

**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**

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached government proposed Legislative Competence Order which would confer additional legislative competence upon the National Assembly for Wales. It is laid in accordance with SO 22.13 and explains the scope of the power requested.
2. The memorandum sets out the background to and the context of the proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009.
3. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act). Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified Matters. These Matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and can therefore modify existing legislation and make new provisions), in relation to Matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.
4. Matters may be inserted into the Fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or a Legislative Competence Order, approved by the Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, via an LCO.
5. The proposed LCO would confer further legislative competence on the National Assembly for Wales, in the Field of environment (Field 6 within Schedule 5 to the 2006 Act). Attached at Annex A is a copy of Schedule 5 showing the legislative competence that the Assembly has acquired to date.

Background

The Strategic Context

6. This proposed LCO will provide the National Assembly for Wales ('the Assembly') with competence in relation to waste, pollution and nuisances. The Welsh Assembly Government's vision, as set out in the *One Wales* Programme of Government, is of a truly sustainable environment and the Welsh Assembly Government is pursuing a number of specific actions and policies, including seeking enhanced legislative competence, in order to realise this vision. The Environment is a long-devolved policy area, being one of the Fields listed in the Government of Wales Act 1998 within which Ministerial functions were transferred from the Secretary of State for Wales to the Assembly at its inception. In addition, further executive functions have been devolved to Welsh Ministers in subsequent Acts of Parliament. The proposed LCO seeks legislative competence for the Assembly over areas where executive competence is already held by Welsh Ministers. This would allow the Assembly to consider legislation in this area and enable the Welsh Assembly Government to propose legislation supporting the delivery of the vision above. This LCO was one of the very first Orders brought forward by the Welsh Assembly Government and is an integral part of its legislative programme.
7. The Welsh Assembly Government's overall approach to waste, pollution and local environmental quality is set out in a number of strategic policy documents. The key overarching document is the Welsh Assembly Government's Sustainable Development Scheme, which is of particular relevance to the scope of the powers in the Order. Section 79 of the Government of Wales Act 2006 places a duty on Welsh Ministers to prepare a scheme setting out how they propose, in the exercise of their functions, to promote sustainable development. In November 2008, the Welsh Assembly Government published for consultation its revised Sustainable Development Scheme entitled '*One Wales: One Planet*' setting out the Welsh Assembly Government's vision of a sustainable Wales and establishing sustainable development as the central organising principle for policy development and implementation. The revised scheme sets out that in order to achieve this goal over a generation, the total resources currently used to sustain our lifestyles need to be reduced by two thirds. This includes radically reducing our use of carbon-based energy by 80-90%, resulting in a similar reduction in greenhouse gas emissions; having a radically different approach to waste management and moving towards a zero waste nation; and organising the way we live and work so we can travel less by car. The LCO will provide legislative powers to the Assembly that will enable the Welsh Assembly Government to propose legislation which will be a vital tool in helping to deliver the sustainable development duty.
8. The Sustainable Development Scheme sets out the Welsh Assembly Government's broad approach, across the full range of its

responsibilities, toward realising the vision of a sustainable Wales. The Environment Strategy for Wales (2006) builds on the Sustainable Development Scheme's aspirations by providing more detail on the Welsh Assembly Government's long term strategy for the environment of Wales. The Environment Strategy sets the strategic direction for the next 20 years and establishes the framework within which to achieve an environment which is clean, bio-diverse healthy, and valued by the people of Wales. It is supported by a series of action plans and a policy map setting out the key actions that are being taken to deliver its outcomes. There are a number of key outcomes that are relevant to the scope of the LCO.

