

MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT

CONSTITUTIONAL LAW: DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010

Draft Legislative Competence Order relating to housing and local government

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 draft Legislative Competence Order which would confer additional legislative competence upon the National Assembly for Wales. It also explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy contained in the White Paper "Better Governance for Wales". 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. 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, in relation to matters, subject to the limitations provided for by 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.
3. The draft LCO would confer further legislative competence on the National Assembly for Wales, in the Fields of housing and local government (Fields 11 and 12 within Schedule 5 to the 2006 Act). New legislative powers in respect of the specified matters will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures. These Measures will be subject to thorough scrutiny and approval by the National Assembly. Attached at Annex A is a copy of Schedule 5 showing the legislative competence that the National Assembly has acquired to date.

Context

4. Housing is a devolved policy area and Ministerial functions relating to housing (with certain exceptions) were transferred to the National Assembly following its inception, under section 22 of the Government of Wales Act 1998. In addition, further executive functions in relation to housing have been devolved to the Welsh Ministers in subsequent Acts of Parliament. The draft LCO would provide the National Assembly with legislative competence over areas where executive competence is already held by the Welsh Ministers. This would allow the National Assembly to have a role in deciding the legislative framework for the policy areas devolved to the Welsh Ministers and enable the Welsh Assembly Government to propose legislation which supported its policy ambitions. The draft LCO has been developed following the withdrawal of an earlier draft LCO on Housing (the draft “National Assembly for Wales (Legislative Competence (Housing) Order 2009”). The Welsh Assembly Government and the UK Government agreed not to take forward the 2009 draft LCO following its consideration by Parliament’s Joint Committee on Statutory Instruments (JCSI). The 2009 LCO was more narrowly focused on the disposal by a social landlord of land held or used for housing purposes. This matter is included in the broader scope of the new draft LCO.
5. Since 2008, housing policy in Wales has been undergoing a full review. At the centre is the development of a new National Housing Strategy. The Assembly Government consulted widely upon a draft of this Strategy between January and May 2009 and the final version will be published in the Spring 2010. Its vision is to promote an approach to housing supply and management that will help build a more sustainable future, thus improving our communities and the lives of individuals. The new Housing Strategy is also supported by a number of other policy developments.
6. There is a detailed programme of work in hand across the housing sector to put in place a new direction of travel for the delivery of affordable housing. This programme of work responds to a 2008 report by a review group, led by the former Minister Sue Essex and commissioned by the Assembly Government, on strengthening affordable housing delivery in Wales (the Report to the Deputy Minister for Housing by the Affordable Housing Task and Finish Group – commonly referred to as the Essex Review).
7. In relation to homelessness and following extensive public consultation, the Welsh Assembly Government launched a Ten Year Homelessness Plan in July 2009. This plan sets out the strategic aims and broader vision for minimising homelessness in Wales from 2009 to 2019. In particular, the plan recommends reviewing the statutory framework for homelessness

policy in Wales, with the aim of ensuring an all-encompassing service provision for homeless people.

8. On the issue of housing-related support activities, the Welsh Assembly Government consulted on *Supporting people – housing related support strategy* in spring 2009. This draft strategy sets out the focus for the future direction for housing-related support activities, designed to enable people to live independently in their accommodation.
9. In relation to Gypsies and Travellers, the Welsh Assembly Government published *A Road Less Travelled – A Draft Gypsy Traveller Strategy* for consultation in September 2009.

Current legislative framework

10. The Welsh Ministers already have devolved to them significant executive powers and secondary legislative powers across a wide range of legislation relating to housing. The key legislative provisions which relate to the draft Order are as follows:

Caravan Sites and Control of Development Act 1960

11. This Act deals with licensing of caravan sites, and provision of sites for Gypsies and Travellers.

Housing Act 1985

12. This Act (among other things) describes the Local Housing Authorities (which are, in Wales, County Councils or County Borough Councils), and their duties. The Act also deals with the provision of housing accommodation, the disposal of land held for housing purposes, the Right to Buy, and defines secure tenancies.

Housing Associations Act 1985

13. This Act confers a number of general functions, relating to Housing Associations, on the Welsh Ministers.

Housing Act 1988

14. This Act governs rented accommodation including assured tenancies granted by private landlords (including housing associations and Registered Social Landlords). It also legislates in respect of housing associations.

