



HOUSE OF LORDS

Select Committee on the Constitution

13th Report of Session 2008–09

**The National Assembly
for Wales (Legislative
Competence)
(Social Welfare) Order
2009 (relating to Carers)**

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)

Introduction

1. The Constitution Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. As part of the second limb our remit, we have since March 2007 conducted pre-legislative scrutiny of proposed Legislative Competence Orders (LCOs). We described the approach we adopt in a report made in December 2007.¹ Our work is undertaken simultaneously with reviews of proposed LCOs carried out by the House of Commons Welsh Affairs Committee and is intended to complement rather than duplicate the work of others during the pre-legislative phase.
2. LCOs are made under Part 3 of the Government of Wales Act 2006. Under Part 3, Parliament, the National Assembly for Wales and the Secretary of State for Wales may agree to amend Schedule 5 to the 2006 Act in order to enlarge the National Assembly’s legislative powers to make Measures. Schedule 5 defines the scope of the National Assembly’s legislative competence in terms of “fields” (20 broad areas of policy), under which are listed various more specific “matters” on which Measures may be enacted by the Assembly.
3. The pre-legislative phase is initiated by the publication, as a Command Paper laid before Parliament, of the text of the **proposed** LCO, a memorandum prepared by the Welsh Assembly Government, and an appendix showing how the proposals would amend Schedule 5. After the completion of the pre-legislative phase, a **draft** LCO is prepared and laid before Parliament for consideration. Parliament may also amend Schedule 5 by primary legislation; several Acts of Parliament since 2006 have enlarged the National Assembly’s legislative powers in this way.
4. **In this report, we draw the attention of the House proposed changes in the way in which the scope of “matters” are defined in Schedule 5.**
5. The continuing development of Schedule 5 to enlarge the National Assembly’s competence to make Measures takes place against the background of Part 4 of the 2006 Act (which is not in force). Legislative powers under Part 4 would enable the National Assembly to make laws known as “Acts of the National Assembly”. Part 4 will come into force only if the people of Wales vote in favour of this next step in devolution in a referendum. If and when this step is taken, the legislative powers of the National Assembly will be governed by the subject areas set out in Schedule 7 to the 2006 Act.

Proposed LCOs which have progressed to draft LCOs

6. Nine proposed LCOs have been published since the 2006 Act came into force. To date, five of the **proposed** LCOs have progressed into **draft** LCOs laid

¹ 2nd Report of Session 2007–08, *Scrutiny of Welsh Legislative Competence Orders* (HL Paper 17).

before Parliament (see Table 1 below); three of these have been approved by both Houses; one was withdrawn (in circumstances we describe in the next paragraph); and, at the time of making this report, one is awaiting debate.

TABLE 1

Proposed LCOs which have completed pre-legislative scrutiny

Proposed LCO	Field in Schedule 5 (and new matters)	Progress
1st	Field 5: Education and training (inserting matters relating to additional learning needs)	The National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008 (SI 2008/1036) was made on 9 April 2008
2nd	Field 15: Social welfare (inserting matters relating to charges levied by local authorities for non-residential social care)	The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008 (SI 2008/1785) was made on 9 July 2008
3rd	Field 5: Education and training and Field 15: social welfare (matters relating to facilities for training and education of children and safeguarding of vulnerable children)	The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132) was made on 10 December 2008
4th	Field 11 Housing (matters relating to disposal by a social landlord or land held or used for housing purposes)	Draft LCO withdrawn by Secretary of State in March 2009 following report of Joint Committee on Statutory Instruments
5th	Field 1: Agriculture, fisheries and rural development (matters relating to the red meat industry)	Draft LCO laid in March 2009; awaiting debate.