9. In relation to waste management, the Environment Strategy emphasises that achieving a more sustainable pattern of consumption and production will help reduce the impact that economic activity has on the environment. The Strategy sets out a range of outcomes which the Welsh Assembly Government will work towards, including minimising the amount of waste generated in Wales; accepting the principle of 'reduce, reuse and recycle' across government, business, industry and home life; ensuring appropriate waste management facilities are in place to minimise landfill; and encouraging business to produce designed products that require less resources and ensure minimal waste.
10. The Environment Strategy also aims to minimise pollution and reduce its impact on the environment and on health. Outcomes which the Welsh Assembly Government is working towards include reducing air pollution, leading to increased life expectancy; and maintaining and enhancing the quality of groundwater, rivers, lakes and coastal waters.
11. In relation to local environmental quality, the Environment Strategy notes the Welsh Assembly Government's aim of securing places where quality of life is not negatively affected by environmental nuisances. A specific outcome in this area is the minimisation of environmental nuisances such as litter, flytipping, graffiti, dog fouling, fly-posting, noise pollution and light pollution.
12. Supplementing the Environment Strategy's strategic approach in relation to waste management is the Welsh Assembly Government's long term framework for waste management and resource efficiency, set out in 'Wise About Waste – The National Waste Strategy for Wales' (2002). The National Waste Strategy provides further detail on how the Welsh Assembly Government will work in partnership with others to move Wales from an over-reliance on landfill to more sustainable waste management by limiting the amount of waste produced and managing it more effectively, recycling and composting far more and finally disposing safely the waste that cannot be recycled or composted. 'Wise About Waste' is currently being reviewed and a revised Waste Strategy will be issued for consultation in the first half of 2009.

Current Legislative Framework

13. The Welsh Assembly Government has significant executive powers and secondary legislative competence across a wide range of legislation relating to the environment. In relation to the scope of the powers within the Order, Welsh Ministers have very broad powers that have been devolved from a number of sources. The key sources of these powers are as follows:

- Control of Pollution Act 1974 and Control of Pollution (Amendment) Act 1989

These Acts provide powers in relation to waste carriage and disposal, water pollution, noise pollution, atmospheric pollution and public health.

- Food and Environmental Protection Act 1985

This Act gives the Welsh Ministers powers to control the dumping of waste in the territorial sea adjacent to Wales.

- Local Government Acts of 1988 and 1999

These Acts provide further powers in relation to setting statutory recycling and composting targets.

- Environmental Protection Act 1990

The Act provides Welsh Ministers with broad powers in relation to integrated pollution control and integrated air pollution control; statutory nuisances and clean air; contaminated land; waste; and litter.

- Water Industry Act and Water Resources Act 1991

Under these Acts, the Welsh Ministers have the functions of regulating water quality and wholesomeness, and preventing and controlling water pollution, in relation to Wales.

- Clean Air Act 1993

This Act confers powers on the Welsh Ministers in relation to certain types of emission into the air.

- Environment Act 1995

The Act provides Welsh Ministers with powers to give directions and guidance to the Environment Agency with regard to how the Agency carries out its wide-ranging functions, which include pollution control, waste and contributing to the achievement of sustainable development.

- Pollution Prevention and Control Act 1999

This is a key piece of legislation which provides powers for Welsh Ministers to make subordinate legislation regulating any kind of polluting activities, or to prevent or control emissions capable of causing any pollution.

- Anti-Social Behaviour Act 2003

This Act provides powers relating to graffiti.

- Clean Neighbourhoods and Environment Act 2005

In relation to local environmental quality, key executive powers are contained within this Act, which provides powers in relation to noise and in relation to Site Waste Management Plans.

- European Law

Welsh Ministers also have considerable powers under Designation Orders, designating them for the purposes of implementing European law. Some of the key Designations are:

- the European Communities (Designation) (No. 3) Order 2000 No 2812 - Designation in relation to air quality
- the European Communities (Designation) (No. 2) Order 2003 No. 1246 – (Designation in relation to urban and industrial waste water);
- the European Communities (Designation) (No. 4) Order 2003 No. 2901 (Designation in relation to water resources)
- the European Communities (Designation) (No. 7) Order 2004 - Designation in relation to water quality;
- the European Communities (Designation) Order 2004 No. 706 - Designation in relation to environmental noise;
- EC Designation Order 2005/850 (Designation for “measures relating to the prevention, reduction and elimination of pollution caused by waste and the management of packaging and packaging waste”); and
- the European Communities (Designation) Order 2007 No. 193 (Designation in relation to land contamination);

14. The above paragraphs describe some of the key executive powers that Welsh Ministers currently have in relation to the environment. However, Welsh Ministers’ powers in relation to these subject areas are broad and the above list is by no means exhaustive.

