



HOUSE OF LORDS

Select Committee on the Constitution

20th Report of Session 2008–09

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

Report

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Select Committee on the Constitution

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

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 of our remit, we have since March 2007 conducted pre-legislative scrutiny of proposed Legislative Competence Orders (LCOs). 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. After the completion of the pre-legislative phase, a draft LCO is prepared and laid before Parliament for consideration
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. **In this report we draw to the attention of the House the drafting in the proposed LCO on the Environment (LCO 8).**¹

LCO 8

3. LCO 8 will amend Part 1 of Schedule 5 by inserting three new Matters into Field 6 (environment), as follows:
 - 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.
4. The environment is a long-devolved policy area and the proposed LCO seeks legislative competence for the Assembly over areas where executive competence is already held by Welsh Ministers. Such legislative competence, it is said, will facilitate a more holistic and less piecemeal approach to be

¹ The proposed Order and Explanatory Memorandum are published as *Pre-legislative scrutiny of the proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009*, Cm. 7608, April 2009. The Welsh Affairs Committee of the House of Commons has scrutinised this proposed LCO: see its 12th report for 2008–09, HC 678, July 2009.

adopted for environmental regulation in Wales. **The Committee would like to draw the attention of the House to the use made in this LCO of exceptions.** These appear in three main forms: “fixed exceptions”, “floating exceptions” and “carve-outs” (which are in fact exceptions to exceptions). The drafting thus raises concerns about clarity and transparency in the law.

The “fixed exceptions”

5. Also known as “matter(s)-specific exceptions” these exceptions are detailed in each new Matter (6.1, 6.2, 6.3). Thus, to take an example, Matter 6.1 excludes: the regulation of the provision of postal services, the regulation of decommissioned explosives, the regulation of radioactive material that is at military premises, the decommissioning of offshore energy installations, the capture, conveyance and disposal of carbon dioxide, etc. The use made in this proposed LCO of fixed exceptions is readily understandable, in that it seeks (in the words of the Welsh Assembly Government’s memorandum at paragraph 24) “to follow the current boundaries of what are devolved and non-devolved issues”. However, **the Constitution Committee endorses the conclusion reached by the House of Commons Welsh Affairs Committee that, while “the extensive use of exceptions in this proposed Order reflects the complexity of this field of legislation, ... such a sweeping use risks making the Government of Wales Act 2006 unwieldy and incomprehensible”.**²

The “floating exceptions”

6. Floating exceptions were first proposed in the Carers LCO, on which the Committee reported in June 2009.³ A floating exception, unlike a fixed exception, is not pinned to a particular Matter and appears not in Part 1 of Schedule 5 to the Government of Wales Act 2006 (which lists Fields and Matters), but in paragraph A1 of Part 2 of that Schedule. (Part 2 originally listed “general restrictions” to Fields and Matters and now lists “floating exceptions” as well as “general restrictions”.) The proposed LCO contains floating exceptions that will be listed not under Field 6 (environment), but under Field 4 (economic development), Field 10 (highways and transport) and Field 19 (water and flood defence). For example, in respect of highways and transport it will insert new floating exceptions relating to road freight, aviation and carriage of dangerous goods. They are listed otherwise than under Field 6 not because they do not relate to the environment but because they relate more closely to Fields 4, 10 and 19. This usage may be considered complex and inelegant but is understandable given that environmental concerns are relevant to policy and legislation in many areas. **The Constitution Committee echoes the recommendation of the House of Commons Welsh Affairs Committee that “the inclusion of floating exceptions not directly related to the Matters encompassed by an LCO should not become common practice”.**⁴ Likewise, the Constitution Committee re-emphasises that, in the interests of effective parliamentary scrutiny, “LCOs should avoid rolling up

² Welsh Affairs Committee, 12th Report (2008–09) HC Paper 678, para. 41, emphasis added.

³ See Constitution Committee, 13th Report (2008–09) *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, HL Paper105.

⁴ Welsh Affairs Committee, 12th Report (2008–09) HC Paper 678, para. 45.

specific provision on a subject and ‘exceptions to matters’ on a completely unrelated subject.”⁵

The “carve-outs”

7. Carve-outs add back in what an exception would otherwise remove from the Assembly’s legislative competence. Several of the floating exceptions included within the proposed LCO contain them. This is not wholly novel to LCOs: they were included in the Carers’ Order, but they feature more extensively and more prominently in the proposed Environment LCO. To give some examples:

Aviation is listed as a floating exception under Field 10 (Highways and Transport). Three carve-outs are then listed as exceptions to this exception: the provision of financial assistance to providers of air transport services, Government or other public authorities’ strategies about the provision of air services, and the regulation of the use of aircraft carrying animals for the purpose of protecting human or other health or the environment.

Similarly, under the same Field, *shipping* is listed as an exception. From this there are two carve-outs: financial assistance for shipping services, and regulations for the purpose of protecting human or other health or the environment.

Again under the same Field, *‘harbours, docks, piers and boatslips’* are listed as an exception from all Matters, except that two areas are carved out from this exception, one of which provides that harbours, docks, piers and boatslips “used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales” are excluded from the exception.

8. Some use of carve-outs must be expected. As the examples show, this will tend to be the case where an area of policy—such as aviation—is not generally devolved but the Welsh Ministers have some limited functions within that area or have functions in another devolved field (such as the environment) which may affect activities in that area. However, **in reporting on the proposed LCO, the House of Commons Welsh Affairs Committee noted that the carve-outs “add complexity to this legislation” and, moreover, that “their exact effect on the law in Wales is not easy to explain”.**⁶ The Constitution Committee endorses this view, along with the further recommendation of the Welsh Affairs Committee that such carve-outs should be “kept to an absolute minimum”.

Clarity, transparency and accessibility

9. **The Constitution Committee considers LCO 8, taken in the round, to be perilously close to the borderline of what is constitutionally acceptable. A common thread is the opaque nature of the evolving ‘written constitution’ that is the Government of Wales Act 2006. To this effect, the Constitution Committee agrees with the Welsh Affairs**

⁵ See Constitution Committee, 13th Report (2008–09) *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, HL Paper105, para. 15.

⁶ Welsh Affairs Committee, 12th Report (2008–09) HC Paper 678, para. 48.

Committee that “LCOs should be drafted with the aims of clarity and simplicity in mind”⁷ and, indeed, recalls that clarity and transparency in the law are elemental to the core constitutional principle of the rule of law. The Wales Office, it is recommended, should actively explore ways in which the proposed Environment LCO may be simplified. The Constitution Committee also urges the importance of user-friendly explanations of the Assembly’s evolving legislative competence, both in the case of individual LCOs and, on a regular basis, of Schedule 5 as a whole. The concept of an evolving ‘written constitution’ for one of the four countries of the Union demands no less.

⁷ Ibid, para. 41.