Local Government Finance Act 1992

15. This Act replaced the Community Charge with the Council Tax. There are substantial secondary legislation-making powers under the Act and the devolution of these gives the Welsh Ministers powers to make significant amendments to the council tax regime.

Housing Act 1996

16. This Act deals with the registration and regulation of Registered Social Landlords, the disposal of land by them, the payment of Social Housing Grant, and the Right to Acquire for tenants of Registered Social Landlords. The 1996 Act also deals with social housing allocations and homelessness. The Welsh Ministers already have executive powers in all these areas.

Local Government Act 2000

17. Section 93 of this Act empowers the Welsh Ministers to provide grants to local authorities to fund, amongst other matters, housing-related support services.

Homelessness Act 2002

18. This Act mainly amends the Housing Act 1996 in relation to homelessness. It also places duties on local authorities and others in relation to formulating and publishing local homelessness strategies.

Local Government Act 2003

19. Section 87 of this Act empowers Welsh Ministers to require Local Housing Authorities to submit Local Housing Strategies. This power has been used in the development of Affordable Housing Delivery Statements in Wales. Section 88 similarly empowers the Welsh Ministers to require the submission of Housing Revenue Account Business Plans; these have been used by the Assembly Government to scrutinise local planning to meet the Welsh Housing Quality Standard for social housing stock.

Housing Act 2004

20. Section 225 of this Act places a duty on local authorities to undertake an accommodation needs assessment for Gypsies and Travellers within the authority's area and to plan for identified needs. Section 226 provides that the Welsh Ministers may issue guidance regarding the duty.

Rationale

21. The primary purpose of the draft LCO is to provide the National Assembly with legislative competence in relation to two main themes, namely social housing and meeting the housing needs of vulnerable people. These are

devolved policy areas where the Welsh Ministers currently have extensive executive functions but where the Assembly does not have the corresponding legislative competence. Legislative competence will enable the Welsh Ministers, Assembly Members or Assembly Committees to introduce legislative proposals to the National Assembly which reflect particular needs and circumstances in Wales.

22. The LCO will assist the Welsh Assembly Government to deliver on its ambitions, set out in *One Wales*, the Welsh Assembly Government's Programme of Government for 2007-11, of ensuring that housing need is met and that there is improved access to housing. In particular, *One Wales* contained three related commitments to:

- suspend the Right to Buy in areas of housing pressure;
- address homelessness;
- provide local authorities with the powers to address the impact of second homes in areas of housing pressure.

23. The aims in *One Wales* are supported by key strategic documents in the policy areas, as set out in paragraphs 5-9. The LCO will assist the Assembly Government in helping to deliver commitments within these strategies.

24. The overall approach to housing policy is set out in the draft National Housing Strategy. The strategy sets out guiding principles in six areas:

- Providing the right mix of housing: developing the housing market, and breaking down the barriers that prevent people moving between social housing, private rental, part-ownership and full owner occupation.
- Using housing as a catalyst to improve lives: where necessary, aiming to offer training, financial advice, healthcare and personal support alongside the provision of housing.
- Strengthening communities: ensuring housing investments improve places, support local jobs and skills and strengthen community cohesion.
- Radically reducing the ecological footprint: improving the energy and environmental performance of all housing in Wales.
- Ensuring better services: ensuring that the regulation and management of housing provides high standards of service in the private and public sector.
- Delivering together: co-production of future work on housing policy by all those with an interest in housing.

25. The National Housing Strategy is supported by other strategic policy documents including those on housing-related support activities and Gypsies and Travellers. In particular, the programme of work stemming from the Essex Review into affordable housing (referred to in paragraph 6)

aims, amongst other things, to introduce a new regulatory regime for social housing providers. The Assembly Government's 10 Year Homelessness plan (referred to in paragraph 7) recommends, amongst other things, reviewing the statutory framework for homelessness policy in Wales, with the aim of ensuring an all-encompassing service provision for homeless people.