Current Actions

15. Legislation is supplemented by a range of executive actions. Many of the key actions in relation to household, commercial and industrial waste management in Wales arise from targets set in the 'Wise about Waste' Strategy. For example, the Welsh Assembly Government funds Local Authority household waste recycling via the Sustainable Waste Management Grant and the Regional Capital Access Fund. In 2009/10, the budget for this is £67m. There is also funding (£3.5m in 2009/10) for capital competitions for the provision of strategically important infrastructure. The Welsh Assembly Government also funds a number of service providers who provide a diverse range of advice and support to the general public, business, public sector and the community sector. These include agencies such as Envirowise, WRAP, Wise about Waste and Cylch. The development of Sector Plans as part of the review of the current 'Wise about Waste' Strategy involves working closely with key sectors to drive forward the goals of the Waste Strategy.
16. In relation to pollution, the Welsh Assembly Government has been working in partnership with Defra and the Environment Agency to take forward the Environmental Permitting Programme (EPP). The EPP aims to reduce the burden of industrial regulation on both regulated businesses and the Environment Agency without reducing effective regulation of human health or the environment. With reference to environmental water quality, the Welsh Assembly Government issues detailed guidance to the Environment Agency to meet a number of European Community Directives, most notably the Water Framework Directive. The key actions to make improvements to water quality are found in the Environment Strategy for Wales, specifically that diffuse pollution is better understood, and action is taken to reduce and manage diffuse pollution. Much of the regulatory work in relation to pollution control and waste management is undertaken by the Environment Agency, to which the Welsh Assembly Government provided over £23m grant funding in 2008-09. The Welsh Assembly Government has a general power of direction over the Environment Agency (Wales).
17. With regard to local environment quality issues, the Welsh Assembly Government issued detailed guidance in 2008 on the powers contained within the Clean Neighbourhoods and Environment Act 2005 which is designed to help community and town councils decide whether to utilise the powers under the Act. These include powers for community and town councils to take legal action against those that litter, flyposting or graffiti in their areas. The 'Tidy Towns' initiative, a *One Wales* commitment, was launched in April 2008, and is supported by an annual fund of £4 million. Funding is available to local authorities where there is evidence that they have worked with local communities, voluntary organisations and other key stakeholders to improve the quality of their local environment. The aim of the project is to empower the people of Wales to take responsibility for the quality of their own local environment so that over the next 3 years they can contribute towards a clean, safe

and tidy Wales.

18. These activities have contributed to the Welsh Assembly Government making clear progress in relation to the overall goal of sustainable development. The latest Sustainable Development Indicators report by the Welsh Assembly Government, published in August 2008, shows clear improvements in 15 of the 39 areas measured and includes improvements in environment-related indicators such as biodiversity conservation (the status of Biodiversity Action Plan species); air quality, both urban and rural; river quality; waste (waste arisings by disposal); household waste (recycled or composted); sustainable water and greenhouse gas emissions. The 'State of the Environment' bulletin, also published in 2008, summarises the latest information on the indicators that monitor progress against the Environment Strategy. The bulletin highlighted that there had been an improvement in over half of the indicators that have been defined and where information exists, including in relation to both waste management and pollution. For waste management the indicators showed improvements in areas such as the proportion of municipal, industrial and commercial waste recycled or composted; the proportion of municipal, industrial and commercial waste sent to landfill; and the proportion of packaging waste recovered in the UK. In relation to environmental hazards, there was an improvement in the indicators relating to bathing water quality; the intake of persistent organic chemicals and metals via food intake in relation to WHO guidelines; and trends in radioactive discharges from major sources in Wales.

