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Y Gwir Anrh/Rt Hon Rhodri Morgan AC/AM
Prif Weinidog Cymru/First Minister for Wales



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Dr Hywel Francis MP
Chairman, Welsh Affairs Select Committee
House of Commons
London SW1A 0AA

October 2009

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

I am writing in response to the letter, dated 17th August 2009, you and Mike German AM, Chairman of the National Assembly for Wales Legislation Committee No.4, jointly sent regarding the recent scrutiny of the above order. I would like to take this opportunity to thank both committees for their timely scrutiny of this draft Order, which forms a key part of the Assembly Government's legislative programme and to respond to the three main issues of concern to both committees.

Floating Exceptions

You raise a specific concern relating to the inclusion of floating exceptions in fields which do not yet contain any matters conferring competence on the National Assembly. I appreciate the opportunity to set out our thinking on this matter which I hope will address your concern.

The Assembly's legislative competence is defined by reference to the matters set out under Schedule 5, rather than by reference to fields. Furthermore, matters can and do relate to more than one field. Fields are defined in broad terms and consequently there is considerable scope for overlap between them. Where a matter overlaps between fields, a choice needs to be made as to the field in which the matter should be inserted. For convenience, a given matter is placed under the field that represents the best core fit for the content, but that does not constrain the scope of the legislative power conferred by the matter to that particular field.

Just as the inclusion of a matter in a particular field does not necessarily mean that it relates exclusively to that field, the same also applies to the floating exceptions which will be listed in paragraph A1 in Part 2 of Schedule 5. Indeed, the very purpose of floating exceptions is that they should apply to all matters, regardless of the fields in which they are listed. The Exceptions to Matters LCO, if and when made by Her Majesty in Council, will amend section 94(4) of GoWA 2006 to provide that a provision will be outside the Assembly's competence if it falls within a floating exception "whether or not the exception is under a heading corresponding to the field which includes the matter".

In considering the use of relevant floating exceptions in developing LCOs, as evidenced in the proposed Environment LCO, our view is a sequence of considerations which need to be followed before a floating exception is added to Schedule 5. These are as follows:

- A new matter or matters which it is proposed to add to Schedule 5 creates a need for a new exception;
- That exception is relevant to more than one matter; and
- It is evident that the exception should apply across the board to all matters (because the exception in question describes something that it is agreed remains the responsibility of the UK Government and Parliament in all circumstances).

If all three principles apply, then the exception should logically be a floating exception. The insertion of a floating exception will help to avoid having to repeat the exception several times, thus avoiding the over-cluttering of Schedule 5 and aiding clarity and transparency. It would also avoid the risk that an exception is not attached to a particular matter even though it turns out in future to be relevant to it.

Duplicating the Function of the Minister of the Crown restriction

The committees noted concern about those exceptions which duplicate the 'functions of the Minister of the Crown' restriction that is already included in paragraph 1 of Part 2 to the Government of Wales Act 2006. We agree that unnecessary duplication should be avoided. In those instances where the UK Government has requested exceptions which appear, wholly or in part, to duplicate the functions of the Minister of the Crown restriction, we have drawn their attention to the particular restriction and the need to avoid duplication with provisions set out in the GoWA. It is appropriate, by way of clarification, to note that the functions of a Minister of the Crown in relation to a topic are not necessarily the same as the topic itself and the UK Government has therefore highlighted that the Minister of the Crown restriction was not always sufficient to reserve their interest on particular issues.

Complexity of the Legislative Settlement and Explanatory Memoranda

Finally, the committees raised concerns about the complexity of the legislative settlement that is developing under Schedule 5 of the Government of Wales Act 2006 and the need to ensure that Explanatory Memoranda clearly explain what powers are being conferred and the reasons for and implications of any exceptions to competence.

You will appreciate that the precise terms of LCOs are the product of detailed discussions with Whitehall Departments. Much of the complexity of drafting, in the form of detailed exceptions from competence, has arisen as a result of these negotiations. In relation to the Environment LCO, we are currently working with UK Government Departments to try to simplify the Order and avoid unnecessary exceptions. Nevertheless, there is a difficult balance to be struck between the desire for simplicity of drafting on the one hand, and the desire for reassurance about the boundaries and the extent of the National Assembly's competence on the other. We are keen to work towards a simplified legislative settlement but this will require a shared interpretation between all those involved in the process about the breadth of the legislative competence that can properly be conferred on the National Assembly, given its character as a democratically elected legislature. The Assembly Government has consistently maintained that conferring legislative powers on such a body is very different to the conferral of subordinate law-making powers on the Executive, where close attention to the precise detail of the powers conferred may be more appropriate.

As I have noted above, the move towards the use of floating exceptions will in our view help to work towards a simpler settlement by decluttering Schedule 5 and avoid needless

repetition of exceptions. This will in turn help to aid understanding of the legislative competence conferred upon the National Assembly.

I have noted your comments on the Explanatory Memoranda. We will aim to ensure that the revised explanatory memorandum for the Environment LCO and all future explanatory memoranda do clearly describe the powers to be conferred on the National Assembly and the reasons and implications of any exceptions to competence. In doing so it is important that these powers are put clearly in the wider context of the devolution settlement, as powers that are granted to a legislature in areas where executive devolution has already occurred. They should serve to enhance the capacity of the devolved institutions to develop distinctive solutions to meet Welsh circumstances in policy areas where it has already been accepted that a distinctive approach may be required. It would not serve that purpose if the powers conferred are hedged about with overly-complex limitations.

I hope this response serves to address the concerns of both committees.

cc Rt. Hon. Peter Hain MP, Secretary of State for Wales
Mike German AM, Chairman, Legislation Committee No.4, National Assembly for Wales
Jane Davidson AM, Minister for Environment, Sustainability and Housing, Welsh Assembly Government