7. As noted in the previous paragraph, one **draft** LCO, on housing, was withdrawn by the Secretary of State before debate in the light of a report made by the Joint Committee on Statutory Instruments (JCSI) on 9 March 2009. In response to policy recommendations made by the House of Commons Welsh Affairs Committee during pre-legislative scrutiny, the Government had made a constitutionally significant change to the text of the proposed LCO when it laid the draft LCO before Parliament. The gist of the JCSI's criticism was that the draft LCO appeared not to be *intra vires* (within the powers) of the Government of Wales Act 2006. This is because the draft LCO appeared to make the decision whether the National Assembly had legislative power to abolish the "right to buy" social housing dependent on the consent, at some future point, of the Welsh Ministers and the Secretary of State for Wales. The JCSI applied the principle that "delegated legislation should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling statute". While noting that there were some "consent provisions" in the Government of Wales Act 2006, the JCI reported:²

"The delegation in paragraph 7B proposed by this Order differs in degree from the existing consent provisions. First, it delegates power not

² 7th Report of 2008–09, HL Paper 51/HC3-VII, paragraph 1.16.

only to the Secretary of State, but also to the Welsh Ministers, who are not accountable to Parliament. Secondly, unlike paragraphs 7 and 8, it relates to a specific matter in Part 1 and so can be seen as undermining the principle ... that Parliament retains control over the matters in Part 1. Thirdly, the provision to be authorised by the consent would inevitably impact directly not just on the Secretary of State or administrative arrangements, but on the statutory rights and liabilities of others (the social landlords and their tenants).”

8. **The robustness of the scrutiny process is demonstrated by the Joint Committee on Statutory Instrument’s report on the draft Housing LCO and the Government’s subsequent decision to withdraw that draft LCO. The problem arose because the Government introduced a constitutionally significant change to the proposed LCO after our Committee had scrutinised it. While we recognise that a distinction has to be made between the pre-legislative and legislative phases of an LCO’s passage through Parliament, 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.**

Proposed LCOs currently undergoing pre-legislative scrutiny

9. Four proposed LCOs are currently undergoing pre-legislative scrutiny (see Table 2). Two of these—the 6th proposed LCO on carers and the 8th proposed LCO on the environment—adopt a new approach to defining the extent of the matters on which the National Assembly may make Measures. The 7th and 9th proposed LCOs continue with the current approach.

TABLE 2

Proposed LCOs currently undergoing pre-legislative scrutiny

Proposed LCO	Command paper	Field in Schedule 5	Proposed new “matters”
6th	December 2008, Cm 7505	Field 15: Social Welfare	Would insert one matter relating to the support and the well-being of carers
7th	February 2009, Cm 7544	Field 20: Welsh Language	Would insert two matters to enable Measures on promotion of the use of the Welsh language and the freedom of people who wish to use the Welsh language with one another
8th	April 2009, Cm 7608	Field 6: Environment	Would insert three matters relating to waste, pollution and nuisances
9th	May 2009, Cm 7627	Field 9: Health and Health Services and Field 15: Social Welfare	Would insert a matter on assessment of mental health and treatment of mental disorder and another on social care services related to mental health

10. When we embarked on pre-legislative scrutiny of the 6th proposed LCO, we were puzzled by the fact that many of the provisions in it related not to the field of social welfare (as the title suggested) but to a novel way of setting out exceptions to “matters”, most of which had nothing to do with carers (the

matter which is proposed to be inserted). Three brief paragraphs of explanation were contained in the accompanying memorandum by the Deputy Minister for Health and Social Services.³ In order to understand more fully the reasons for these changes, and to assess any constitutional implications that might arise, we wrote to the Secretary of State for Wales seeking a more detailed account. The correspondence is set out in Appendix 1. In carrying out pre-legislative scrutiny we have considered issues of process and substance; we look at these in turn.

Issues of process

11. **An unsatisfactory situation has arisen in that two of the proposed LCOs currently undergoing pre-legislative scrutiny use the new method and two do not. This is a recipe for confusion. The arrangements relating to LCOs under Part 3 of the Government of Wales Act 2006 are complex at the best of times; the Welsh Minister's and Secretary of State's approaches to introducing a new method, has added to that complexity.**
12. In relation to the process, we do not regard the brief explanation for the changes given in paragraphs 17–19 of in the memorandum set out Command Paper 7505 as satisfactorily explaining the reasons for and significance of the proposed changes. **The fuller account given by the Secretary of State in his letter of 12 May is to be welcomed, and we recommend that such an account be included in the explanatory notes which will in due course accompany a draft LCO when it is laid before both Houses of Parliament.**
13. **In our view it is unsatisfactory that the proposed change to the method of defining exceptions to matters should be introduced under cover of an LCO that is, by its title, ostensibly about the field of social welfare. The provision for a new “matter” on carers should be severed from those on the new method of defining exceptions to matters and two separate draft LCOs should be laid before Parliament. This will enable each House of Parliament to debate and make a decision on whether the new method is acceptable. Such severance need not cause any undue delay as they can be set down for debate on the same occasion.**
14. **We welcome the Secretary of State's undertaking in his letter of 1 June that separate LCOs accompanied by full explanatory memoranda will be presented to Parliament.**
15. **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 the 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 5) 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.**