The need for change

19. The key driver for legislative competence in relation to these policy areas is that it will enable Welsh Ministers to propose legislation to the Assembly that supports the goal of a more holistic approach to policy development and improvement in what is a long-devolved policy area. As previously noted in paragraphs 13-15, Welsh Ministers already have wide-ranging executive powers in relation to waste, pollution and local environmental quality. However, the regulation-making powers, whilst wide, restrict Welsh Ministers to a piecemeal approach to regulatory change across this policy area. Legislative competence will enable Welsh Ministers to adopt a more holistic approach to tackling critical challenges in relation to the environment and propose more strategic legislation for consideration by the Assembly.
20. Closely linked to the need for a more holistic and coherent approach to legislation is the fact that the Welsh Assembly Government has a distinct and clearly defined policy agenda in relation to environmental policy. The Welsh Assembly Government undertakes a wide range of activities and initiatives supporting environmental improvement, and creating a sustainable environment is one of the key aims of the *One Wales* Programme of Government. In particular, *One Wales* commits the Welsh Assembly Government to use legislation to strengthen recycling

targets and to provide better and more coordinated support in relation to waste management. As noted in paragraphs 6-12, the broad policy commitments set out in *One Wales* are supported by key Assembly Government strategic documents in this policy area, namely the Sustainable Development Scheme, the Environment Strategy and the Waste Strategy. Legislative competence would enable Welsh Ministers to propose coherent strategic legislation in line with the Welsh Assembly Government's defined policy agenda.

21. Legislative competence will also enable Welsh Ministers to propose legislation to the Assembly to address new and significant challenges in relation to the environment. A key challenge, and a headline indicator for the Welsh Assembly Government's sustainable development aspirations, is to reduce Wales' ecological footprint. The ecological footprint is an indicator of the total environmental burden that is placed on the planet and represents the area of land needed to provide the raw materials, energy and food, as well as absorb pollution and waste created – in this case by the Welsh population. Wales' ecological footprint was first calculated using 2001 data and Wales is the first country to recalculate its footprint using 2003 data. The most recent report shows that the Welsh footprint has increased at an average rate of 1.5% per year between 1990 and 2003 – a trend that is replicated elsewhere in the UK. Although the report has confirmed that Wales' ecological footprint is the lowest of the four countries of the UK, it is still at an unsustainably high level and more needs to be done.
22. Another important challenge faced by the Welsh Assembly Government, and a commitment in the *One Wales* Programme of Government, is the implementation of a citizen-centered model of improving public services, drawing on the Beecham Review of Local Service Delivery (2006). The Welsh Assembly Government has put in place a challenging programme to deliver efficient, effective, citizen centred public services. Securing improved waste management, improving local environmental quality standards and safeguarding the environment and human health from pollutants are key elements of providing better quality public services to the citizens of Wales.
23. Legislative competence will enable Welsh Ministers to propose legislation to the Assembly to respond effectively to these and other challenges as they emerge and meet the Welsh Assembly Government's aspiration of a truly sustainable environment and the provision of excellent public services. It is important that all the appropriate policy levers, including legislative competence, are available to help address significant environmental challenges in a holistic manner and improve the local environment for people in all parts of Wales.
24. The provision of legislative competence on the Assembly in relation to the specified policy areas will enable the Welsh Assembly Government to bring forward coherent and holistic proposals for legislation, in the form of Measures, which are based on Welsh priorities and timescales.

The exact content of these Measures is a matter for Welsh Ministers, but Welsh Assembly Government priorities in the short to medium term are likely to focus on Measures which are aimed at addressing waste management issues and improving local environmental quality. Policy proposals will be subject to consultation, and any Measures will be subject to thorough scrutiny and approval by the Assembly. Assembly Measures will supplement a broader package of actions that will help us move towards the aspirations set out in this Memorandum.

Scope

25. The approach taken with regard to this LCO is for legislative competence to follow the current boundaries of what are devolved and non-devolved issues.
26. It is proposed that three Matters be inserted into Field 6: *environment of* Schedule 5 to the Government of Wales Act 2006, to enable the Assembly to legislate on these issues by way of Assembly Measures.

Matter 6.1 – Waste

27. Matter 6.1 will provide the Assembly with legislative competence in relation to the prevention, reduction, collection, management, treatment or disposal of waste on the mainland of Wales. It also provides competence in relation to the disposal of waste in the sea around Wales, where that waste has been collected, managed or treated on land. This will enable the Assembly to legislate in order to increase recycling and improve sustainable waste management in Wales.