26. Legislative competence will enable the Welsh Ministers to propose legislation in line with the Welsh Assembly Government's defined and distinct policy agenda. As was detailed in the UK Government's Better Governance for Wales White Paper that preceded the 2006 Act the executive powers already devolved to the Welsh Ministers tend to be, by their very nature, piecemeal. This is certainly the case in relation to housing, and legislative competence would allow the National Assembly to have a role in deciding the legislative framework in relation to social housing and meeting the housing needs of vulnerable people under which Welsh Ministers operate. This would, in turn, enable the Welsh Ministers to adopt a more holistic approach to tackling crucial challenges in relation to social housing. Examples of how a more comprehensive approach to policy development and improvement could be adopted as a result of the conferral of legislative competence are set out in paragraphs 27-38 below.
27. For example, in relation to the regulation of Registered Social Landlords (RSLs), the Welsh Ministers already have executive functions but the existing legislative framework constrains the powers for enforcement available to them. As one illustration, the Welsh Ministers can commission a statutory investigation into the performance of an RSL, but cannot serve an Enforcement Notice requiring a social landlord to take remedial action, or require compensation to be paid to tenants. The competence proposed would enable the National Assembly to consider legislation to implement a comprehensive regulatory regime developed in partnership between the Assembly Government and the housing sector in Wales. The National Assembly could, amongst other things, address the fact that Welsh Ministers' powers relate solely to landlords registered under the Housing Act 1996, and not to local authorities or any other relevant bodies. This position now contrasts with the powers provided to the relevant regulators for England and Scotland - the Tenants Services Authority and the Scottish Housing Regulator. The competence proposed will allow the National Assembly to consider legislating in relation to social housing providers or other bodies with functions related to social housing.
28. Legislative competence would also enable the Assembly Government to make legislative proposals to reform secure and assured tenancies. Under existing legislation, tenants of local authorities are normally secure tenants under the Housing Act 1985, whilst tenants of Registered Social Landlords are normally assured tenants under the Housing Act 1988. As at 31 March 2008, approximately 132,000 dwellings were rented from local authorities, and 89,000 dwellings were rented from Registered Social

Landlords. The differences between the two forms of tenure are not significant for most tenants although there are differences in their statutory rights, including in respect of the Right to Buy, as well as some grounds for repossession. Consequently, when housing stock is proposed to be transferred from a local authority to a Registered Social Landlord (to fund improvements in quality) tenants have been concerned about moving from one type of tenancy to another.

29. The Law Commission's report *Renting Homes* (2006) recommended a simplified system of secure and standard contracts in place of the existing multiplicity of tenancy and licence types. Such a move would uncouple the existing link to the status of the landlord whilst providing substantial security of tenure protected by statute. The Commission considered that there is no practical justification for the current distinction and that a single form of tenure would provide many benefits for social housing tenants. These would include easier comprehension of rights, simplifying rights of succession and addressing the concerns of tenants about the transfer of housing stock from a local authority to a Registered Social Landlord which currently involves a change of tenancy.
30. In addition to the above, the Law Commission's report also recommended the creation of a consumer protection approach, a clear statement of rights and obligations, contained within model agreements. It also suggested the creation of specific tenure provisions for supported housing in the statutory and voluntary sector which would allow for easier possession in the early period of a tenancy and create more flexible options where an individual poses a physical risk to other tenants or staff. The draft National Housing Strategy makes a commitment to review tenure law "with the aim of establishing a clearer and more consistent framework of rights and responsibilities between landlord and tenant". Legislative competence would enable the National Assembly to review the legislative framework for tenure law for social housing.
31. Further legislative competence would enable coherent legislation to be developed to take forward the Assembly Government's policy direction for housing-related support. Housing-related support is provided to those who need help to maintain, or to develop the ability to occupy, their home. At present the Welsh Ministers use general welfare-related powers to provide grants, through the Supporting People programmes, to local authorities and the voluntary sector to ensure that this type of support is provided. Support is provided to enable people to live independently or more independently than they otherwise would and to maintain a tenancy. The Supporting People consultation document referred to in paragraph 8 stated that the focus for the future direction of Supporting People programmes is:
 - Using support as part of a range of innovative approaches to social care.

