

National Assembly for Wales
Legislation Committee No. 4

The National Assembly for Wales
(Legislative Competence)
(Environment) Order 2009

Committee Report
June 2009



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Legislation Committee No 4

Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009

Committee Membership

Lorraine Barrett	Labour
Michael German (Chair)	Welsh Liberal Democrats
Jonathan Morgan	Welsh Conservative Party
Janet Ryder (Substituting for Bethan Jenkins)	Plaid Cymru
Joyce Watson	Labour
Kirsty Williams	Welsh Liberal Democrats

1. Introduction

Background

1. On 19 June 2007, Jane Davidson AM, the Minister for Sustainability and Rural Development laid before the National Assembly the proposed *National Assembly for Wales (Legislative Competence) (No.2) Order 2007* on environmental protection and waste management (“the original proposed Environment LCO”) and an Explanatory Memorandum.¹

2. On 3 July 2007, the Business Committee agreed to refer the original proposed Environment LCO to a committee for detailed consideration. The Environmental Protection and Waste Management LCO Committee was established specifically to scrutinise the legislation and given until 30 November 2007 to conclude its consideration and to report. It laid its report before the National Assembly on 27 November 2007.²

3. On 27 April 2009, Jane Davidson AM, the Minister for Environment, Sustainability and Housing (“the Minister”) issued a written statement about the proposed *National Assembly for Wales (Legislative Competence) (Environment) Order 2009*³ (“the current proposed Environment LCO”), whose provisions include a substantially revised version of those of the original proposed Environment LCO referred to in paragraphs 1 and 2 above. A copy of the current proposed Environment LCO is available at Annex 1. The Minister’s written statement explained that the current proposed Environment LCO was to be subject to pre-legislative scrutiny in the UK Parliament by the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee.⁴

4. Given that the Minister did not lay the current proposed Environment LCO before the National Assembly in April when it was presented to the UK Parliament, it appears to us that it was the intention of Welsh Ministers to rely instead on the scrutiny given to the original proposed Environment LCO in 2007. However, the current proposed Environment LCO was in fact subsequently laid before the National Assembly by the Minister, with an Explanatory Memorandum⁵, on 19 May 2009. On the same date, the Business Committee referred it to Legislation Committee No. 4 for consideration and set a deadline to report of 12 June 2009. This deadline was subsequently extended to 19 June 2009.

¹ Welsh Assembly Government, *Memorandum from the Minister for Sustainability and Rural Development, National Assembly for Wales (Legislative Competence) (No. 2) Order 2007, Proposal for a Government Legislative Competence Order relating to Environmental Protection and Waste Management*, June 2007

² Proposed Environmental Protection and Waste Management LCO Committee, *National Assembly for Wales (Legislative Competence)(No. 2) Order 2007 – Committee Report*, November 2007

³ Welsh Assembly Government, Minister for Environment, Sustainability and Housing, *Proposed Legislative Competence Order on the Environment*, Written Statement, 27 April 2009

⁴ The Secretary of State published *The National Assembly for Wales (Legislative Competence) (Environment) Order* by way of a command paper (Cm 7608).

⁵ Welsh Assembly Government, *Memorandum from the Minister for Environment, Sustainability And Housing, The Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009, Proposal for a Government Legislative Competence Order relating to the Environment*, May 2009

The committee's approach to scrutiny

5. Bearing in mind the nature of the consideration which had already been given to the original proposed Environment LCO (as well as the very limited time available to us to complete our consideration of the current proposed Environment LCO), we agreed to consider how the current proposed Environment LCO differs from the original proposed Environment LCO, the reasons for the changes and the implications of those changes.
6. The National Assembly's Chief Legal Adviser provided a briefing note to assist with our scrutiny. A copy of the briefing note is attached at Annex 2.
7. We invited organisations who responded to the original consultation exercise in 2007 to provide their views on the current proposed Environment LCO. A copy of our consultation letter is attached at Annex 3. We also issued a press release.⁶
8. Four consultation responses were received. A list of consultation responses is attached at Annex 4.
9. We took oral evidence from the Minister on 3 June 2009.⁷
10. Neither the House of Commons Welsh Affairs Committee nor the House of Lords Constitution Committee has as yet reported on the current proposed Environment LCO. We note however that when reporting on the proposed *National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, the House of Lords Constitution Committee made some preliminary references to the current proposed Environment LCO. Its comments on the Legislative Competence Order (LCO) relating to Carers are also relevant, to some degree, to the LCO which we are considering. We have therefore taken the views expressed in that report⁸ into account and made reference to those views at various points in this report.

⁶ National Assembly for Wales Press Release, *Environment Legislative Competence Order (LCO)*, 21 May 2009

⁷ A transcript of the evidence session is available at:

<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-1c4-agendas.htm?act=dis&id=131868&ds=6/2009>

⁸ Select Committee on the Constitution, *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, 5 June 2009, HL Paper 105

2. Changes to the Proposed Environment LCO

Overview of the changes

Differences between the original and current proposed Environment LCO

11. The differences between the two proposed LCOs are substantial. The Chief Legal Adviser summarised the position as follows:

“The current Proposed Order also seeks to add legislative competence in the Field of the Environment, expressed in broadly (with one substantial difference) the same terms as the additional Matters set out in the 2007 Proposed Order. However, it also contains much more extensive qualifications and exceptions to the proposed legislative competence.

Because the form in which these qualifications and exceptions are expressed is different from the list of exceptions proposed by the 2007 Proposed Order, an exact comparison is not possible. An idea of the scale of the differences can however be obtained as follows. The exceptions to the Environment Field set out in the 2007 Proposed Order take up 31 lines of one column of the two-column Table (equivalent to about a third of a page if set out in the same form as those in the current Proposed Order). The “exceptions” to the Environment Field set out in the current Proposed Order account for over four pages. In crude terms the “exceptions” to the competence to be transferred have expanded by a factor of about 12.”⁹

Evidence from the Minister

12. In her opening remarks the Minister explained that:

“On the substantive content of the proposed LCO, the matters remain essentially the same as those scrutinised by the Assembly in 2007, with competence to be conferred in relation to waste, pollution and nuisances. There have, however, been some changes to the way in which the matters have been drafted to define competence more precisely. We have clarified that matter 6.1 includes competence over the reduction of waste, which responds to one of the Assembly committee’s recommendations. Moreover, to clarify that the intended focus of the proposed LCO is waste on land, competence over waste in the territorial sea has been excluded under matter 6.1. That exception will ensure the integrity of the regulatory arrangements recently agreed with the UK Government in the context of the Marine and Coastal Access Bill. Matter 6.2 has been redrafted, and no longer includes the phrase ‘hazardous substances’. This is a drafting change only, because hazardous substances remain within the competence. Competence over nuisances is now in a separate matter, matter 6.3, to

⁹ Paragraphs 8 and 9 of the Chief Legal Adviser’s briefing note, attached at Annex 2.

provide greater clarity over the competence relating to pollution and nuisances.”¹⁰

13. She went on:

“The proposed LCO also contains a number of exceptions to clarify the extent of the competence. Exceptions are necessary to provide clarity over the extent of the competence that the Assembly is acquiring, and, as a general principle, we have sought to ensure in our discussions with the UK Government that legislative competence reflects the existing executive powers of Assembly Ministers. There are two main types of exception in the proposed Order. First, there are the fixed exceptions, which apply only to specific matters and form part of the definition of those matters. Secondly, there are the floating exceptions, which apply to all fields under Schedule 5 to the Government of Wales Act 2006. These are largely in areas that are not devolved but are potentially relevant to several matters. The floating exceptions in this proposed Order have been included on the basis that they are relevant to the matters being scrutinised today.”¹¹

14. The Minister also explained that the original proposed Environment LCO “was published before agreement with Whitehall was reached on the detailed content”¹² and that the current proposed Environment LCO:

“... now reflects subsequent detailed discussions. A number of changes have been made to the proposed Order to define competence more precisely.....the matters remain essentially the same as those scrutinised by the Assembly in 2007. The changes are to the way in which matters have been drafted in order to define competence more precisely.”¹³

15. She added that:

“...the exceptions are about clarifications made through dialogue with the UK Government to preserve the matters of the Ministers of the Crown.”¹⁴

16. When asked about the implications for the clarity of the law of the way in which the current proposed Environment LCO was drafted, the Minister said that

“...having that number of exceptions is all about increased legal clarity, because.... this is not a policy, it is legislative competence. Therefore, we are looking at the boundaries of the competence with as precise a set of arrangements as possible. The whole focus of the exceptions

¹⁰ RoP, [paragraph 10], 3 June 2009, Legislation Committee No. 4

¹¹ RoP, [paragraph 11], 3 June 2009, Legislation Committee No. 4

¹² RoP, [paragraph 17], 3 June 2009, Legislation Committee No. 4

¹³ Ibid

¹⁴ RoP, [paragraph 28], 3 June 2009, Legislation Committee No. 4

has been to give us that clarity, and to define the boundaries of the competence with greater precision.”¹⁵

17. The Minister also said that “...the approach to this Order is to get legislative competence to follow the current boundaries of what are devolved and non-devolved issues”¹⁶ and that in essence “...we are operating from the general principle that we want the proposed LCO to reflect the executive competence of the Welsh Ministers”.¹⁷

Matters

Matters 6.1, 6.2 and 6.3 – our view

18. We have noted and considered the changes that the Welsh Ministers have made to the Matters that are now contained in the current proposed Environment LCO.