Matter 6.2 – Pollution

28. Matter 6.2 will provide legislative competence for the protection or improvement of the environment in relation to pollution. This will enable the Assembly to pass Measures to strengthen pollution controls in a holistic way.

Matter 6.3 – Nuisance

29. Matter 6.3 will provide legislative competence for the protection or improvement of the environment in relation to nuisances. This will enable the Assembly to pass Measures to address nuisances and improve local environmental quality. “Nuisances” are defined, for the purposes of the competence, as acts or omissions affecting any place, or states of affairs in any place, which may impair or interfere with the amenity of the environment or any legitimate use of the environment. The definition of “Nuisance” does not, however, include an act, omission or state of affairs that constitutes pollution.

30. In summary, the principal purpose of this LCO is to enable the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act 2006 to improve the environment of Wales.

Exceptions

31. As stated above, the legislative competence provided by this LCO broadly reflects the current executive powers of Welsh Ministers. The LCO therefore includes a number of exceptions to the legislative competence, the broad purpose of which is to reflect topics which are relevant to waste or environmental protection, but where the Welsh Ministers do not have significant functions. Exceptions are necessary where a particular Matter is so broad that it could be interpreted as including something which is not meant to be included within the competence being conferred. The exceptions therefore seek to provide clarity over the extent of the competence that the Assembly is acquiring in this LCO. The exceptions are summarised below.

Exceptions from all Matters

32. The regulation of the decommissioning of offshore energy installations and related infrastructure is excluded from all Matters. Offshore petroleum, renewable energy and carbon storage installations are subject to existing decommissioning regimes established by UK legislation - the Petroleum Act 1998, the Energy Act 2004 and the Energy Act 2008. The geographical limit of this exception is set out in paragraph 54.
33. Provisions made by health and safety regulations are also excluded from all Matters. The Welsh Ministers currently have no powers to make such regulations.

Exceptions from Matter 6.1 (Waste)

34. Matter 6.1 does not include the regulation of the provision of postal services by persons licensed by the Postal Services Commission. Regulatory arrangements for postal services are set out in the Postal Services Act 2000.
35. The regulation of decommissioned explosives, in relation to military activities, is also excluded from this Matter. Decommissioned explosives are excluded from the Waste Framework Directive (Directive 2006/12/EC) and the Welsh Ministers' powers in relation to waste under the Environmental Protection Act 1990 reflect this exclusion.
36. The regulation of radioactive material at military premises is excluded from the scope of this Matter, thus reflecting provisions in the Radioactive Substances Act 1993.

37. The regulation of large-scale Carbon Capture and Storage (CCS) is excluded from the Matter. Under the Energy Act 2008, the disposal of CO₂ in the territorial sea adjacent to Wales requires a licence from the Secretary of State. Regulatory arrangements for the full range of CCS activities have yet to be defined.
38. The regulation of certain activities in the territorial sea adjacent to Wales is also excluded from Matter 6.1. The Marine and Coastal Access Bill will provide Welsh Ministers with a range of licensing and regulatory powers in relation to the territorial sea adjacent to Wales.

Exceptions from Matter 6.2 (Pollution) alone

39. The regulation of oil and gas exploration and exploitation is excluded from competence in relation to the outermost 9 miles of the territorial sea adjacent to Wales. The Assembly will have competence in relation to this Matter in the area extending 3 miles out to sea from the low-water mark thus reflecting the powers of Welsh Ministers under the Pollution Prevention and Control Act 1999. The geographical limit of this exception is also set out in paragraph 55.
40. Matter 6.2 does not include a number of topics concerned with transport fuel. The first is the regulation of the composition and content of fuel used in a means of transport, in non-road mobile machinery or in an agricultural or forestry tractor. Also excluded from competence are 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. In the current renewable transport fuel obligation, this is evidence of the volume of renewable fuel supplied. To take account of the fact that transport is likely to be powered by renewable “energy”, rather than just renewable “fuel”, the Order also excludes from competence the making of provisions regarding the proportion of renewable energy consumed in transport, including the imposition of sustainability requirements in relation to renewable energy products. Finally, the provision of financial support in connection with the production or use of renewable energy for consumption in transport, including the imposition of sustainability requirements as a condition for financial support, is excluded. The content and composition of transport fuel, and the renewable transport fuel obligation, are non-devolved policy areas.
41. There are exceptions that apply to both Matter 6.2 and 6.3. These are set out at paragraphs 48-49 below.