- Using the programme to address underlying needs of individuals, by providing the stability on which co-ordinated and successful interventions can be made.
 - Tackling the underlying causes of repeat homelessness.
 - Professionalising the work of providers in the sector and increasing the strategic focus of commissioning.
 - Promoting independent living as a core value.
32. Legislative competence would enable the Welsh Ministers to consider proposing changes to the legislative framework to ensure that support of the desired standard is provided consistently across the 22 local authorities in Wales, and in line with the focus set out above. Competence in this area would complement the legislative competence relating to regulation, homelessness and social housing tenancies.
33. In relation to the provision of social housing, legislative competence could enable Welsh Ministers to develop and introduce new legislative proposals for new forms of occupation of social housing. The draft National Housing Strategy highlights the importance of developing intermediate housing, that is, housing where prices or rents are below market house prices or rents but above social rent levels. Low cost home ownership schemes, where owners do not hold all the equity in their property, are a key means for developing such intermediate housing. Legislative competence would enable the National Assembly to legislate as necessary regarding low cost home ownership schemes in the future whilst ensuring coherence with other areas of social housing policy. This may involve more novel arrangements, such as mutual home ownership where the built housing assets are owned co-operatively, and the land is owned separately.
34. In relation to the disposals of land held or used for the purposes of providing social housing, legislative competence would provide the National Assembly with full flexibility to define arrangements for Wales in what is a devolved area. Since the introduction of the Right to Buy (including the Right to Buy, Right to Acquire and Preserved Right to Buy) over 140,000 dwellings have been purchased by tenants in Wales. This equates to almost half the original social housing stock (excluding any new-builds). This has substantially reduced the amount of social housing available for rent by people in housing need.
35. The Welsh Ministers have already used their powers to make secondary legislation to develop a distinctive approach for the Right to Buy, tailored to the particular circumstances of Wales which differ in important respects from those in England. For example, secondary legislation has been made to:
- a. reduce the maximum discount from £24,000 to £16,000 throughout the whole of Wales, and

b. extend significantly the number of rural areas where restrictions may be placed on resale of former Right to Buy properties.

36. The Assembly Government's policy aims are to support the aspirations of social housing tenants for home ownership, recognising the wider variety of forms which this can now take, but also ensuring that the legislative framework provides a facility for retaining social housing stock in appropriate circumstances.

37. The LCO would provide the National Assembly with competence in relation to the disposals of land held or used for the purposes of providing social housing, including all aspects of the Right to Buy, the Preserved Right to Buy and the Right to Acquire. This would provide the National Assembly with a role in deciding the legislative arrangements for Wales in what is already an area with devolved executive powers, in line with the principles of the devolution settlement and the rationale set out in paragraph 26 of this Memorandum. Legislative competence for the policy area as a whole addresses the piecemeal nature of executive powers, improves the clarity of the devolution settlement and ensures that the National Assembly has the flexibility to improve on current arrangements. For instance, legislative competence would enable the National Assembly, if it so wished, to replace the current Right to Buy scheme with improved and updated schemes to assist home ownership. It also ensures that the Welsh Assembly Government could adopt a more joined-up approach to policy development in line with the policy aims set out above.

38. Legislative competence would also enable the Assembly Government to propose legislation to the National Assembly that supports the Assembly Government's Homelessness Strategy. The competence would allow the National Assembly to legislate in relation to, for example, the prevention of homelessness, duties of housing associations, the definition of homelessness, intentionality, local connection, discharge of duties, and strategic planning responsibilities. The existing legislation on homelessness would confine Welsh Ministers to piecemeal regulatory reform whilst any legislative proposals under the proposed competence of this LCO would be subject to full and detailed scrutiny by the National Assembly.

39. In addition to enabling Welsh Ministers to adopt a more comprehensive approach to policy development and improvement, as set out in paragraphs 26-38, legislative competence would also enable Welsh Ministers to address legislative constraints within the existing legislative framework. Such legislative constraints hinder the Assembly Government's ability to take forward the policy direction set out in its strategies for housing. In order to overcome these constraints, the National Assembly would require competence so that appropriate Assembly Measures could be developed. Specific examples of legislative constraints are set out in paragraphs 40-43 below.