Issues of substance

16. The remaining question is whether, leaving aside issues of process, the substance of the new approach to defining exceptions to “matters” is constitutionally acceptable.

³ Wales Office, *Pre-legislative Scrutiny of the Proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Cm 7505 (December 2008), paragraphs 17–19.

17. At the outset, it should be said that what the Government now proposes in the 6th and 9th proposed LCOs is rather different from the detailed descriptions of how Schedule 5 would operate that was given by ministers during the passage of the Government of Wales Bill in 2006. In his memorandum, the Deputy Minister for Health and Social Services described the changes that are to be brought about in section 95 and Schedule 5 as “technical amendments”.⁴ **We do not regard the proposed new method as being merely “technical”. The Government of Wales Act 2006 is, in effect, a written constitution for the governance of Wales. There is an onus to explain with care and to justify why changes to this constitutional code are necessary and desirable.**
18. Schedule 5 deals with the limits placed on “matters” in various ways:
- In relation to some matters, a statement that “This matter does not include ...” immediately follows on from the statement of the matter
 - There are various “exceptions” to matters currently set out in Part 1 of the Schedule but which it is proposed to move to Part 2
 - There are “general restrictions” set out in Part 2
 - Part 3 of the Schedule sets out “exceptions from Part 2”.
19. This scheme is far from easy to follow. In this Committee’s March 2006 report on the Government of Wales Bill, we warned:⁵
- “Part 3 of the bill does nothing to simplify either the sources of law relating to Wales or the process by which those laws are made. Problems with access to law, whether for citizens, public authorities or legal professionals, are not merely practical inconveniences but go to the heart of the constitutional principle of the rule of law. Confusion about who makes legislation, caused by complexity in the legislative processes, also risks undermining public confidence. We believe that there is a clear risk that the gains in transparency and promotion of public understanding by ending the corporate status of the Assembly in Parts 1 and 2 of the bill may be obscured by the intricacies created by Part 3.”
- We reiterate these concerns about the intricacies of the legislative arrangements.**
20. The Secretary of State’s letter of 12 May 2009 describes the current approach as one of “fixed exceptions”: Part 1 of Schedule 5 contains tables which pin “exceptions to a matter” to a particular “matter”. So, for example, the exception “child support” relates specifically to matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.6 and 15.8. What is now proposed is that the device of “fixed” exceptions set out in tables in Part 1 of the Schedule should be abandoned and in future there should be “floating exceptions” listed in Part 2 of the Schedule (along with the “general exceptions” that are already there). Figure 1 below represents diagrammatically the current approach; figure 2 the proposed approach.
21. In assessing whether the change is constitutionally acceptable two main points need to be considered. The first is whether the 2006 Act provides the Secretary of State with sufficient delegated power to make the proposed changes to Schedule 5 by order (rather than by primary legislation). **We have concluded that section 95 of the Act provides a sufficient legal base for the change.**

⁴ Wales Office, *Pre-legislative Scrutiny of the Proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Cm 7505 (December 2008), paragraph 17.

⁵ 8th Report of 2005–06, HL Paper 142, paragraph 31.

22. The second aspect is whether it is a good idea to adopt the new method of expressing exceptions to matters. **We are satisfied that the Secretary of State's sets out a justification for the new approach in his letter.**

FIGURE 1

Schedule 5 in current format

Part 1: Matters
 20 'fields' populated with 'Matters'
 Exceptions to matters set out in table using 'fixed' method

Highways and transport	
Column 1: Exceptions	Column 2: Matters to which the exceptions relate
...	...

Social Welfare	
Column 1: Exceptions	Column 2: Matters to which the exceptions relate
...	...