Exceptions from Matter 6.3 (Nuisance) alone

42. Competence under Matter 6.3 does not include the ability to impose criminal or civil liability for nuisances arising from energy activities or infrastructure, where there is a statutory authority for the act, omission or state of affairs that constitutes that nuisance. However, if the Welsh

Ministers have the power to impose liability in the circumstances, the Assembly will also have legislative competence.

43. Likewise excluded from competence are defences or other forms of exemption from liability (criminal or civil) for nuisance where those defences or exemptions are created by statute and the nuisance in question relates to energy activities or infrastructure. In other words, the Assembly will not be able to make someone liable for nuisance arising from energy activities, where, at the moment, the person would not be liable. Again, this exception from legislative competence is disapplied where the Welsh Ministers have the power to remove the defence in question.
44. The regulation of the emission of smoke, artificial light and noise from military establishments is excluded from Matter 6.3. Smoke, light and noise from those establishments are exempted from the provisions under the Environmental Protection Act 1990 in relation to statutory nuisances.
45. The regulation of the generation of electricity at a generating station whose construction, extension or operation requires the consent of the Secretary of State or an order granting development consent under the Planning Act 2008 is excluded from legislative competence in relation to this Matter. The regulation of the transmission, distribution and supply of electricity is also outside legislative competence. And the regulation of oil and gas activities, other than those activities carried out by an individual for their domestic purposes, is excluded from competence in relation to this particular Matter. These are non-devolved policy areas.
46. The regulation of oil and gas exploration and exploitation is excluded from Matter 6.3 in relation to the territorial sea adjacent to Wales (12 nautical miles from the low water mark). The geographical limit of this exception is also set out in paragraph 55.
47. The regulation of electronic communication and networks is outside legislative competence in relation to this particular Matter. Telecommunications is a non-devolved policy area.

Exceptions from Matters 6.2 and 6.3

48. The regulation of the contained use of genetically modified organisms (GMOs) is excluded from both Matters. This reflects the fact that the Welsh Ministers do not have executive powers in this regard under Part VI of the Environmental Protection Act 1990, while they do have powers in relation to other aspects of GMOs.
49. The licensing regime established under Part 4 of the Marine and Coastal Access Bill is excluded from legislative competence. The Marine and Coastal Access Bill will provide Welsh Ministers with a range of licensing and regulatory powers in relation to the territorial sea adjacent to Wales.

Exceptions in Paragraph A1 of Part 2 of Schedule 5 of the Government of Wales Act 2006

50. The proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009, commonly referred to as the Carers LCO, will, if approved by the Assembly and Parliament, shortly change the way in which exceptions apply to Matters in Schedule 5 to the 2006 Act. The proposed Order would change the effect of certain exceptions to Matters in Part 1 of Schedule 5, by removing the current table and making certain exceptions, to be listed in Part 2 of the Schedule, apply to all Matters. Part 2 of Schedule 5 would be renamed as “Exceptions to Matters and General Restrictions”. The exceptions to be listed in paragraph A1 of that Part will be organised into Fields, in the same way that Matters are. Section 94 of the 2006 Act would also be amended to reflect this change. This will achieve more surely the objective that these exceptions should apply in all cases where they are relevant and makes Schedule 5 clearer and easier to understand by applying these exceptions to all Matters listed in it.
51. The proposed Carers LCO is currently subject to pre-legislative scrutiny in Parliament and the Assembly.
52. The Order will add a number of exceptions to paragraph A1 of Part 2 of Schedule 5 to the Government of Wales Act 2006. Section 94 of the 2006 Act, as it will be amended by the Carers LCO, makes clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph. The new exceptions to be added by this Order are set out below.