40. For example, Part 6 of the Housing Act 1996 sets out the statutory framework which local housing authorities must comply with when allocating social housing. This includes allocating secure tenancies of council housing and nominations to assured tenancies with registered social landlords. Under the 1996 Act, the Welsh Ministers have considerable executive powers in relation to social housing allocations, including some powers to amend the primary legislation. However, the Welsh Ministers do not have the power to amend or repeal the factors which local authorities may take into account when determining priorities in allocating housing accommodation (set out in section 167(2A) of the 1996 Act). This is in contrast to section 167(2), which deals with those who should receive reasonable preference in allocation schemes, where Welsh Ministers have full powers to add, amend or repeal, and could do away with reasonable preference categories altogether. Legislative competence would enable the National Assembly to consider social housing allocations alongside closely related issues such as homelessness, tenure and the regulation of registered social landlords.
41. The competence sought also would remove legislative constraints on taking forward the Gypsy and Traveller Strategy. Lack of appropriate sites and insufficient provision has a significant detrimental impact on the lives of Gypsies and Travellers. The links between lack of accommodation and other inequalities experienced by the Gypsy and Traveller community is well established. The Welsh Assembly Government has put in place a policy framework and financial incentives to aid local authorities to deliver appropriate sites but if they do not deliver in line with clearly identified demand, the Welsh Assembly Government may seek powers, for example to be able to direct local authorities to make appropriate provision. Sections 225 & 226 of the Housing Act 2004 place a duty on local authorities to undertake an accommodation needs assessment for Gypsies and Travellers, and to plan for the identified needs. An Assembly Government Planning Circular has instructed local authorities to identify suitable locations in their local development plans for Gypsy and Traveller sites. However, existing legislation stops short of enabling the Welsh Ministers to require local authorities to deliver Gypsy and Traveller sites.
42. A constraint has also been identified in relation to Council Tax policy on second or empty homes. Where a high proportion of homes are kept empty for a significant proportion of the year it can have an adverse effect on the fabric of a community, for instance in relation to the viability of particular services such as schools, post offices and shops. The evidence from the 2001 census suggested that some localised areas are particularly affected by second homes – 27 wards had between 10 and 20 % of their stock as second or holiday properties.
43. One potential approach to mitigate the effect of such dwellings in particular areas is to allow local authorities to vary the council tax payable. The

relevant legislation is section 12 of the Local Government Finance Act 1992, which makes provision relating to Council Tax. Council Tax powers are broadly devolved; the Welsh Ministers have considerable regulation-making powers. Currently, the Welsh Ministers have made regulations which give local authorities the discretion not to offer discounts on Council Tax for some classes of dwellings that are not the main residence of an individual. However, the Welsh Ministers and National Assembly for Wales have no power to allow local authorities to charge additional Council Tax in respect of such dwellings. Competence in this area would enable the National Assembly to consider any proposed Assembly Measures in respect of dwellings which are not the main residence of an individual.

44. In summary, the areas covered by this draft LCO are closely inter-related. The opportunity to develop a new regulatory framework cannot be divorced from reform of the nature of secure and assured tenancies; the Right to Buy, Preserved Right to Buy and Right to Acquire are inherent to these tenancies. The need to provide affordable and appropriate housing to those in need includes action on homelessness, housing allocations, those needing housing-related support, Gypsy and Traveller sites and second or empty homes. The lack of legislative competence, and the consequent reliance on Welsh Ministers' executive powers, constrain such action. Legislative competence for the National Assembly will enable the Welsh Ministers to address these constraints and propose legislation to help implement the Assembly Government's overarching housing policy.

Scope

45. It is proposed that seven Matters be inserted into Field 11: (housing) and one Matter into Field 12: (local government) under Part 1 of Schedule 5 to the 2006 Act.
46. Article 2 of the draft Order inserts Matters 11.2 to 11.8 into Field 11, and Article 3 inserts Matter 12.18 into Field 12.
47. The draft National Assembly for Wales (Legislative Competence) (Housing) (Fire Safety) Order 2010, if approved, will insert Matter 11.1 into Field 11.
48. The following paragraphs describe each new Matter in turn.
49. Matter 11.2 would give the Assembly competence to legislate regarding social housing providers. These are defined as either local authorities, or other bodies providing housing to people whose needs are not adequately served by the commercial housing market. This wording applies a similar requirement to that set out in sections 69 and 70 of the Housing and Regeneration Act 2008 which must be met in relation to low cost rental

accommodation or low cost home ownership accommodation in order for it to fall within the definition of “social housing” for the purposes of Part 2 of that Act. However, the definition within the Order does not preclude such bodies from being treated as “social housing providers” on the basis that they provide “other housing”. This matter also relates to the function of allocating social housing by social housing providers, in line with the corresponding definition in the interpretation section.