Part 2: General Restrictions

- relating to functions of Ministers
- creation of certain criminal offences
- alteration of police areas
- modifications to certain Acts of Parliament
- modifications to certain provisions of GWA Act 2006 itself

Part 3: Exceptions from Part 2

- qualification of general restriction on Measures not dealing with functions of Ministers, if Secretary of State consents
- police areas may be modified if the Secretary of State consents
- Measure may modify powers of Comptroller and Auditor General if he consents
- Measures may restate the law
- subordinate legislation
- Data Protection Act 1998 may be modified by a Measure so that it applies to complaints about health and health services

FIGURE 2**Schedule 5 in its proposed format**

Part 1: Matters

20 'Fields' populated with 'Matters'

*[The tables setting out 'fixed' exceptions to matters is removed]*Part 2: Exceptions to Matters and General RestrictionsExceptions to mattersExceptions to matters set out using 'floating' method

- Economic Development (field 4 of Part 1)
- Highways and transport (field 10 of Part 1)
- Social Welfare (field 15 of Part 1)
- Water and flood defence (field 19 of Part 1)

General Restrictions

- relating to functions of Ministers
- creation of certain criminal offences
- alteration of police areas
- modifications to certain Acts of Parliament
- modifications to certain provisions of GWA Act 2006 itself

Part 3: Exceptions from General Restrictions in Part 2

- The general restrictions in Part 2 do not apply to Measures not dealing with functions of Ministers, if Secretary of State consents
- police areas may be modified if the Secretary of State consents
- Measure may modify powers of Comptroller and Auditor General if he consents
- The general restrictions in Part 2 do not prevent a Measure restating the law
- The general restrictions in Part 2 do not prevent Measures making provision for subordinate legislation in certain circumstances
- Data Protection Act 1998 may be modified by a Measure so that it applies to complaints about health and health services

APPENDIX: CORRESPONDENCE ON THE WELSH LEGISLATIVE COMPETENCE ORDERS BILL

Letter from Lord Goodlad to Paul Murphy MP, 23 April 2009

The Constitution Committee is carrying out pre-legislative scrutiny of this proposed Legislative Competence Order (LCO). To enable us to complete this task, we would be grateful for your response to the areas of possible concern we raise below which relate to Article 3. Article 3 would make amendments to the method by which legislative competence is defined in Schedule 5 to the Government of Wales Act 2006.

Our concerns may be summarised in three main questions.

- (1) Is there a compelling case for re-casting the method of defining legislative competence in Schedule 5 (i.e., by adopting a different drafting method and transferring “exceptions to matters” from tables in Part 1 to Part 2 of the Schedule)?**

We have noted the explanation given by the Welsh Assembly Government in their memorandum accompanying the proposed LCO that these are “technical amendments” and that transferring the “exceptions to matters” currently set out in tables in Part 1 of Schedule 5 to Part 2 would 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”. We would be grateful for a fuller explanation as what, in practical terms, the proposed change will achieve, as this is not clear to us from the information contained in the memorandum.

- (2) Is it constitutionally acceptable for the change to be made by way of LCO rather than by primary legislation? (As we explain below, we are not, without further information, convinced that the 2006 Act enables this change to be made by way of LCO).**

Schedule 5 was the subject of detailed debate when the Government of Wales Bill was considered by Parliament in 2006. The three-part structure of the Schedule was carefully explained. In the Explanatory Notes accompanying the Bill, the Government said: “The effect of an individual Order in Council will be to insert, under the relevant field heading in Part 1 of Schedule 5, a description of the “matter” in relation to which the Assembly is to be given enhanced legislative competence, together with any specific exceptions necessary accurately to define its scope” (paragraph 316). As recently as December 2008, when the third of the proposed LCOs was made, this approach of (a) exceptions being specific and (b) being in Part 1 of the Schedule was confirmed, when the “exceptions tables” were inserted into Part 1.

Against this background, the proposed new approach—of (a) exceptions applying to all matters and (b) exceptions being set out in Part 2 of the Schedule, along with “general restrictions”—is surprising. The 2006 Act is, in effect, a written constitution for the governance of Wales. Given this constitutional character, its provisions ought not to be tinkered with lightly or without careful deliberation. In this context, we note that three paragraphs in the Welsh Assembly Government memorandum are devoted to this aspect of the proposed LCO. The title of the proposed LCO makes no reference to the amendments to the structure of Schedule 5 which, given the proportions of the two topics (carers and changes to Schedule 5) covered by the draft order, is rather misleading. A matter of this

significance would seem to us to demand a discrete LCO to ensure adequate scrutiny.

