

MEMORANDUM FROM THE COUNSEL GENERAL

CONSTITUTIONAL LAW: DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.32. It sets out the background to the provisions in the attached Government draft Legislative Competence Order (LCO) relating to the legislative competence of the National Assembly for Wales. The term “Legislative Competence Order” is used to refer to an Order in Council under Section 95 of the Government of Wales Act 2006 (“the 2006 Act”).

Background

2. Under Part 3 of the 2006 Act, the legislative competence of the Assembly is defined by section 94 and Schedule 5 of that Act. Part 1 of Schedule 5 specifies the matters in relation to which the Assembly has power to legislate by Assembly Measure. Part 2 of Schedule 5 lists general restrictions on that power and Part 3 lists exceptions to those general restrictions. Section 95 (1) of the 2006 Act enables Her Majesty, by Order in Council, to amend Schedule 5 so as to add new matters to Part 1; to vary or remove a matter, or add, remove or vary a field; or to amend Part 2 or Part 3. Section 95 (3) specifies that an Order in Council under that section may make such modifications of any enactment – including the 2006 Act itself – as Her Majesty considers appropriate in connection with the provision made by the Order in Council.
3. It is sometimes necessary to include, in the definition of matters in Part 1 of Schedule 5, exceptions to those matters, so as to make it clear that a matter does not include a particular area of policy. It has also proved necessary in many cases to apply the same exception to more than one matter. As a result of the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132), exceptions to matters in Part 1 of Schedule 5 are now listed in a table, with the matters to which each exception applies being identified against each one.

Scope

4. The draft Order makes technical amendments to Section 94 and Schedule 5 of the 2006 Act. The effect of these amendments is to apply the exceptions which are currently listed in that table to all matters in Part 1 of Schedule 5. The table of exceptions is replaced by a list of exceptions, set out in a new paragraph A1 in Part 2 of Schedule 5. Section 94 of the 2006 Act is amended to make it clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph.
5. The draft Order does not add any new exceptions. It amends exceptions 2 and 8 under the heading of Highways and Transport so as to preserve the scope of Matter 10.1 (road charging).

Rationale

6. The current approach of linking each exception to specific matters involves trying to anticipate all the circumstances in which a particular exception might be relevant to a particular matter. Where both the Government and the Welsh Assembly Government have agreed that an area of policy remains the UK Government's responsibility and primary legislation in those areas would in all circumstances remain the preserve of Parliament, it would be the intention to except such areas from the Assembly's legislative competence in all cases where they were relevant. It would appear more straightforward to recognise this by making such areas general ("floating") exceptions to the Assembly's competence, where there is any matter in Part 1 of Schedule 5 which is relevant to one of those areas.
7. If amendments to Schedule 5 had continued on the basis of applying specific exceptions to each matter, the table of exceptions would itself have become more cumbersome and harder to follow because certain exceptions would need a large number of matters to be listed against them. There would also have been a risk of perverse and inconsistent consequences if the UK 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.
8. The move to "floating" exceptions will not lessen the current flexibility of the Schedule in terms of applying exceptions to matters. It will 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 will 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.

9. It will therefore be possible to add new exceptions to the list (including under other fields) when new matters are added which make further exceptions necessary and where it is intended that those further exceptions should apply across the board. It will also still be possible to specify an exception to an individual matter in future, where it is required only as part of the definition of that matter.
10. 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).

Changes to the Order following pre-legislative scrutiny

11. A proposed Order to which this Order relates was subject to pre-legislative scrutiny by the National Assembly for Wales Legislation Committee No 3, the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee. The proposed Order in question was the proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 which contained a matter relating to carers as well as containing the changes in relation to exceptions. The National Assembly for Wales Committee considered but did not raise any concerns in its report on that part of the proposed Order which relates to this draft Order.
12. The Welsh Affairs Committee noted that the changes with regard to exceptions were essentially technical and that there was agreement that that they would enhance transparency and make the reading of Schedule 5 far more straightforward. It concluded:

“We accept that the revision of the list of excepted matters in Part 1 of Schedule 5 of the Government of Wales Act 2006 does not in any way broaden or change the Welsh Assembly's legislative competence. There is some doubt about whether such a change to the structure of Schedule 5 was envisaged as part of the LCO process. However, given that there is unlikely to be an opportunity for further primary legislation amending the Government of Wales Act 2006, we can see some logic in tidying up loose ends which may have emerged during the implementation process, so long as this is designed to clarify rather than alter the fundamental settlement that the 2006 Act embodies. We await with interest the findings of the Constitution Committee”.
13. The Constitution Committee of the House of Lords concluded that the proposed Order should be split so that both legislatures were able to consider and vote separately on the different issues of adding to the

Assembly's legislative competence in relation to carers and amending the way in which exceptions to matters in Schedule 5 operate. It also requested further clarification of the grounds for making the Order: this Explanatory Memorandum has been expanded accordingly.

14. Apart from presenting it as a separate LCO, this draft Order does not differ from the relevant content of the proposed Order other than to provide for it to come into force two days after it is made. This will ensure that, even if it is considered simultaneously with the draft National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 relating to carers, the technical changes which it brings about will apply subsequently.

Conclusion

15. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be amended in accordance with the provisions of the Government draft Order to which this Explanatory Memorandum relates.

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