50. Matter 11.3 would give the Assembly competence to legislate regarding relevant social housing bodies. This Matter is included so as to provide competence over bodies which have functions in relation to social housing, without necessarily being social housing providers. The Welsh Ministers would be an example of such a body.
51. Matters 11.2 and 11.3, taken together, will therefore confer competence on the National Assembly to legislate in respect of the regulation of social housing providers and also relevant social housing bodies, and to legislate in respect of the allocation of social housing.
52. Matter 11.4 relates to tenure arrangements for rented social housing, this would include the secure and assured tenancy regime for tenants of local authorities and Registered Social Landlords respectively. The competence that would be granted by this Matter would not extend to private sector tenancies outside social housing. The matter would also give the Assembly competence regarding other arrangements under which social housing is provided. This will enable the Assembly to consider legislation relating to, for example shared ownership arrangements or mutual home ownership.
53. Matter 11.5 relates to disposals of land and would enable the Assembly to legislate regarding the Right to Buy, Preserved Right to Buy or Right to Acquire for tenants of local authorities and Registered Social Landlords. Paragraph (a) relates to social housing and paragraph (b) relates to disposals of land held or used for the purposes of, or in connection with, social housing. Paragraph (c) cites the enactments under which tenants may hold the Right to Buy, Preserved Right to Buy or Right to Acquire and is included to ensure that the Assembly is able to legislate in relation to all circumstances under which those rights might arise, whether or not the land satisfies the definition of “social housing” within the Order. This might cover, for example, disposals under the Right to Buy or Right to Acquire of properties which are held by bodies providing housing under secure or assured tenancies but who are not social housing providers, therefore falling outside paragraphs (a) or (b) of this matter. The competence conferred by this matter includes voluntary transfers including stock transfers.
54. Matter 11.6 relates to the delivery of housing-related support to those who need help to maintain or to develop the ability to occupy their home. The

competence would cover, for example, situations where assistance is offered to elderly people living in sheltered accommodation, those escaping domestic abuse, or for young people leaving the care system. This matter includes advice and non-financial assistance to people in respect of skills that are relevant to their ability to live independently in housing, who might otherwise be at risk of losing their home, or to enable them to live in more independent accommodation than they otherwise might.

55. Matter 11.7 would provide legislative competence over sites for Gypsies and Travellers. “Caravan sites” are defined in the Order in a similar way to that in section 1(4) of the Caravan Sites and Control of Development Act 1960. The terms “Gypsies and Travellers” and “caravan” are intentionally not defined in the Order as it is intended that the words bear their usual meaning. “Caravan” is already used, without further definition, in Schedule 7 to the 2006 Act. This matter would enable the National Assembly to define these terms within subsequent Measures for specified purposes.
56. Matter 11.8 would provide the National Assembly with legislative competence regarding homelessness. “Homelessness” is not defined in the Order as it is intended that the word bears its usual meaning. It is already used, without further definition, in Schedule 7 to the 2006 Act. This matter would enable the National Assembly to define “homelessness” within subsequent Measures for specified purposes.
57. Article 3 of the draft Order would insert Matter 12.18 into Field 12 (Local Government). This would enable the Assembly to pass legislation relating to the Council Tax charged on dwellings that are not the main residence of an individual.

Exceptions to the competence

58. The draft LCO does not set out any exceptions to the competence which it would confer. However, that competence would need to be considered against the general exceptions set out in paragraph A1 of Part 2 of Schedule 5 to the 2006 Act (which was inserted by the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009). This means that social security, including Housing Benefit and Council Tax Benefit, is an exception which applies to all matters.

Changes to the LCO following pre-legislative scrutiny

59. Pre-legislative scrutiny of the proposed Order was undertaken by the National Assembly Legislation Committee No. 2, the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee.

