



**Cynulliad Cenedlaethol Cymru
The National Assembly for Wales**

**Pwyllgor Deddfwriaeth Rhif 4
Legislation Committee No. 4**

**Dydd Mercher, 3 Mehefin 2009
Wednesday, 3 June 2009**

Cynnwys
Contents

- 4 Cyflwyniad, Ymddiheuriadau a Dirprwyon
Introduction, Apologies and Substitutions
- 4 Gorchymyn Arfaethedig Cynulliad Cenedlaethol Cymru (Cymhwysedd
Deddfwriaethol) (Amgylchedd) 2009
The Proposed National Assembly for Wales (Legislative Competence) (Environment)
Order 2009
- 19 Cynnig Trefniadol
Procedural Motion

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal,
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee.
In addition, an English translation of Welsh speeches is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Lorraine Barrett	Llafur Labour
Michael German	Democratiaid Rhyddfrydol Cymru (Cadeirydd y Pwyllgor) Welsh Liberal Democrats (Committee Chair)
Jonathan Morgan	Ceidwadwyr Cymreig Welsh Conservatives
Janet Ryder	Plaid Cymru (yn dirprwyo ar ran Bethan Jenkins) The Party of Wales (substituting for Bethan Jenkins)
Joyce Watson	Llafur Labour
Kirsty Williams	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Jane Davidson	Aelod Cynulliad, Llafur (Y Gweinidog dros yr Amgylchedd, Cynaliadwyedd a Thai) Assembly Member, Labour (The Minister for Environment, Sustainability and Housing)
Prys Davies	Pennaeth Rheoli Deddfwriaeth, Adran yr Amgylchedd, Cynaliadwyedd a Thai, Llywodraeth Cynulliad Cymru Head of Legislation Management, Department for Environment, Sustainability and Housing, Welsh Assembly Government
Elisabeth Jones	Dirprwy Gyfarwyddwr y Gwasanaethau Cyfreithiol, Llywodraeth Cynulliad Cymru Deputy Director of Legal Services, Welsh Assembly Government
Matthew Quinn	Cyfarwyddwr, Adran yr Amgylchedd, Cynaliadwyedd a Thai, Llywodraeth Cynulliad Cymru Director, Department of Sustainability, Environment and Housing, Welsh Assembly Government

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Keith Bush	Prif Gyngorydd Cyfreithiol a Chyfarwyddwr y Gwasanaethau Cyfreithiol Chief Legal Adviser and Director of Legal Services
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Owain Roberts	Dirprwy Glerc Deputy Clerk
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 10.05 a.m.
The meeting began at 10.05 a.m.

**Cyflwyniad, Ymddiheuriadau a Dirprwyon
Introduction, Apologies and Substitutions**

[1] **Michael German:** Good morning, colleagues, and welcome to this meeting of Legislation Committee No. 4. Before I welcome the Minister and her officials, I will just make the usual introductory remarks. We conduct our arrangements through the media of Welsh and English. Headphones are provided so that you can hear the translation, on channel 1, and those who are hard of hearing can hear the amplified sound on channel 0. No fire drills are planned so, if the fire alarm sounds, it will be a real emergency, in which case you should follow the marked exits and the instructions of the ushers and staff. Please switch off all mobile phones, pagers and BlackBerrys as they interfere with the broadcasting equipment. We have received apologies for absence from Bethan Jenkins, and Janet Ryder is substituting for her.

10.06 a.m.

**Gorchymyn Arfaethedig Cynulliad Cenedlaethol Cymru (Cymhwysedd
Deddfwriaethol) (Amgylchedd) 2009
The Proposed National Assembly for Wales (Legislative Competence)
(Environment) Order 2009**

[2] **Michael German:** I welcome the Minister for Environment, Sustainability and Housing, Jane Davidson, and her officials to this morning's meeting. Before we start our questioning, it might be helpful if I briefly outline the background to the Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009 and this committee's role.