Moreover, it is not clear to us that section 95 provides a sufficiently wide enabling power to achieve this new approach. While it is true to say that section 95(1)(c) provides for “amendment” of Part 2 of Schedule 5, it may be open to doubt whether that enabling provision allows for the re-casting Part 2 (which was enacted to contain “general restrictions”) into something that generically it is not (i.e., a collection of “exceptions to matters” as well as “general restrictions”).

We would welcome your observations on these points.

(3) Is there a risk that the new method of defining legislative competence may illegitimately facilitate making legislative competence subject to ministerial consent?

This question is posed in the aftermath of concerns raised by the Joint Committee on Statutory Instruments (JCSI) about the vires of the Draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009. In its memorandum to the JCSI on that draft LCO, the Wales Office said that the delegation to Ministers of the decision whether the National Assembly should have legislative competence to pass a Measure otherwise outside competence because of Part 2 of Schedule 5 to the Government of Wales Act 2006 was legitimate because existing entries in paragraphs 7, 7A and 8 of Part 3 of Schedule 5 to the 2006 Act provided for Ministerial consent.

Is it the view of the Wales Office that a future LCO could add an entry in Part 3 involving a delegation to Ministers which relates to one of the exceptions inserted by article 3(9) of the proposed LCO?

Does the Wales Office consider that an amendment which added a new matter in Part 1 of Schedule 5 would be a legitimate use of the power conferred by section 95(1) if it stated that provision of a specified kind is excepted from the matter unless the Secretary of State consents? If so, what is the reason for that view?

I am copying this letter to the Rt Hon Rhodri Morgan AM, First Minister for Wales, to Dr Hywel Francis MP, Chairman of the House of Commons Welsh Affairs Committee and to David Maclean MP, Chairman of the Joint Committee on Statutory Instruments.

Response from Paul Murphy MP to Lord Goodlad, 12 May 2009

Thank you for your letter of 23 April, setting out some questions your Committee has in relation to its scrutiny of the proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009—the “Carers LCO”.

Let me begin by saying how grateful I am for the thorough scrutiny undertaken by the Select Committee on the Constitution in relation to Legislative Competence Orders (LCOs). This work, and the complementary scrutiny carried out by the Welsh Affairs Committee, and the National Assembly for Wales, ensures the draft LCOs I present to Parliament are robust and fully in accord with the provisions of the Government of Wales Act 2006 (“GOWA”).

I am also grateful for the opportunity to respond to the areas of possible concern raised by your Committee in relation to Article 3 of the proposed Carers LCO, which applies certain exceptions in Schedule 5 to all matters in the Schedule. This change was agreed by all the interested parties including the Government, the Welsh Assembly Government, Welsh Legislative Counsel and Parliamentary

Counsel. I appreciate that a further change to the way that exceptions are dealt with, coming so soon after the change effected by the Vulnerable Children LCO (SI 2008/3132), requires a comprehensive explanation. I will respond to each of your concerns in turn.

1. Case for changing the drafting approach to exceptions.

Both the table approach and the new approach in the Carers LCO are designed to solve the same drafting issue. What is the clearest and most practical way of applying exceptions that should apply to a number of matters? The table approach addresses this by fixing each exception to specific matters (which we call the “fixed” exception approach), providing a mechanism for multiple matters to be listed alongside a particular exception. While this works theoretically, experience of expanding the table has revealed some practical drawbacks.

The process of defining the scope of LCOs can be a lengthy one, with much of the discussion focusing on exceptions. It can be difficult to define precisely a clear boundary between devolved areas of policy and areas which remain the responsibility of the UK Government, and consequently to determine the matters on which the Assembly should be able to legislate and the areas relating to those matters which should remain the preserve of Parliament (and be expressed as exceptions to the Assembly’s competence).