Economic Development (Field 5)

- The generation of electricity from a generating station whose construction, extension or operation requires the consent of the Secretary of State or the authority of an order granting development consent under the Planning Act 2008 is excluded from all Matters.
- The transmission, distribution and supply of electricity are also excluded from all Matters.
- Energy conservation, apart from the encouragement of energy efficiency otherwise than by prohibition or regulation, is excluded from all Matters.
- Nuclear energy and nuclear installations, including nuclear safety and liability for nuclear occurrences, are excluded from all Matters. This exception does not include provisions within an Assembly Measure relating to the disposal of very low level radioactive waste from Nuclear Licensed Sites.

Highways and Transport (Field 10)

- Road freight transport services, including goods vehicles operating licensing, are excluded from all Matters. This exception does not include the regulation of use of vehicles carrying animals for the purposes of protecting human, animal, fish or plant health or the environment.
- 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, are excluded from all Matters. This exception does not include the regulation of relevant vehicles carrying animals, where such regulation is for the purposes of protecting human, animal, fish or plant health or the environment.
- Aviation, air transport, airports and aerodromes are excluded from all Matters. There are three carve-outs to this exception. Firstly, the exception does not cover the provision of financial assistance to providers or proposed providers of air transport services or airport facilities or services. Secondly, the exception does not include strategies by the Welsh Ministers or local or other public authorities about the provision of air services. Thirdly, the exception does not include the regulation of the use of aircraft carrying animals for the purpose of protecting human, animal, fish or plant health (other than the health of persons on aircraft) or the environment.
- Shipping is excluded from all Matters. There are two carve-outs from this exception. Firstly, the exception does not cover the provision of financial assistance for shipping services to, from or within Wales. Secondly, the exception does not include regulations for the purposes of protecting human, animal, fish or plant health (other than the health of persons on ships) or the environment.
- Harbours, docks, piers and boatslips are excluded from all Matters. There are two carve-outs from this exception. Firstly, the exception does not cover those harbours, docks, piers or boatslips that are used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales (or for two or more of these purposes). Secondly, the exception does not include regulations for the purposes of protecting human, animal, fish or plant health or the environment.
- The carriage of dangerous goods, including the transport of radioactive material, is excluded from all Matters.

Water and Flood Defence (Field 19)

- The appointment and regulation of any water undertaker whose area is not wholly or mainly in Wales are excluded from all Matters.

- The 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, are excluded from all Matters.

Geographical limits of any Assembly Measure

53. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly's legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). For these purposes, section 158 of the 2006 Act defines "Wales" as extending out to the seaward boundary of the territorial sea (12 nautical miles from the low water mark). There are limited exceptions for certain kinds of ancillary provisions, for example a provision appropriate to make the provisions of the Measure effective, or a provision enabling other provisions of the Measure to be enforced, or making consequential amendments to other legislation.
54. The limitation relating to functions other than in relation to Wales prevents the Assembly from passing any Measure conferring on the Welsh Ministers, Welsh local authorities or any other public authority, functions which relate other than to Wales.
55. The proposed Order uses a definition of "Wales" which does not include the territorial sea. This means that, in relation to Matter 6.1, a provision of an Assembly Measure under the competence accorded to the National Assembly by the LCO could extend to the whole landmass of Wales, to the mean low-water mark on the sea-shore. It could extend further where it was dealing with the disposal of waste collected, managed or treated on land; in that case it could extend to the seaward boundary of the territorial sea (12 nautical miles from the low water mark). This latter extent would also apply to all Measures under Matters 6.2 and 6.3. The only exception in the case of provision made under those Matters would be if an Assembly Measure aimed to regulate oil and gas exploration and exploitation in relation to pollution. The geographical limits of such an Assembly Measure would extend seawards from the low water mark to three miles into the territorial sea adjacent to Wales. The Assembly would not have competence over pollution from offshore oil and gas exploration and exploitation in the outermost nine miles of the territorial sea adjacent to Wales.

Minister of the Crown functions

56. This proposed Order does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of the Minister

of the Crown without the consent of the Secretary of State. In relation to any future proposals that may impact on Minister of the Crown functions the appropriate UK Government Departments will be consulted and agreement sought.

Conclusion

57. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the proposed LCO to which this Explanatory Memorandum relates.

Jane Davidson
Minister for Environment, Sustainability and Housing
27 April 2009