19. We are pleased that the Welsh Ministers have responded positively to the recommendations of the Proposed Environmental Protection and Waste Management LCO Committee.

20. For that reason, we very much welcome that the old Matter 6.1 has been expanded to explicitly refer to “preventing” and “reducing” waste and that competence over radioactive waste (subject to an exception) is included.

21. The Minister explained that the splitting of the old Matter 6.2 (pollution, nuisances and hazardous substances) into new separate Matters 6.2 (pollution) and 6.3 (nuisances) was for reasons of clarity¹⁸ and also to make it easier to frame exceptions in a way which was tailored to the particular executive powers that Welsh Ministers have in relation to the different areas of pollution and nuisances.¹⁹

22. The Minister also explained that the omission in the current proposed Environment LCO of any specific reference to “hazardous waste” was only a drafting change and that “hazardous substances remain within the competence”²⁰ (i.e. under the rubrics of waste, pollution and nuisances).

23. We consider that splitting the old Matter 6.2 into new Matter 6.2 and new Matter 6.3, together with making specific reference to “improving” the environment in these Matters has helped provide some of the clarity requested by the Proposed Environmental Protection and Waste Management LCO Committee. However, we do have some reservations that this clarity has subsequently been clouded by the extent and nature of some of the fixed and floating exceptions provided to these Matters (see paragraphs 26 to 61 below). In expressing those reservations, we make it clear that we accept that the Minister considered that this approach was necessary

¹⁵ RoP, [paragraph 45], 3 June 2009, Legislation Committee No. 4

¹⁶ RoP, [paragraph 42], 3 June 2009, Legislation Committee No. 4

¹⁷ RoP, [paragraph 61], 3 June 2009, Legislation Committee No. 4

¹⁸ RoP, [paragraph 133], 3 June 2009, Legislation Committee No. 4

¹⁹ RoP, [paragraphs 59 – 61], 3 June 2009, Legislation Committee No. 4

²⁰ RoP, [paragraph 10], 3 June 2009, Legislation Committee No. 4

because of the uneven distribution of executive functions currently held by Welsh Ministers in relation to pollution and nuisances. Our reservations arise out of wider considerations, to which we refer later in this report.

24. We recognise that (subject to the vital issue of exceptions) the additional legislative competence to be conferred on the National Assembly by Matters 6.1, 6.2 and 6.3 is at least as broad as that which would have been provided for under the Matters (again leaving aside exceptions for the time being) in the original proposed Environment LCO.

25. We are content with the basic content of Matters 6.1, 6.2 and 6.3 and, as a result, the broad competence being conferred on the National Assembly. Nevertheless, we do have significant reservations about how this apparently broad competence will in practice be constrained by the very extensive fixed and floating exceptions contained in the current proposed Environment LCO. These issues are considered in detail in paragraphs 26 to 61.

Exceptions

Evidence from the Minister

26. In explaining the nature and effect of the different exceptions contained in the current proposed Environment LCO, the Minister adopted the terminology which has now evolved in relation to the provisions of LCOs. This classifies the various exceptions to the legislative competence which the Assembly would acquire under the proposed new Matters as being either “fixed” or “floating”. The distinction is that “fixed” exceptions apply to a single Matter (or to more than one Matter) within a single Field whereas “floating” exceptions apply across all Fields.

27. A feature of the current proposed Environment LCO which immediately catches the eye is that Article 3 adds a number of floating exceptions listed under Fields other than that of the Environment. The Minister explained that they “have been included on the basis of their relevance to the matters being scrutinised today.”²¹ She also indicated that the proposals for floating exceptions had come from the UK Government²² and that “the list of exceptions is about clarity in terms of our engagement with the UK Government”.²³

28. The Minister said that she would welcome our views on the various exceptions and whether they can be simplified.²⁴ In particular she invited our views on three issues:

- i) the appropriateness of the floating exception on the generation of electricity to be included in relation to Field 4, given that a number of fixed exceptions are already included in relation to energy issues.²⁵

²¹ RoP, [paragraph 75], 3 June 2009, Legislation Committee No. 4

²² RoP, [paragraphs 86 & 88], 3 June 2009, Legislation Committee No. 4

²³ RoP, [paragraph 88], 3 June 2009, Legislation Committee No. 4

²⁴ RoP, [paragraph 12], 3 June 2009, Legislation Committee No. 4

²⁵ Ibid

(The Minister expressed concern about the inclusion of the exception, suggesting that it “appears to be a belt-and-braces approach”²⁶ and an approach which the Welsh Ministers are not sure is required²⁷).

- ii) the fixed exception on the content and composition of fuel under Matter 6.2, which the Minister suggested “is very detailed, arguably too detailed in that it contains references to agricultural or forestry tractors.”²⁸
- iii) an overlap between the fixed exceptions under Matters 6.2 and 6.3, dealing with the regulation of specific activities in the territorial sea adjacent to Wales and the marine licensing framework under the Marine and Coastal Access Bill.²⁹

29. The Minister also suggested that we consider whether the exceptions (both fixed and floating) are “already covered to some extent by, for example, the protection given by the Government of Wales Act 2006, by the functions of the Minister of the Crown.”³⁰ This is a reference to the fact that paragraph 1 of Part 2 to Schedule 5 to the Government of Wales Act 2006 (“the 2006 Act”) ensures that a provision of an Assembly Measure cannot remove or modify or confer power to remove or modify any function of a Minister of the Crown without the consent of the Secretary of State (– see paragraph 7 of Part 3 to Schedule 5). So where, for example, a UK Minister has existing powers to regulate a particular industry those powers cannot be modified by an Assembly Measure without the consent of the Secretary of State.

The general approach to exceptions – our view

30. We have noted the Minister’s view that the exceptions are necessary to follow precisely the boundary between the current executive functions of the Welsh Ministers and of UK Ministers i.e. the boundary between devolved and non-devolved executive functions.

31. We have also noted that the legislation includes two different types of exceptions: those that are “fixed” (specific to a particular Matter or to the Matters in a particular Field) or those that are “floating” (applying across all Fields).

32. We welcome the Minister’s suggestion that there may be scope for some simplification of the exceptions and her request for our specific views on a number of points, as set out in paragraph 28 above.

33. The exceptions now included in the current proposed Environment LCO are much more numerous and detailed than the original proposed Environment LCO. In our view the effect of the volume and complexity of these new exceptions will be to make it extremely difficult for the public,

²⁶ RoP, [paragraph 21], 3 June 2009, Legislation Committee No. 4

²⁷ Ibid

²⁸ RoP, [paragraph 12], 3 June 2009, Legislation Committee No. 4

²⁹ RoP, [paragraph 13], 3 June 2009, Legislation Committee No. 4

³⁰ RoP, [paragraph 80], 3 June 2009, Legislation Committee No. 4

stakeholders and even relevant professionals to be clear where the boundaries of the National Assembly's legislative competence will lie.

34. We therefore strongly recommend that the Minister investigates ways in which the exceptions to the National Assembly's proposed legislative competence could be simplified with a view to making them easier to understand and apply. We make this as a general recommendation but also suggest a number of particular ways in which we believe this could be achieved in relation to the current proposed Environment LCO in paragraphs 35 to 41.

35. We have noted that Part 3 of the 2006 Act does not permit a Measure to modify a function of a Minister of the Crown without the consent of the UK Government. It is our view that it is these provisions within Part 3 of the 2006 Act which should be relied upon to ensure that Measures do not impinge on UK Ministers' powers (at least without their agreement) rather than duplicating the effect of this safeguard by numerous complex exceptions that are difficult to understand and may, in some cases, unintentionally constrain the legislative competence of the National Assembly to a greater degree than is necessary.