In practice, it is accepted by both the Government and the Welsh Assembly Government that there are some areas of policy—such as social security—which will remain the UK Government’s responsibility and primary legislation in those areas would in all circumstances remain the preserve of Parliament. These are, in effect, general exceptions to the Assembly’s competence.

General exceptions present difficult drafting issues in the fixed exception approach, relating to the proper scope of matters. We need to be certain that the exception is potentially relevant to a matter before it is applied. This involves trying to establish the full breadth of every matter and every exception. This requires a great deal of careful consideration, as the full breadth of a matter is almost certain to go beyond what was being borne in mind when the relevant agreement was reached between Whitehall and colleagues in Cardiff.

In essence the fixed exception approach requires the UK Government and the Welsh Assembly Government (and ultimately the Assembly and Parliament) to consider all potential scenarios for the purposes of working out the fullest imaginable breadth of every matter and every exception. This kind of work can be challenging, and can certainly be much more difficult than the work involved with “floating” exceptions. This effort is directed at a purely technical question that does not advance the agreed position of the UK Government and the Welsh Assembly Government on the policy issues involved. The difficulty in matching exceptions to matters leads to a risk that in certain cases the need to match a specific exception to a specific matter could be overlooked. Over the longer term, as more and more LCOs are brought forward, there is a risk that, cumulatively, such oversight could erode the efficacy of the devolution settlement as a whole.

If we continued to proceed on the basis of applying specific exceptions to each matter, the consequences would be as follows:

- i. the table of exceptions would itself become more cumbersome and harder to follow because certain exceptions would need a large number of matters to be listed against them;

ii. there would be a risk of perverse and inconsistent consequences if the Government and the Welsh Assembly Government failed to anticipate all matters to which an exception should apply. The considerable time and effort incurred in identifying scenarios where a particular exception may be relevant to a particular matter would not necessarily succeed in capturing every eventuality.

While it is theoretically possible to deal with exceptions of general application through the use of the table format, we consider that it would be far clearer and less prone to errors and anomalies for those negotiating the LCD and for those subsequently considering whether a particular Measure was within the Assembly's competence if we moved to a system of general or "floating" exceptions for topics intended to remain outside Assembly competence under all fields. These floating exceptions fit more naturally in drafting terms in Part 2 of Schedule 5, which concerns general limitations on the Assembly's competence. The drafting solution proposed would also make the interpretation of exceptions in Schedule 5 consistent with that of exceptions in Schedule 7, should it come into force (see section 108(4)(a) of G0WA). The floating exception approach also improves accessibility since it does not require cross-referencing between the table references and the matters.

The move to "floating" exceptions would not lessen the current flexibility of the Schedule in terms of applying exceptions to matters. It would not, for example, preclude exceptions applying only to one matter in Schedule 5 or applying to several matters (as part of the definition of those matters). But it would at the same time recognise that there are some areas which are generally not intended to be within the competence of the Assembly, even though they could be interpreted as relating to one or more matters in Part 1 of Schedule 5.

So the change we are proposing, has we think several benefits; it makes the process of negotiating the LCD simpler, it is easier for the reader to understand and it makes it clearer what is within and beyond legislative competence in relation to any matter.

2. Constitutional acceptability of the change.

It is worth noting that the result achieved by the floating exception approach could also be achieved using the tables in the Schedule by adding each matter to the exceptions listed and amending the tables each time a further matter is inserted into Schedule 5. We do not however think that this would be an economical or reliable drafting solution. We anticipate that there would still be matters which could only be defined properly by the inclusion of an exception in the text of the matter itself and that option (as described in the Explanatory Notes and summarised above) will remain.

As more LCOs amending Schedule 5 have been proposed it has become clear that more and more exceptions would in practice need to apply in all circumstances, and it would make the Schedule very cumbersome and complex to understand if that had to be achieved by listing every matter against those exceptions. We do not consider that this drafting approach is a change to the constitutional arrangements for Wales but would be content to ask the Welsh Assembly Government to change the name of the Order to reflect the significance of this amendment if your Committee wishes.