[3] The purpose of this meeting is to take evidence from the Minister for Environment, Sustainability and Housing on the current proposed environment LCO, which was laid before the National Assembly for Wales by the Welsh Assembly Government on 19 May 2009. The current proposed Order is a revised piece of legislation that was originally laid before the Assembly for scrutiny in June 2007. The Proposed Environmental Protection and Waste Management LCO Committee was set up specifically to consider the proposed Order, and it reported in November 2007. So, the current version of the proposed Order has been referred to this legislation committee for scrutiny by the Business Committee, and we have been set a deadline for reporting of 12 June 2009.

[4] As part of our work, we have undertaken a very short consultation exercise, which is now closed, seeking views particularly from those organisations that responded to the original consultation exercise in 2007. We have received four responses, namely from Keep Wales Tidy, the Welsh Association of Chief Police Officers, the Welsh Local Government Association and Environment Agency Wales. I place on record our gratitude to those organisations for reporting to us and responding at such short notice. The main purpose of this meeting is to question the Minister on how the proposed Order has changed, why it has changed, and the implications of those changes. We have the Minister before us, and I would be grateful if she could introduce her colleagues before we start the questioning.

[5] **The Minister for Environment, Sustainability and Housing (Jane Davidson):** Matthew Quinn is the director of the Department for Environment, Sustainability and Housing. Prys Davies on my left is the legislation manager for the department, and Elisabeth Jones provides legal advice to the department. I hope to be able to say a few words before the questioning commences, Chair.

[6] **Michael German:** Of course. I also thank you for responding and for coming here at

short notice. Before we start the questioning, perhaps you would like to make your introductory remarks.

[7] **Jane Davidson:** I am delighted to be able to attend the meeting today to give evidence on the revised proposed environment legislative competence Order. I welcome the additional consideration by the Assembly to give Members an opportunity to consider its current content. I am also grateful that Members have an ambition to see the process completed as quickly as possible so that we can move towards securing these additional powers for the Assembly. It may help if I explain the rationale behind the request for legislative competence from the Government's perspective.

[8] We are all aware of the significant environmental challenges that we now face. In particular, we need to ensure that we reduce the size of our ecological footprint as a country, become more sustainable, and reduce our emissions to meet the challenges of climate change. As Assembly Members, we are also aware of the importance placed on the quality of the local environment by the general public. Legislative competence, along with other policy and delivery levers, will assist us to address these environmental challenges in an holistic manner rather than through piecemeal regulatory reform. It will also help us to build on the distinct policy agenda that we already have in Wales. The proposed LCO will enable us to tackle policy areas where we currently lack powers, taking appropriate action to deal with the problem of single-use carrier bags is one such example. I emphasise that the rationale and overall ambition for this proposed LCO remain the same as those that were previously endorsed by the Assembly's scrutiny committee in 2007.

10.10 a.m.

[9] On the process followed, you will be aware that this proposed LCO was one of three that were published before agreement was reached with Whitehall on their detailed content. The proposed Order was then scrutinised by an Assembly committee, which reported in November 2007, and I am extremely grateful for its work. I am pleased that the recommendations of the original Assembly committee have helped to refine the scope of this proposed LCO. Following the Assembly's scrutiny, we have engaged in discussions with a number of UK Government departments—seven, I think, in total—on the scope and content of the proposed Order. These discussions have helped to clarify the scope of the legislative competence to be afforded to the Assembly under this proposed LCO.

[10] On the substantive content of the proposed LCO, the matters remain essentially the same as those scrutinised by the Assembly in 2007, with competence to be conferred in relation to waste, pollution and nuisances. There have, however, been some changes to the way in which the matters have been drafted to define competence more precisely. We have clarified that matter 6.1 includes competence over the reduction of waste, which responds to one of the Assembly committee's recommendations. Moreover, to clarify that the intended focus of the proposed LCO is waste on land, competence over waste in the territorial sea has been excluded under matter 6.1. That exception will ensure the integrity of the regulatory arrangements recently agreed with the UK Government in the context of the Marine and Coastal Access Bill. Matter 6.2 has been redrafted, and no longer includes the phrase 'hazardous substances'. This is a drafting change only, because hazardous substances remain within the competence. Competence over nuisances is now in a separate matter, matter 6.3, to provide greater clarity over the competence relating to pollution and nuisances.