36. Accordingly, we recommend that the current proposed Environment LCO should be amended to remove exceptions (or parts of exceptions) that merely duplicate the "functions of a Minister of the Crown" restriction already contained in Part 2 of Schedule 5 to the 2006 Act.

37. In preparing a bid for legislative competence, we do not believe that it should be necessary to follow slavishly the present boundary between executive functions of the Welsh Ministers and UK Ministers, particularly when the boundary is not entirely clear or obvious, for example in relation to pollution and nuisances.³¹

38. In our view, a better approach would be to simplify and rationalise the current division between devolved and non-devolved functions in parallel with the acquisition of legislative competence. This could be achieved by the transfer of executive functions to Welsh Ministers at the same time as seeking corresponding legislative competence for the National Assembly.

39. We see no reason why negotiations between Welsh Ministers and the UK Government on the acquisition of legislative competence, which marks the first step in that process, could not also encompass discussions about the transfer of executive functions at the same time. We accept that it is unlikely that such an approach would eliminate all reserved executive functions in a devolved Field such as the Environment and in such cases those functions would continue to be protected by the restriction on modification of a Minister of the Crown function by a Measure to which we have referred above.

³¹ See paragraphs 21 and 23 above and RoP, [paragraphs 58 – 61], 3 June 2009, Legislation Committee No. 4

40. Unfortunately, we have not had the time to explore and examine these issues in the depth we would have liked to in relation to this current proposed Environment LCO.

41. So as not to constrain the transfer of legislative competence to the National Assembly and so that the boundaries of its legislative competence can more clearly be understood, we recommend that, in current and future negotiations with the UK Government over legislative competence, the Welsh Ministers also address the transfer of relevant executive functions.

Fixed exceptions – our view

42. The Minister specifically asked for our advice on the following exception relating to Matter 6.2 and whether it could be simplified:

“This Matter does not include—

(a) regulating the composition and content of fuel used in any of the following—

- (i) a means of transport;
- (ii) non-road mobile machinery;
- (iii) an agricultural or forestry tractor; “

43. In our view, this is a good example of an overcomplicated “belt and braces” approach in that the machinery referred to in (iii) would inevitably already be covered by (i) and (ii).

44. Although clearly a relatively minor matter, we therefore recommend that the fixed exception under Matter 6.2 (a)(iii) be deleted.

45. We have noted that many of the fixed exceptions relate to “regulation” of certain activities and industries. For example, “provision of postal services...”; “electricity activities, gas activities, oil activities...”; “oil and gas exploration...”; and “electronic communications and electronic communications networks”.

46. We understand and accept that the “regulation” of these industries, in the sense of imposing and enforcing rules which are special to their particular activities are not devolved. But it seems to us that “regulation” could be interpreted as any legislation which has any impact whatsoever on their activities even if it was of a general nature which did not affect them to any greater degree than any other industry.

47. The fact that “regulation” will indeed be interpreted in this second, broader, way was illustrated by evidence given to us by the Minister’s legal adviser in relation to the following exception to Matter 6.1 (which deals with waste):

“This matter does not include regulation of the provision of postal services by a person who holds, or is required to hold, a licence from the Postal Services Commission authorising the person to convey letters from one place to another (whether or not the licence relates to the services)”.

48. The Minister’s legal adviser told us that:

“As the exception is about the regulation of the provision of postal services by a person holding a licence under the 2000 Act, it is clear that the Assembly cannot impose further obligations on those persons or change that existing statutory regime.”³²

49. It is clear, therefore, that the effect of this and similar exceptions will be that the ability of the National Assembly to legislate so as to impose obligations in the Environment field may well be limited in a way which applies to certain industries and not to others. So, unless “regulation” is qualified or restricted in some way, these exceptions would be very far-reaching. As a consequence many important areas of potential legislation on waste, pollution and nuisances would have to leave important industries as “no-go” areas.

50. Again, rather than include such exceptions we see no reason why we cannot rely on the provisions of paragraph 1 of Part 2 of Schedule 5 to the 2006 Act to control the extent of the National Assembly’s legislative competence. Indeed, there is a strong argument for preferring this approach since it incorporates a mechanism for over-riding the restriction with the consent of the Secretary of State whereas these exceptions place anything which can be characterised as “regulation” of the industries or activities in question totally outside the National Assembly’s legislative competence.

51. We therefore repeat our recommendation that the current proposed Environment LCO should be amended to remove exceptions (or parts of exceptions) that appear to duplicate the “functions of a Minister of the Crown” restriction in Part 2 of Schedule 5 to the 2006 Act, with particular reference to those which relate to the “regulation” of specific industries or activities.

52. We have noted that competence to be conferred under Matters 6.1, 6.2 and 6.3 is very much constrained by exceptions relating to the regulation of activities involving depositing substances in the sea or on to the seabed – the rationale being that the activities which are excepted fall within executive powers governed by provisions contained in the *Marine and Coastal Access Bill* currently before the UK Parliament. The Minister explained that however desirable it might be that the National Assembly should also be able to legislate on such Matters this could not be achieved within the framework of a Bill to which Ministers for all parts of the UK had signed up (although with the National Assembly not having had any opportunity to influence that decision.)

³² RoP, [paragraph 125], 3 June 2009, Legislation Committee No. 4

53. Under the circumstances, there is little which we can usefully add by way of comment (particularly given the limited time available), other than to make the point that we hope that early consideration will be given as to ways in which the National Assembly's legislative competence can be extended to include those matters over which the Welsh Ministers will be exercising executive functions under the proposed Act.

Article 3 and floating exceptions – our view

54. We have looked carefully at the floating exceptions to be listed under Fields 4, 10 and 19 by virtue of Article 3 of the current proposed Environment LCO.

55. We have noted that the House of Lords Constitution Committee in its recent report on the Carers LCO has said:

“In future, LCOs should avoid rolling up specific provision on a subject and “exceptions to Matters” on a completely unrelated subject. For example, the 8th proposed LCO is ostensibly about enlarging the National Assembly's legislative powers under the Environment field (field 6), by introducing Matters relating to waste, pollution and nuisances; but it is also used as a vehicle for introducing exceptions of a general nature to unrelated fields such as Economic Development (field 4) and Highways and Transport (field 10). **We are concerned that “omnibus LCOs”, covering a disparate range of subjects, are less easily scrutinised by Parliament, the National Assembly, and the public.**”³³

56. We share the concerns of the House of Lords Constitution Committee. While it is not made explicit in the Explanatory Memorandum, we note that the Minister has said that exceptions contained in Fields 4, 10 and 19 are relevant to the Matters in Field 6. We accept that they may, in certain circumstances, be relevant to Field 6 but we are not convinced that the likelihood of this arising is sufficiently great to justify the inclusion in the current proposed Environment LCO of these exceptions, whose impact on future Matters to be added in the Fields in question (and other Fields) is unpredictable.

57. We are not persuaded that the inclusion in the current proposed Environment LCO of floating exceptions which are at least primarily relevant to Fields 4, 10 and 19 rather than Field 6 is justified.

58. If they provide safeguards in relation to the Field of Environment then we consider that it would have been more appropriate to include relevant fixed exceptions in Field 6 and to convert them into floating exceptions at such time as it is intended to seek to add legislative competence in Fields 4, 10 or 19.

59. **Accordingly, subject to our recommendation in paragraph 61, we recommend that the floating exceptions are removed from Fields 4, 10 and 19 and appropriate fixed exceptions included in Field 6 instead.**

³³ Select Committee on the Constitution, *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, 5 June 2009 HL Paper 105, paragraph 15

60. As regards the Minister's specific question about the floating exception related to generating electricity in Field 4, we take the view that this exception is already amply covered by fixed exceptions contained in Matters 6.2 and 6.3, this being another example of an unnecessary "belt and braces" approach.