60. Legislation Committee No. 2 issued its report on 29 January and supported the general principles of the proposed Order. The Welsh Affairs Committee reported on 3 February and similarly welcomed the proposed LCO.
61. The LCO was positively received by stakeholders who responded to the Committee's consultation. Consideration has been given to extend the scope of the draft Order to cover the private rented sector and "Community Right to Buy", as suggested by Legislation Committee No 2. The Assembly Government is currently consulting on the private rented sector, including a national register of private sector landlords and on the mandatory regulation of letting and management agents. The Assembly Government will consider options for future legislation following the consultation. At this point the Assembly Government does not have the evidence base to include Community Right to Buy within the scope Matter 11.5 and the scope of the draft Order has not been changed at this time.
62. In light of the careful scrutiny of Legislation Committee No. 2 and the Welsh Affairs Committee, some clarifications have been made to the Explanatory Memorandum. The meanings of "Homelessness", "Gypsies and Travellers" and "caravan" as used in the LCO have been further clarified in paragraphs 55 and 56 of this Memorandum.
63. The Welsh Affairs Committee recommended the titles of LCOs should reflect more accurately the content of the matters they contain. The Committee therefore recommend amending the title of this LCO. The Assembly Government concluded that the title of an LCO should follow standard drafting convention and include the name of the relevant field or fields listed in Part 1 of Schedule 5 to the 2006 Act into which matters are to be inserted by the LCO. The Assembly Government has considered the broad scope of the LCO, which would necessitate a potentially lengthy title if it were to reflect all the matters covered. The title has therefore not been amended.
64. The Committee also recommended that the drafting of matters relating to social housing should be reviewed to ensure they are as clear as possible. In particular, whether the matters in the proposed LCO which relate to social housing could be more simply expressed in a single matter designating "social housing". The Assembly Government has considered this recommendation carefully, concluding that the competence being conferred is best expressed in the matters as set out in the LCO. In drafting the LCO, the approach has been to avoid including exceptions and "carve-outs" to exceptions if at all possible. Expressing the competence more succinctly, for example using the term "social housing", would require the insertion of exceptions and likely carve-outs to those exceptions, such as for certain aspects of social housing finance. It has been concluded that the matters should remain in the LCO as drafted (but with some clarification to definitions - see paragraph 65).

65. The Welsh Affairs Committee recommended that the reference to “Gypsies and Travellers” be capitalised. This change has been made.
66. The Committee also recommended that an amendment be made to the definition of “social housing provider” to avoid any doubt being cast on the interpretation that the functions of such a provider (other than a local authority) include both provision and allocation of housing. The Committee considered that the distinction between paragraph (b) of that definition, which did not make specific reference to “allocation” and the final part of that definition, which did, might give rise to uncertainty. Given the intention that competence should apply both to provision and allocation, as stated in this Memorandum, paragraph (b) of this definition has therefore been amended to reflect this clearly. In amending this definition in the light of the Committee’s recommendation, it was considered that the final part of the definition could be drafted in a simpler fashion, whilst not altering its meaning. A corresponding revision has also been made to the final part of the definition of “relevant social housing body” which had been drafted in similar terms..
67. The House of Lords Constitution Committee concluded that the LCO did not raise any matters of constitutional principle.

Geographical limits of any Assembly Measure

68. The draft LCO would permit the National Assembly to legislate by Assembly Measure in relation to Wales only. In practice, this would be likely to mean that a Measure could make provision in relation to local authorities and other social housing providers based in Wales, housing located in Wales and the housing needs of people in Wales. However, the Welsh Assembly Government recognises that in developing future Measures it will be necessary to consider cross border issues (for example, concerning the needs of tenants whose landlords are based across the border). The Assembly Government will continue to liaise closely with the UK Government regarding any proposed future legislation.

Minister of the Crown functions

69. By virtue of Part 2 of Schedule 5 to the 2006 Act, an Assembly Measure cannot confer or impose any function on a Minister of the Crown. By virtue of Parts 2 and 3 of Schedule 5, the National Assembly may not by Measure remove or modify any functions of a Minister of the Crown without the consent of the Secretary of State. For example, HM Treasury is regarded as a Minister of the Crown for these purposes and continues to have some functions under housing and local government legislation which applies to Wales. The Secretary of State’s consent would be required if it were proposed that a Measure should modify or remove any of those functions.

Conclusion

70. 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 provisions of the draft Order to which this Explanatory Memorandum relates.