limit the power of the Assembly to legislate in respect of the Right to Buy in ways which fall short of abolition, thus ensuring that the original purpose for which the powers were sought can be achieved. They would also allow the Assembly by Measure to disapply the Right to Buy in relation to particular types of property, such as new builds.
25. Other recommendations in the Committee's report, summarised in paragraph 23, relate to the detail of any proposal to suspend the Right to Buy, and therefore are considered to be more appropriate for the Assembly Government to address in the drafting of an Assembly Measure.
26. Three further changes have been made since the Order was considered by the Welsh Affairs Committee within article 2(1) of the Order (inserting Matter 11.1) in the definition of "social landlord":
27. Firstly, a reference to providers of social housing registered under Chapter 3 of Part 2 of the Housing and Regeneration Act 2008 has been added. This refers to a type of landlord introduced by the Act that would be based in England and registered by the Office for Tenants and Landlords, but which may have holdings in Wales.
28. Secondly, a person to whom a grant has been paid under section 27A of the Housing Act 1996 has been inserted. This section has not yet been commenced, but relates to the payment of grant to landlords other than Registered Social Landlords and therefore the reference was added for completeness.
29. Thirdly, reference to the Commission for New Towns has been removed. This body is in the process of abolition and holds no dwellings in Wales which would be subject to the Right to Buy.

Scope

30. The draft Order would amend Part 1 of Schedule 5 to the 2006 Act to insert a Matter under Field 11: housing. Matter 11.1 relates to the disposal by a social landlord of land held or used for housing purposes.

For the purposes of matter 11.1, a disposal of land held or used for housing purposes includes, in particular, a disposal of land to which any of the following applies-

- (a) a provision of Part 2 of the Housing Act 1985 (includes a disposal of land under section 32 (land held for housing purposes) and section 43 (disposals not within section 32) of the Housing Act 1985);
- (b) a provision of Part 5 of the Housing Act 1985 (the Right to Buy).
- (c) a provision of Chapter 2 of Part 1 of the Housing Act 1996 (includes disposal of land by a Registered Social Landlord and the right to acquire);
- (d) a provision of Chapter 4 of Part 1 of the Housing Act 1996 (includes disposal of land by a Manager appointed under Part 1).

31. This would enable the Assembly to bring forward Measures under Part 3 of the 2006 Act relating to disposal by a social landlord of land held or used for housing purposes, in particular a disposal of land to which any of the provisions outlined in (a)-(d) above apply.

32. The draft Order amends Part 2 of Schedule 5 to the 2006 Act, which deals with general restrictions on the power of the National Assembly for Wales to pass Measures. The amendment would prevent a provision of an Assembly Measure from abolishing the Right to Buy or the Preserved Right to Buy under Part 5 of the Housing Act 1985 or abolishing the right to acquire under Chapter 2 of Part 1 of the Housing Act 1996 in Wales. Provision has been made so that the following is not to be taken to be abolition of such a right:

- (a) Suspension of the right in particular circumstances;
- (b) Modification of the right so that it ceases to apply in relation to particular classes of dwelling.

33. The scope of the Order therefore includes competence to suspend the Right to Buy, the Preserved Right to Buy and the Right to Acquire in areas of housing pressure in line with the commitment in the Welsh Assembly Government's programme of government.

34. The draft Order also amends Part 3 of Schedule 5 to the 2006 Act, which deals with exceptions from Part 2. If both the Secretary of State and the Welsh Ministers consent, an Assembly Measure is not prevented from abolishing the right to buy or the preserved right to buy under Part 5 of the Housing Act 1985 or abolishing the right to acquire under Chapter 2 of Part 1 of the Housing Act 1996.

35. The principal purpose, therefore, of this Order is to confer legislative competence on the Assembly to pass Measures under Part 3 of the 2006 Act that will give effect to policies of the Welsh Ministers aimed at improving the availability of “affordable housing” in Wales, except that the Right to Buy/Acquire and Preserved Right to Buy cannot be abolished in Wales unless the Welsh Ministers and the Secretary of State consent to the provision. Improving the supply of affordable housing for both rent and purchase is an area of priority for the Welsh Assembly Government.

Geographical limits of any Assembly Measure

36. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly’s legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

Minister of the Crown functions

37. This proposed Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of Ministers of the Crown without the consent of the Secretary of State.

Conclusion

38. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the provisions of the draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008.

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12 January 2009