61. **We therefore further recommend that, whatever approach is finally chosen in terms of the handling of floating exceptions, the floating exception relating to the generation of electricity in Field 4 should not be included in any draft Environment LCO that is brought forward.**

Definitions

Evidence from the Minister

62. The Minister also explained the rationale for the definitions contained in the current proposed Environment LCO, noting that they:

"...aim to clarify the scope of the competence because it is a broad proposed LCO and we believe that the scope needs to be as clear as possible. So, we believe that the definitions usefully serve to clarify competence and will therefore contribute towards making good law."³⁴

63. She also said that the use of definitions would not constrain the National Assembly's ability to make its own laws.³⁵

Our view

64. We have noted the Minister's view regarding the definitions contained in the current proposed Environment LCO. Whilst we have no specific comments (other than that in paragraph 66) to the definitions used, **we regret that we have not had more time to probe to what extent the need for such numerous definitions is justified.**

65. Nevertheless, in our view the effect of including so many definitions in the current proposed Environment LCO is to make it more complex. **We therefore recommend that the Minister reconsiders whether there is a specific need to include all these definitions in the current proposed Environment LCO, with a view to removing those that are deemed unnecessary as a result.**

66. One specific issue which we raised with the Minister was why it is necessary to include, in relation to the Matters to be added, a definition of "Wales" which is different from the one in section 158 of the Act itself. The Minister explained that this was necessary in order to facilitate the way in which the current proposed Environment LCO defines the competence conferred under Matter 6.1 in relation to the territorial sea. We accept that some device was needed to do so but we believe that an alternative way

³⁴ RoP, [paragraph 63], 3 June 2009, Legislation Committee No. 4

³⁵ RoP, [paragraph 65], 3 June 2009, Legislation Committee No. 4

could have been found to that of defining “Wales” in different ways in relation to different Matters in Schedule 5. For example, there could have been added to the phrase “Preventing, reducing, collecting, managing, treating or disposing of waste in Wales” a rider along the lines of “other than in the territorial sea adjacent to Wales”. This would have meant that “Wales” would have retained its standard Government of Wales Act 2006 definition, which includes the territorial sea adjacent to Wales.

67. As things stand, the current proposed Environment LCO will amend Schedule 5 to the 2006 Act in a way which means that “Wales” has a different meaning in that part of the Schedule which deals with Field 6 from that in any other part of the 2006 Act, including other Fields in the same Schedule. **We are concerned that this is a further potential source of confusion.**

Complexity of the legislation

Our view

68. As will be apparent from our recommendations above, we have concerns about the complexity of this piece of legislation, particularly in terms of the difficulties it creates for the public and stakeholders to gain a full understanding of the extent of the National Assembly’s legislative competence in this subject area. It is important that all laws are accessible and in our view this means ensuring that they are drafted as simply as possible.

69. We have noted that the House of Lords Constitution Committee, in its report on the Carers LCO referred to the 2006 Act as “in effect, a written constitution for the governance of Wales”.³⁶ As regards Schedule 5 of the 2006 Act, the Constitution Committee noted that the scheme for dealing with limits placed on Matters is “far from easy to follow” and reiterated concerns it has “about the intricacies of the legislative arrangements.”³⁷ One feature of this scheme which has now emerged is the classification of exceptions into “fixed” and “floating”. The Minister’s appearance before us was the first time that this terminology has been fully explained to an Assembly committee (although it was referred to by the Secretary of State when explaining the provisions of the Carers LCO to the House of Lords Constitution Committee³⁸). It would have made it easier for us to decipher this complex legislation had these relatively novel concepts, which are of key importance in understanding the current proposed Environment LCO, been explained in the Explanatory Memorandum.

70. In light of the current proposed Environment LCO, we share the concerns of the House of Lords Constitution Committee about the complexity of the legislative settlement that is developing under Schedule 5 of the 2006 Act and by implication, the complexity that is being added to the written constitution for the governance of Wales.

³⁶ Select Committee on the Constitution, *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, 5 June 2009 HL Paper 105, paragraph 17

³⁷ *Ibid*, paragraph 19

³⁸ *Ibid*, Appendix (correspondence with the Secretary of State)

71. As well as stressing the need to simplify the exceptions contained in Legislative Competence Orders, we would urge the Welsh Ministers to ensure that they communicate any changes to the way in which the National Assembly's legislative competence is defined as clearly and as widely as possible.

72. One way in which this could be achieved is through the Explanatory Memoranda which accompany proposed and draft LCOs. Related to this, section 3 of our report considers the Explanatory Memorandum provided in respect of the current proposed Environment LCO.

3. The Explanatory Memorandum

73. The Proposed Environmental and Waste Management LCO Committee stated in its report of November 2007:

“However, we have noted that some consultation respondents were unclear about the excepted Matters in relation to the proposed Order. We also note that the Explanatory Memorandum in relation to the proposed Order provided no information about the presentational change to Schedule 5 to the 2006 Act or about the individual excepted Matters in relation to Matters 6.1 and 6.2. The excepted Matters cover complex issues and need to be explained clearly to ensure that there is full understanding of the extent of the legislative competence being conferred on the National Assembly by a particular proposed (or draft) Order. Therefore, **we would encourage the Welsh Ministers to ensure that Explanatory Memoranda which accompany proposed (and draft) Orders explain clearly the reasons for including any excepted Matters and the purpose of those excepted Matters.**”³⁹

74. We are extremely disappointed therefore that the Explanatory Memorandum accompanying the current proposed Environment LCO did not, in our view, provide an adequate explanation of the purpose and reasons for many of the exceptions. As a consequence, the implications of the exceptions are not very clear, particularly in terms of what the National Assembly can or cannot do with the powers it is being given.

75. In addition, the Explanatory Memorandum missed an opportunity to explain the new concepts of fixed and floating exceptions and accordingly, as a way of bringing this issue to our attention in advance of our meeting on 3 June 2009.

76. When questioned in committee, the Minister provided a number of helpful explanations of the reasoning for certain exceptions. We believe that many of these explanations could and should have appeared in the Explanatory Memorandum. For example, the Minister explained that the implications of the fixed exception in Matter 6.1 relating to the postal services are that a Measure could include provisions dealing with unaddressed material being delivered to premises, providing the persons delivering it are not regulated by the Postal Services Commission.⁴⁰ Including such an explanation would have provided useful clarity on the reasons for the exception and helped identify more clearly the boundaries of the National Assembly’s legislative competence.

77. We therefore strongly recommend that the Welsh Ministers, in future, ensure that all Explanatory Memoranda which accompany proposed and draft LCOs explain clearly, and thoroughly, the reasons for the inclusion of exceptions and the practical implications they have

³⁹ Proposed Environmental Protection and Waste Management LCO Committee, *National Assembly for Wales (Legislative Competence)(No. 2) Order 2007 – Committee Report*, November 2007, paragraph 68.

⁴⁰ RoP, [paragraphs 121-30], 3 June 2009, Legislation Committee No. 4

on the scope of the laws the National Assembly will or will not be able to pass. The inclusion of such information is vital to ensure that the boundaries of the National Assembly's legislative competence are clearly understood by the public, stakeholders and relevant professionals.

78. As regards the issue of Explanatory Memoranda more generally, we are aware of a recent report by the Subordinate Legislation Committee⁴¹ which, although in a slightly different context, made recommendations about improving the level of information publicly available through such Memoranda. **The experience of our committee, and that of the Subordinate Legislation Committee, highlights the need for Welsh Ministers to produce Explanatory Memoranda which clearly explain the purpose and detail of any legislation that is to be scrutinised by Assembly committees. In our view this is fundamental to the principles of openness, transparency and good governance.**

⁴¹ Subordinate Legislation Committee, *Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers*, May 2009

4. The scrutiny process

Background

79. The original proposed Environment LCO was laid before the National Assembly in June 2007 and the Proposed Environmental Protection and Waste Management LCO Committee, which was established specifically to scrutinise it, reported in November 2007.

80. The Secretary of State published the current proposed Environment LCO for pre-legislative scrutiny in the UK Parliament on 27 April 2009.

81. On the same date, the Minister issued a brief written statement on the current proposed Environment LCO. She also circulated the current proposed Environment LCO to all Assembly Members together with an accompanying Explanatory Memorandum. However, it was not laid formally in the National Assembly until 19 May 2009, the week before the Whitsun recess. The Business Committee set a reporting deadline of 12 June 2009, although we subsequently secured an extra week to this deadline.

Our view

82. We accept that the original proposed Environment LCO has already been subject to scrutiny by a committee of the National Assembly. We also acknowledge that the circumstances surrounding this piece of legislation are relatively unusual in that, although a government proposed LCO, it did not receive Whitehall clearance prior to that original scrutiny.