You are concerned also by the perceived lack of scrutiny because these proposed changes have been combined with provision inserting a new matter into Schedule 5 (in the field of social welfare). I greatly value the process of pre-legislative scrutiny, and can assure you that both the Welsh Affairs Committee and the

Assembly Committee which scrutinised the LCO were fully briefed on the changes to the treatment of exceptions and raised no objections. We considered that it would be easier for both legislatures to scrutinise the effect of the proposed changes to the presentation of exceptions in the context of an actual addition to Part 1 of Schedule 5, rather than in the abstract. There would of course also be an opportunity for the Assembly and both Houses of Parliament to consider and debate the proposal when the draft LCO is presented for approval.

In summary, we believe that in taking forward this proposed LCO we have given Parliament and the Assembly the opportunity to properly scrutinise its provisions.

We are clear that the provisions of GoWA enable us to make the amendments we propose; in addition to section 95(1)(c) which you cite, we believe that section 95(3) enables us to make such changes. The subsection allows for an Order in Council to modify any enactment in connection with the provision made by the Order.

We do not think that there is a significant conceptual difference between restrictions and exceptions; they are both categories which limit the scope of the Assembly's competence and so the inclusion of "floating" exceptions within Part 2 means that all limitations that are of general application will be in one place in the Schedule (whilst any exception that is of specific application to a matter will be included in Part 1 of the Schedule).

3. Ministerial consent

This LCO contains no provision for subsequent ministerial consent, and we do not believe that it would make such provision more likely in future. We do not anticipate a situation in which a floating exception could be disapplied with the consent of a Minister of the Crown. If a situation arose where it appeared that a floating exception should not apply to a particular matter, then the proper course would be to seek to amend Part 2 to exclude the matter from the ambit of the exception.

It is not intended that Part 3 should relate in any way to the general exceptions to matters in the new paragraph A1 of Part 2 inserted by article 3(9) of the LCO. Paragraphs (10) to (12) of article 3 amend Part 3 to make clear that Part 3 relates only to the general restrictions in Part 2 and not the general exceptions.

I trust my response will help assuage the concerns of your Committee in respect to the provisions in Article 3. I would be happy to meet to discuss this issue further, but think it would be helpful for our officials and legal advisors to meet to discuss in the first instance. My officials will contact the Clerk to your Committee to arrange a meeting.

Response from Paul Murphy MP to Lord Goodlad, 1 June 2009

The Select Committee on the Constitution is examining the proposed National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009, and we have exchanged correspondence about the changes it proposes to the drafting approach to exceptions.

In recent, informal discussions with my officials, your Committee's legal advisors made clear their preference for Parliament to be able to consider separately the proposals on carers and the proposed changes relating to exceptions. Currently both proposals are set out in the proposed Order. To address this concern, the Welsh Assembly Government has prepared two revised Orders—the National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009,

relating to carers, and the National Assembly for Wales (Exceptions to Matters) Order 2009, relating to exceptions. The content of these Orders broadly reflects that of the original proposed LCO, with some changes following its pre-legislative scrutiny by the Welsh Affairs Committee and a Committee of the National Assembly for Wales.

I enclose copies of both LCOs and their Explanatory Memoranda, which your Committee may wish to consider in place of the single proposed Order. The Carers LCD now amends the table of exceptions currently in Part I of Schedule 5 to the Government of Wales Act 2006. It will therefore precede the Order making changes to the way in which exceptions are handled in the Schedule. Subject to the successful completion of pre-Legislative scrutiny and approval by the National Assembly, I would intend to present both draft Orders to Parliament at the same time.

In addition to some minor drafting changes the Carers LCO, as revised, makes a technical change to matter 15.1, which was inserted into Schedule 5 to the 2006 Act in 2008 by the Domiciliary Care LCO. Matter 15.1 enables the National Assembly to legislate about payments to individuals to secure social care services, but only if payments are made to the person with social care needs or a person looking after them. The Health and Social Care Act 2008 amended the relevant legislation on direct payments to include a wider range of payment recipients. The change to the Assembly's legislative competence under matter 15.1 therefore reflects the broadening of Welsh Ministers' executive competence effected by the 2008 Act. This change is further explained at paragraph 17 of the Explanatory Memorandum.

I look forward to the outcome of your Committee's scrutiny of these Orders in due course.

I am copying this letter to David Maclean MP, Chairman of the Joint Select Committee on Statutory Instruments, and I have written in similar terms to Dr Hywel Francis, Chairman of the Welsh Affairs Committee.