83. **Nevertheless, we consider it to be vital that Assembly legislative committees are able to scrutinise essentially the same versions of proposed LCOs as those being considered by the Welsh Affairs Committee in the House of Commons and the Constitution Committee in the House of Lords.**

84. We believe this is important for maintaining the integrity of the scrutiny process for proposed LCOs and will ensure that Welsh Ministers and the Secretary of State are able to take account of conclusions and recommendations about the same piece of legislation when considering the form of a draft LCO to be laid for approval before the National Assembly and the UK Parliament.

85. We note the following recommendation made by the House of Lords Constitution Committee in its report on the Carers LCO:

“...we recommend that if in future the Secretary of State intends to introduce significant changes that might have constitutional implications to a proposed LCO after the completion of pre-legislative

scrutiny, the Constitution Committee should be alerted to this and invited to comment.”⁴²

86. We share these sentiments as they apply to the scrutiny process in the National Assembly. The changes between the original and current proposed Environment LCO are substantial in nature and **we are pleased that the Welsh Ministers laid the current proposed Environment LCO to allow it to be scrutinised by a legislation committee.**

87. However, we have some concerns about the length of time we have been given to undertake that scrutiny given:

- i) the nature of the changes made to the legislation and the complexity of the current proposed Environment LCO (a point demonstrated by the length of time taken for it to be cleared by Whitehall departments following the report of the Proposed Environmental Protection and Waste Management LCO Committee); and
- ii) the fact that, at our evidence session on 3 June, the Minister invited our views on a number of technical points.

88. **We consider that our ability to undertake the level of scrutiny merited by the substantial changes to this legislation has been significantly restricted by the delay in formally laying the current proposed Environment LCO before the National Assembly and the short timescale given to us in which to report.**

89. In addition, we have been hampered by a lack of clear and timely information from the Welsh Ministers fully explaining this complex piece of legislation. We acknowledge that the Minister wrote to all Assembly Members on 27 April 2009 offering a technical briefing session with her officials to explain the changes to the legislation in more detail. However, we consider that such detailed information should have been included in the Explanatory Memorandum to enable better understanding of the provisions and allow scrutiny of that information by the committee.

90. Of particular concern to us is that our reporting deadline of 19 June 2009 has given us under 3 working weeks in which to undertake our scrutiny, while we understand that the House of Commons Welsh Affairs Committee will continue to take oral evidence until 2 July, some 9 weeks after the legislation was published and referred to them by the Secretary of State for Wales.

91. **We therefore recommend that, if a proposed LCO is presented to the UK Parliament in a different form to that scrutinised originally by an Assembly committee, Welsh Ministers should lay the revised version before the National Assembly at the same time.**

⁴² Select Committee on the Constitution, *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, 5 June 2009 HL Paper 105, paragraph 8

92. Furthermore, we recommend that when setting deadlines for Assembly legislative committees to report on proposed LCOs, account should be taken, where possible, of the likely date of reporting by the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee. This will ensure that the ability of an Assembly committee to undertake thorough scrutiny is not curtailed.

93. In making this recommendation, we do not believe that such an approach would in any way frustrate the ability of the Welsh Ministers to seek legislative competence for the National Assembly and deliver their legislative programme. Indeed, the standing orders of the National Assembly include a mechanism to prevent this from occurring.⁴³ In our view, the role of a legislation committee is to scrutinise and test the legislation as thoroughly as possible to enable the National Assembly to fulfil its role as a legislature and this is the approach we have endeavoured to adopt in this case.

⁴³ Standing Order 22.31(iii) allows the Welsh Ministers to introduce a draft Order for approval by the National Assembly if a committee does not report by a deadline set by the Business Committee.

Proposed Order for pre-legislative scrutiny.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2009 No.

CONSTITUTIONAL LAW

DEVOLUTION, WALES

**The National Assembly for Wales (Legislative Competence)
(Environment) Order 2009**

Made - - - - - *2009*

Coming into force in accordance with article 1(2)

At the Court at Buckingham Palace, the day of 2009

Present,

The Queen’s Most Excellent Majesty in Council

In accordance with section 95(5) of the Government of Wales Act 2006^(a) a draft of this Order has been laid before, and approved by resolution of, the National Assembly for Wales and each House of Parliament.

Accordingly, Her Majesty, in pursuance of section 95(1) of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order as follows:-

Citation, commencement and interpretation

1.—(1) This Order may be cited as the National Assembly for Wales (Legislative Competence) (Environment) Order 2009.

(2) This Order shall come into force on the day after the day on which it is made.

(3) In this Order “the 2006 Act” means the Government of Wales Act 2006.

Amendments relating to the field of environment

2. In field 6 (environment) of Part 1 of Schedule 5 to the 2006 Act insert—

“Matter 6.1

Preventing, reducing, collecting, managing, treating or disposing of waste in Wales and disposing in the sea adjacent to Wales, out as far as the seaward boundary of the territorial sea, of waste collected, managed or treated on land.

(a) 2006 c.32.

This matter does not include regulation of the provision of postal services by a person who holds, or is required to hold, a licence from the Postal Services Commission authorising the person to convey letters from one place to another (whether or not the licence relates to the services).

This matter does not include regulation of decommissioned explosives that are outside the scope of the waste directive by virtue of Article 2(1)(b)(v) of the waste directive and are or have been—

- (a) held on behalf of the Crown for naval, military or air force purposes or for the purposes of the department of the Secretary of State having responsibility for defence;
- (b) held by or for the purposes of visiting forces.

This matter does not include regulation of radioactive material that is at military premises.

This matter does not include regulation of the decommissioning of offshore energy installations and related infrastructure.

This matter does not include regulation of the capture, conveyance and disposal of carbon dioxide as part of relevant carbon capture and storage.

This matter does not include regulation of the following activities in the territorial sea adjacent to Wales—

- (a) depositing any substance or object in the sea or on or under the seabed from any vehicle, vessel, aircraft, marine structure or floating container;
- (b) depositing any explosive substance or article in the sea or on or under the seabed;
- (c) incinerating any substance or object on any vehicle, vessel, marine structure or floating container.

See below for further provision about what this matter does not include.

Matter 6.2

Protecting or improving the environment in relation to pollution.

This matter does not include regulation of oil and gas exploration and exploitation in those parts of the territorial sea adjacent to Wales that are not relevant territorial waters.

This matter does not include—

- (a) regulating the composition and content of fuel used in any of the following—
 - (i) a means of transport;
 - (ii) non-road mobile machinery;
 - (iii) an agricultural or forestry tractor;
- (b) obligations upon persons who supply transport fuel at or for delivery to places in the United Kingdom to produce evidence showing the supply of renewable transport fuel;
- (c) making provision regarding the proportion of renewable energy consumed in transport, including the imposition of requirements relating to sustainability that determine whether any particular renewable energy is to be counted towards any renewable energy obligation or target;
- (d) provision of financial support in connection with—
 - (i) the production of renewable energy for consumption in transport, or
 - (ii) the use of that energy in transport,

including the imposition of requirements relating to sustainability that determine whether any particular renewable energy qualifies for financial support.

See below for further provision about what this matter does not include.

Matter 6.3

Protecting or improving the environment in relation to nuisances.

This matter does not include imposition of criminal or civil liability in respect of energy nuisances that consist of acts, omissions and states of affairs for which there is statutory authority, except criminal or civil liability which the Welsh Ministers have power to impose.

This matter does not include removal of relevant defences to, or relevant exclusions from, rules of law which impose civil or criminal liability in respect of energy nuisances, except those defences and exceptions which the Welsh Ministers have power to remove.

This matter does not include regulation of the emission of smoke, artificial light or noise from military premises.

This matter does not include regulation of electricity activities, gas activities, oil activities, and infrastructure that is necessary for carrying out any such activities.

This matter does not include regulation of oil and gas exploration and exploitation in the territorial sea adjacent to Wales.

This matter does not include regulation of electronic communications and electronic communications networks.

See below for further provision about what this matter does not include.

Not included in matters 6.1, 6.2 and 6.3

Provision made by health and safety regulations.

Not included in matters 6.2 and 6.3

Matters 6.2 and 6.3 do not include any of the following—

- (a) regulation of the contained use of genetically modified organisms;
- (b) regulation of the decommissioning of offshore energy installations and related infrastructure;
- (c) regulation of the following activities in the territorial sea adjacent to Wales—
 - (i) depositing any substance or object in the sea or on or under the seabed from any vehicle, vessel, aircraft, marine structure or floating container, or any structure on land constructed or adapted wholly or mainly for the purpose of depositing solids in the sea;
 - (ii) scuttling any vessel or floating container;
 - (iii) constructing, altering or improving works in or over the sea or on or under the seabed;
 - (iv) using any vehicle, vessel, aircraft, marine structure or floating container to remove any substance or object from the seabed;
 - (v) dredging;
 - (vi) depositing or using any explosive substance or article in the sea or on or under the seabed;

- (vii) incinerating any substance or object on any vehicle, vessel, marine structure or floating container,
- (d) marine licensing under Part 4 of the *Marine and Coastal Access Act 2009*.

Meaning of “pollution”

In this field “pollution” means pollution of the air, water or land which may give rise to any environmental harm, including (but not limited to) pollution caused by light, noise, heat or vibrations or any other kind of release of energy.

For the purposes of this definition “air” includes (but is not limited to) air within buildings and air within other natural or man-made structures above or below ground.

Meaning of “nuisance”

In this field “nuisance” means an act or omission affecting any place, or a state of affairs in any place, which may impair, or interfere with, the amenity of the environment or any legitimate use of the environment, apart from an act, omission or state of affairs that constitutes pollution.

Meaning of “relevant defence” and “relevant exclusion”

In matter 6.3, in relation to a rule of law which imposes civil or criminal liability in respect of an energy nuisance (“the unlawful nuisance”)—

“relevant defence” means statutory removal (however expressed, and whether conditional or not) of the civil or criminal liability in respect of an act, omission or state of affairs that is within the scope of the unlawful nuisance.

“relevant exclusion” means statutory exclusion (however expressed, and whether conditional or not) of an act, omission or state of affairs from the scope of the unlawful nuisance.

In those definitions, a reference to the scope of the unlawful nuisance is a reference to the class of acts, omissions and states of affairs that constitutes the unlawful nuisance.

Other interpretation of this field

In this field—

“agricultural or forestry tractor” means any motor vehicle, fitted with wheels on at least two axles or with caterpillar tracks, where the main function of the vehicle lies in its tractive power and it is specifically designed to tow, push, carry or power certain tools, machinery or trailers intended for agricultural or forestry use;

“electricity activity” means any of the following—

- (a) generating electricity at a generating station whose construction, extension or operation requires—
 - (i) the consent of the Secretary of State, or
 - (ii) the authority of an order granting development consent under the Planning Act 2008;
- (b) transmitting, distributing or supplying electricity;

and for this purpose, the reference to consent of the Secretary of State is a reference to consent under powers to regulate generation of electricity;

“electronic communication” means a communication transmitted—

- (a) by means of an electronic communications network, or
- (b) by other means but while in an electronic form;

“electronic communications network” means—

- (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description, and
- (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—
 - (i) apparatus comprised in the system,
 - (ii) apparatus used for the switching or routing of the signals; and
 - (iii) software and stored data;

“energy nuisance” means a nuisance that relates to electricity activities, gas activities, oil activities, or infrastructure that is necessary for carrying out any such activities;

“environmental harm” means any of the following—

- (a) harm to the health of humans and other living organisms;
- (b) harm to the quality of the environment, including—
 - (i) harm to the quality of the environment taken as a whole,
 - (ii) harm to the quality of the air, water or land, and
 - (iii) other impairment of, or interference with, the ecological systems of which any living organisms form part;
- (c) offence to the senses of human beings;
- (d) damage to property;
- (e) impairment of, or interference with, the amenity of the environment or any legitimate use of the environment;

“gas activity” means storing, conveying or supplying gas, except any such activity that is carried out by an individual for the domestic purposes of the individual;

“marine structure” means a platform or other artificial structure at sea, other than a pipeline;

“military premises” means premises which are—

- (a) occupied on behalf of the Crown for naval, military or air force purposes or for the purposes of the department of the Secretary of State having responsibility for defence, or
- (b) occupied by or for the purposes of visiting forces;

“non-road mobile machinery” means any mobile machine, transportable industrial equipment or vehicle with or without body work, not intended for the use of passenger – or goods – transport on the road, in which an internal combustion engine is, or is to be, installed;

“offshore energy installation” means any of the following installations that are maintained in the territorial sea adjacent to Wales, or on the foreshore or other land in Wales intermittently covered with water, and that are not connected with dry land by a permanent structure providing access at all times and for all purposes—

- (a) oil installations (including those used for oil activities or for oil exploration or exploitation);
- (b) gas installations (including those used for gas activities or for gas exploration or exploitation);
- (c) carbon dioxide storage installations;
- (d) renewable energy installations;

“oil activity” means storing, conveying or supplying oil, except any such activity that is carried out by an individual for the domestic purposes of the individual;

“relevant carbon capture and storage” means the capture and underground disposal of carbon dioxide by a method in which the carbon dioxide is captured at the place of its production and conveyed for disposal by pipeline directly from the place of production to a place of underground disposal;

“relevant territorial waters” means the waters which extend seaward for three miles from the baselines from which the breadth of the territorial sea adjacent to Wales is measured; but any order made under section 104(4)(a) of the Water Resources Act 1991 for the purposes of Part 3 of that Act in relation to an area of the territorial sea adjacent to Wales also applies for the purposes of determining what are relevant territorial waters for the purposes of this field;

“renewable energy” means energy from renewable non-fossil sources;

“statutory” means arising by virtue of an Act;

“transport fuel” means any of the following—

- (a) renewable transport fuel;
- (b) fossil fuel;
- (c) any solid, liquid or gaseous fuel that is neither renewable transport fuel nor fossil fuel;

“vessel” includes hovercraft and any other craft capable of travelling on, in or under water, whether or not self-propelled;

“visiting force” means any such body, contingent or detachment of the forces of any country as is a visiting force for the purposes of any of the provisions of the Visiting Forces Act 1952;

“Wales” has the same meaning as in the Interpretation Act 1978;

“waste directive” means Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, as it was originally adopted.

An order or an order in council made under or by virtue of section 158(3) or (4) for the purposes of that section also applies for the purpose of determining any boundary between the parts of the sea which are to be treated as adjacent to Wales for the purposes of this field and those which are not.”.

Amendments to Part 2 of Schedule 5 to the 2006 Act

3.—(1) Paragraph A1 of Part 2 of Schedule 5 to the 2006 Act is amended in accordance with this article.

(2) At the appropriate place insert—

“Economic development (field 4 of Part 1)

(1) Generation of electricity at generating stations whose construction, extension or operation requires—

- (a) the consent of the Secretary of State, or
- (b) the authority of an order granting development consent under the Planning Act 2008;

and for this purpose, the reference to consent of the Secretary of State is a reference to consent under powers to regulate generation of electricity.

(2) Transmitting, distributing or supplying electricity.

(3) Energy conservation, apart from the encouragement of energy efficiency otherwise than by prohibition or regulation.

(4) Nuclear energy and nuclear installations, including—

- (a) nuclear safety; and
- (b) liability for nuclear occurrences,

but this paragraph does not include disposal of very low level radioactive waste moved from a site whose use requires a nuclear site licence under the Nuclear Installations Act 1965.”.

(3) Under the heading “*Highways and transport (field 10 of Part 1)*” —

(a) after paragraph (1) insert—

“(1A) Road freight transport services, including goods vehicles operating licensing”

(b) for paragraph (2) substitute—

“(2) Regulation of the use of relevant vehicles on roads, the construction and use of relevant vehicles, and conditions under which relevant vehicles may be so used, apart from regulation of use of relevant vehicles carrying animals for the purposes of protecting human, animal, fish or plant health or the environment.

For this purpose “relevant vehicle” means—

- (a) a motor vehicle, and
- (b) non-road mobile machinery and agricultural and forestry tractors (each of those expressions having the same meaning as in field 6 of Part 1).”;

(c) after paragraph (11) insert—

“(11A) Aviation, air transport, airports and aerodromes, apart from—

- (a) financial assistance to providers or proposed providers of air transport services or airport facilities or services,
- (b) strategies by the Welsh Ministers or local or other public authorities about provision of air services,
- (c) regulation of the use of aircraft carrying animals for the purpose of protecting any of the following—
 - (i) human health, apart from the health of persons in aircraft;
 - (ii) animal, fish or plant health;
 - (iii) the environment.”;

(d) for paragraph (12) substitute—

“(12) Shipping, apart from—

- (a) financial assistance for shipping services to, from or within Wales, and
- (b) regulation of the use of vessels carrying animals for the purposes of protecting any of the following—
 - (i) human health, apart from the health of persons on vessels;
 - (ii) animal, fish or plant health;
 - (iii) the environment.”;

(e) for paragraph (15) substitute—

“(15) Harbours, docks, piers and boatslips, apart from —

- (a) those used or required wholly or mainly for the fishing industry, for recreation, or for communications between places in Wales (or for two or more of those purposes), and
- (b) regulation for the purposes of protecting human, animal, fish or plant health or the environment.

(16) Carriage of dangerous goods, including transport of radioactive material.”.

(4) At the appropriate place insert—

“Water and flood defence (field 19 of Part 1)

(1) Appointment and regulation of any water undertaker whose area is not wholly or mainly in Wales.

(2) Licensing and regulation of any licensed water supplier within the meaning of the Water Industry Act 1991, apart from regulation in relation to licensed activities using the supply system of a water undertaker whose area is wholly or mainly in Wales.”.

Name

Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Government of Wales Act 2006 (“the 2006 Act”). The Order extends the legislative competence of the National Assembly for Wales to make laws known as Measures of the National Assembly for Wales (referred to in the 2006 Act as “Assembly Measures”). The legislative competence conferred by this Order is subject to general limitations on the exercise of that legislative competence, which apply by virtue of section 94 of, and Schedule 5 to, the 2006 Act.

Article 2 inserts matters 6.1, 6.2 and 6.3 into field 6 (environment) of Part 1 of Schedule 5 to the 2006 Act. It also inserts interpretation provisions into that field.

Matter 6.1 is about preventing, reducing, collecting, managing, treating or disposing of waste.

Matter 6.2 is about protecting or improving the environment in relation to pollution.

Matter 6.3 is about protecting or improving the environment in relation to nuisances.

There are a number of exclusions from the three matters.

Article 3 amends Part 2 of Schedule 5 to the 2006 Act to make provision for exceptions that apply to all matters in Part 1 of Schedule 5.

A full regulatory impact assessment has not been prepared for this Order as no impact on the private or voluntary sectors is foreseen.

This document has been prepared by National Assembly for Wales lawyers in order to provide information and advice to Assembly Members and their staff in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no responsibility is accepted for any reliance placed on them by third parties

NATIONAL ASSEMBLY FOR WALES

LEGISLATION COMMITTEE No.4

Proposed National Assembly for Wales

(Legislative Competence) (Environment) Order 2009

Introduction

1. The Minister for Environment, Sustainability and Housing has laid the above Proposed Order before the Assembly for the purpose of scrutiny. It has been referred to Legislation Committee No.4 for that purpose. The Proposed Order (“the current Proposed Order”) supersedes the Proposed National Assembly for Wales (Legislative Competence) (No.2) Order (“the 2007 Proposed Order”) (which was laid before the Assembly on 19th June 2007. That Proposed Order was considered by a Committee established for the purpose, which reported in November 2007. This legal briefing addresses the differences between the two Proposed Orders.

Overview

2. The 2007 Proposed Order sought to increase the legislative competence of the Assembly by adding to Part 1 of Schedule 5 to the Government of Wales Act 2006 (“the Act”) two Matters in Field 6 (environment), namely:
 - Matter 6.1*
Collection, management, treatment and disposal of waste
 - Matter 6.2*
Environmental protection, including pollution, nuisances and hazardous substances.
3. The 2007 Order also sought to amend Part 1 of Schedule 5 by adding a Table containing 18 exceptions to Matters.

4. In the case of 10 of these exceptions¹ they were applicable not to Field 6 (environment) but to Field 5 (education and training) and indeed were already included in Schedule 5. The effect of the 2007 Proposed Order would only have been to move them from one place in Schedule 5 to another. None were of relevance to the new Matters being added.
5. Four new exceptions, of relevance only to the proposed new Matters, were to be added².
6. The remaining four exceptions³ were already present in Schedule 5 but their application was to be extended so that they applied not only to Matters in Field 5 but also to the new Matters in Field 6.
7. A total of eight exceptions would therefore have been applicable, under the 2007 Proposed Order, to the new Matters to be added.
8. The current Proposed Order also seeks to add legislative competence in the Field of the environment, expressed broadly (with one substantial difference) in the same terms as the additional Matters set out in the 2007 Proposed Order. However, it also contains much more extensive qualifications and exceptions to the proposed legislative competence.
9. Because the form in which these qualifications and exceptions are expressed is different from the list of exceptions proposed by the 2007 Proposed Order, an exact comparison is not possible. An idea of the scale of the differences can however be obtained as follows. The exceptions to the Environment Field set out in the 2007 Proposed Order take up 31 lines of one column of the two-column Table (equivalent to about a third of a page if set out in the same form as those in the current Proposed Order). The “exceptions” to the Environment Field⁴ set out in the current Proposed Order account for over four pages. In crude terms the “exceptions” to the competence to be transferred have expanded by a factor of about 12.

¹ Exceptions 3,4,5,6,7,8,9,10,11 and 17.

² Exceptions 1,13,16 and 18.

³ Exceptions 2,12,14 and 15.

⁴ There are also exceptions to be added to other Fields – see paragraph x.

10. It may be that the provisions of the 2007 Proposed Order were insufficiently precise to identify accurately the boundaries of devolved competence in the Environment Field and that the much expanded list of qualifications and exceptions is necessary in order to do so. The Explanatory Memorandum accompanying the current Proposed Order does not state that this is the reason for the greatly expanded list of “exceptions” nor, if this is so, explain why they are necessary.

Summary of the main differences between the Proposed Orders

Matters to be added to Field 5 (environment)

11. The Matters which the 2007 Proposed Order would have added are set out above⁵.
12. The Matters to be added by the current Proposed Order are:

Matter 6.1

Preventing, reducing, collecting, managing, treating or disposing of waste in Wales and disposing in the sea adjacent to Wales, out as far as the seaward boundary of the territorial sea, of waste collected, managed or treated on land.

Matter 6.2 – Protecting or improving the environment in relation to pollution.

Matter 6.3 – Protecting or improving the environment in relation to nuisances.

Matter 6.1

13. As compared with the Matter 6.1 proposed by the 2007 Proposed Order, the current proposal firstly adds “Preventing” and “reducing” to the list of operations in relation to waste which are included in the Matter. This is in line with the recommendation of the Committee which considered the 2007 Proposed Order that Matter 6.1 should be amended “to make it clear that it covers the minimisation or reduction of waste.”
14. The Matter now also refers specifically to the sea adjacent to Wales. It is not clear why this is necessary since it seems merely to repeat the extended definition of “Wales” in section 158(1) of the Act⁶.

⁵ See paragraph 2.

15. There is to be an exception of “regulation of the provision of postal services”. The Explanatory Memorandum does not explain why it would otherwise have been thought possible that legislation regulating waste might affect the provision of postal services.
16. The decommissioning of explosives at military bases is excepted as is the regulation of radioactive material at such premises. (This exception does not itself apply to radioactive waste generally.)
17. There is then an exception relating to the regulation of the decommissioning of offshore energy installations, which would include not only oil and gas installations but also wind and wave power generating stations, as well as related infrastructure (apparently irrespective of whether that infrastructure is on the sea-bed or on land).
18. Carbon capture operations are excepted.
19. There are wide exceptions relating to the deposit of any explosive substance or article in the sea, or on or under the sea bed and to the deposit of *any substance or object* in the sea or on or under the seabed from any vehicle, vessel, aircraft, marine structure or floating container as well as the incineration of any substance or object on any such vehicle, vessel etc. On the face of it this would mean that the only deposits of waste on the seabed about which the Assembly would be able to legislate would be those made by tipping into the sea directly from the land.

Matter 6.2

20. This matter is expressed in wide terms and appears to correspond with that part of the original Mater 6.2 dealing with “Environmental protection, including pollution.” Indeed the revised formulation is wider and now expressly refers to “improving, as well as “protecting” the environment. This again responds to a recommendation made by the Committee which considered the 2007 Proposed Order.

⁶ The interpretation provisions of the current Proposed Order also provide that “Wales” has the same meaning as in the Interpretation Act 1972 which seems to be unnecessary and a possible source of confusion.

21. There are two sets of exceptions specific to this matter.
22. Firstly, legislative competence is not to include regulation of offshore oil and gas exploration in the part of the territorial sea more than 3 miles from the base-line (which generally follows the low-water mark).
23. Secondly, there are provisions excepting legislation relating to vehicle fuels and the use of renewable energy by vehicles. The excepting of competence relating to the regulation of vehicles (other than traffic management) is consistent with the recognised division between devolved and non-devolved subjects which applies in relation to all three devolved administrations.

Matter 6.3

24. This corresponds to “Environmental protection, including ...nuisances..” which formed part of the former Matter 6.2. Again, the scope has been widened in that “improving” has been added to “protecting.”
25. There are broadly two kinds of exception.
26. Firstly there is the single exception relating to military premises and which only relates to emissions of smoke, artificial light or noise from such premises. (Legislation regulating smells or noxious substances from such premises is not excluded.)
27. Secondly there are a number of exceptions relating to the energy (including electricity, gas and oil) and electronic communications industries. The principle of these exceptions is clear – these industries should continue to be under the regulation of the UK Parliament and Government – but its application to particular situations may give rise to difficulty. For example, there is excepted “regulation of oil activities” and “oil activity” is defined as including “storing...oil..” Depending on the meaning of “regulation” it is possible, therefore, that if the Assembly were to seek to legislate for higher criminal penalties for statutory nuisances, such legislation, if it were to be regarded as involving “regulation” of oil activities, would have to exclude straightforward events such as leaks from oil storage depots. The Proposed Order

does not define or otherwise provide any pointer towards the meaning of “regulation”. Since a number of exceptions involve excluding the “regulation” of various industries from the Assembly’s legislative competence this is an important issue.

Hazardous substances

28. The reference in the original Matter 6.2 to “Environmental protection, including ...hazardous substances” has disappeared. It is not clear why this has occurred.

Exceptions common to more than one Matter

29. “Health and safety regulations” are excluded from all three Matters. This is consistent with the current recognised division between devolved and non-devolved functions.
30. There are a number of exceptions common to Matters 6.2 and 6.3. One is the regulation of the *contained* use of GMOs. The others relate to various off-shore activities which are closely related to those excepted from Matter 6.1 although framed in a way which is more appropriate to the subject-matter of Matters 6.2 and 6.3.
31. In the case of all three Matters, therefore, the Assembly’s proposed legislative competence in relation to activities on vessels and marine structures and on or under the sea-bed would be limited.

General interpretation

32. The current Proposed Order contains some two and a half pages of definitions. Although earlier Legislative Competence Orders have included definitions, and the trend seems to be towards more being included, the number of terms defined in the current Proposed Order is very extensive. In many cases this may be unavoidable given the unprecedented complexity of the provisions of this Proposed Order.
33. In other cases (for example “pollution”, “nuisance”, “agricultural or forestry tractor”, “electronic communication”, “electronic communications network”, “environmental harm”, “marine structure”, “military premises”, “non-road mobile machinery”, “offshore energy

installation”, “renewable energy”, “transport fuel”, “visiting force” and even “Wales”) it might be thought that the term in question is either easily understood without interpretation or should be interpreted in accordance with relevant specialist legislation without this having to be expressed or the definition repeated.

34. Precise definition will inevitably be required in the drafting of Measures under the legislative competence to be conferred but the general approach taken by the Act⁷ is that legislative competence should be expressed in broad terms which do not require further definition.

Exceptions to other Fields

35. Article 3 of the current Proposed Order introduces some two pages of exceptions to Fields other than that of the Environment – namely to the Fields of Economic Development, Highways and Transport and Water and Flood Defence.
36. These new provisions did not figure in the 2007 Proposed Order. They represent a major new feature of Legislative Competence Orders in that they do not directly relate to the Matters being added by the current Proposed Order and indeed, in the case of the exceptions relating to Field 4 (Economic Development) and Field 19 (Water and Flood Defence) there are as yet no Matters under either Field to which these exceptions could apply. In the case of Field 10 (Highways and transport) there is an existing Matter but that relates to trunk road charging schemes whereas the exceptions which are being added include ones which are general in nature and include provision relating to aviation, shipping, harbours and docks.
37. The Minister’s Explanatory Memorandum does not explain why it is necessary to add these exceptions when they do not relate to any existing or proposed legislative competence.

⁷ See for example the way in which subjects are expressed in Schedule 7 and in which Parliament has added Matters direct to Schedule 5 by framework powers in Acts.

Relationship with Schedule 7 exceptions

38. If, following a referendum, Part 4 of the Act is brought into force, the Assembly's legislative competence will be governed by Schedule 7, which is intended to be a comprehensive statement of the subjects which have been devolved to Wales.
39. The "Economic Development" subject in Schedule 7 is subject to a number of exceptions. These include:
- "Generation, transmission and supply of electricity."
 - "Energy conservation, apart from the encouragement of energy efficiency otherwise than by prohibition or regulation."
 - "Oil and gas, apart from pollution".
40. Similarly, the Highways and transport subject includes a lengthy and detailed set of exceptions.
41. The "Water and flood Defence" subject in Schedule 7 contains some exceptions, including:
- "Appointment of water undertakers or sewerage undertakers for any area most of which is in England."
42. An examination of the exceptions which the current Proposed Order seeks to add in relation to future legislative competence in each of these fields demonstrates a close connection with the Schedule 7 exceptions. There are however significant differences. For example, the first Schedule 7 exception relating to Economic Development quoted above refers to "Generation, transmission and supply of electricity" but that in Article 3 of the current Proposed Order is much more detailed and excepts:
- (1) Generation of electricity at generating stations whose construction, extension or operation requires—
 - (a) the consent of the Secretary of State, or
 - (b) the authority of an order granting development consent under the Planning Act 2008;
- and for this purpose, the reference to consent of the Secretary of State is a reference to consent under powers to regulate generation of electricity.

(2) Transmitting, distributing or supplying electricity.

(It is right to say that, as in the case of the above example, the Article 3 exceptions are in fact narrower than those which appear in Schedule 7.)

43. The only immediate effect of the exceptions set out in Article 3 of the current Proposed Order is to pave the way for the future addition of Matters in the fields of Economic Development, Highways and Transport and Water and Flood Defence but there is at present no explanation as to why these general prospective exceptions are framed differently from the corresponding ones laid down in Schedule 7 in relation to the corresponding subjects (which exceptions were themselves revised in July 2007 by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2007.

Keith Bush

May 2009

Pwyllgor Deddfwriaeth Rhif.4
Legislation Committee No.4



Cynulliad National
Cenedlaethol Assembly for
Cymru Wales

Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff CF99 1NA

21 May 2009

Dear Sir / Madam

**The National Assembly for Wales (Legislative Competence)(Environment) Order
2009**

I am writing to you in light of the evidence you provided to the Environmental Protection and Waste Management LCO Committee in 2007.

As you may be aware, the Welsh government laid a revised proposed Order yesterday (Tuesday 19 May), which has been referred to Legislation Committee No.4 ('the Committee') for further consideration. The Committee has been asked to report by 12 June. I attach a link to the revised proposed Order and Explanatory Memorandum for ease of reference.

Revised proposed Order:

<http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid.htm?act=dis&id=130079&ds=5/2009>

Explanatory Memorandum:

<http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid.htm?act=dis&id=130080&ds=5/2009>

My purpose in writing is to seek any further views you may have on this revised proposed Order **by noon on Monday 1 June 2009**. We apologise for the short notice, but the Committee has been given a tight deadline to report on this matter.

If you wish to submit evidence please send an electronic copy of your submission to legislationoffice@wales.gsi.gov.uk and entitle the e-mail *Consultation Environment LCO*. If you would prefer to send your submission in hard copy, please send it to Owain Roberts, Deputy Committee Clerk, Legislation Office, National Assembly for Wales, Cardiff Bay CF99 1NA.

Ffon / Tel: 029 2089 8041
Ffacs / Fax: 029 2089 8021
Minicom: 029 2082 3280

E-bost / E-mail: legislationoffice@wales.gsi.gov.uk

When preparing your submission please keep the following in mind:

- Your response should be as succinct as possible. Please reference your response using the title applied above.
- The National Assembly normally makes responses to public consultation available for public scrutiny and they may also be seen and discussed at Committee meetings. **If you do not want your response or name published it is important that you specify this at the end of your submission.**
- Please indicate whether you are responding on behalf of an organisation, or as an individual.

If you have any queries, please contact Gareth Williams, Committee Clerk on 029 2089 8008 or Owain Roberts, Deputy Clerk on 029 2089 8101.

Yours faithfully

A handwritten signature in black ink, appearing to read "Michael German". The signature is written in a cursive style with a large initial 'M'.

Michael German AM
Committee Chair

Consultation responses

Reference	Organisation
Env1	Environment Agency Wales
Env2	Keep Wales Tidy
Env3	Welsh Association of Chief Police Officers
Env4	Welsh Local Government Association