[11] The proposed LCO also contains a number of exceptions to clarify the extent of the competence. Exceptions are necessary to provide clarity over the extent of the competence that the Assembly is acquiring, and, as a general principle, we have sought to ensure in our discussions with the UK Government that legislative competence reflects the existing executive powers of Assembly Ministers. There are two main types of exception in the

proposed Order. First, there are the fixed exceptions, which apply only to specific matters and form part of the definition of those matters. Secondly, there are the floating exceptions, which apply to all fields under Schedule 5 to the Government of Wales Act 2006. These are largely in areas that are not devolved but are potentially relevant to several matters. The floating exceptions in this proposed Order have been included on the basis that they are relevant to the matters being scrutinised today.

[12] I would welcome questions or views from the committee on the various exceptions. I particularly would welcome the committee's views on whether the proposed Order could be simplified. It has developed organically and may include a level of detail that is unnecessary for any LCO. In particular, I welcome the committee's views on the appropriateness of the floating exception on the generation of electricity, given that this proposed Order includes a number of fixed exceptions in relation to energy issues. The fixed exception on the content and composition of fuel under matter 6.2 is very detailed, arguably too detailed in that it contains references to agricultural or forestry tractors. Your views on that matter would be welcomed.

[13] Finally, there is quite an overlap between the fixed exceptions under matter 6.2 and 6.3, dealing with the regulation of specific activities in the territorial sea adjacent to Wales and the marine licensing framework under the Marine and Coastal Access Bill. I would also welcome the committee's views on those issues.

[14] The conferral of legislative competence in the three areas of waste, pollution and nuisance will give the Assembly a further tool to develop legislation tailored to Welsh needs and priorities, bringing the legislative process closer to the people of Wales. I am sure that you will agree that it is wholly appropriate that proposals for legislation on environmental and waste management issues be debated and discussed by the National Assembly for Wales, and I would welcome your views on those areas of the proposed Order that you think could be simplified.

[15] I want to be in a position to propose legislation under the competence afforded by this as quickly as possible. I know that you are aware of the importance of the scrutiny being concluded as quickly as possible, and I look forward to receiving the committee's report, which I will consider very carefully and quickly on 12 June.

[16] **Michael German:** Thank you, Minister. I wish to start by saying that, primarily, what we are looking at, of course, are the differences between the previous proposed LCO and this one. You have just introduced some terminology, which perhaps you could define a little more carefully for us. What would you define as a 'floating exception' and what is a 'fixed exception'? Can you summarise the differences between this proposed LCO and the previous one? What will we gain in terms of legislative competence as a result of the changes and what will we lose?

[17] **Jane Davidson:** As I said in my opening remarks, this is one of three proposed LCOs that was published before agreement with Whitehall was reached on the detailed content, and this one in particular now reflects subsequent detailed discussions. A number of changes have been made to the proposed Order to define competence more precisely. There is a specific change resulting from our own committees' consideration of the reduction of waste. However, the matters remain essentially the same as those scrutinised by the Assembly in 2007. The changes are to the way in which matters have been drafted in order to define competence more precisely.

[18] **Michael German:** Can you give us an explanation of what, in your view, would constitute floating and fixed exceptions? Please give us the definitions.

[19] **Jane Davidson:** I will ask Elisabeth to give you the legal definition.

[20] **Ms Jones:** The term ‘fixed exception’ is not a term of art—its usage has come about around the proposed LCO. A fixed exception is an exception confined to a single matter, and a floating exception is an exception that will appear in a different part of Schedule 5 to the Government of Wales Act 2006 and that will apply to all matters in all fields—across the board.

[21] **Jane Davidson:** Our concern—this is why I raised the issue of the floating exception of energy in our introduction—is that there are a number of fixed exceptions relating to energy in the proposed LCO already, so the floating exception appears to be a belt-and-braces approach. We are not sure that the proposed LCO requires such an approach.

[22] **Michael German:** Perhaps we will explore that later. However, I wish to go back to a letter that you wrote to the former committee on 25 October 2007. You provided a list of topics that would be within the scope of that proposed LCO. What impact have the changes had on this list? In other words, what is the difference between the list in your letter of 25 October 2007 and the current proposed Order?

[23] **Jane Davidson:** The list of topics is the same.

[24] **Michael German:** Thank you.

[25] **Janet Ryder:** In your evidence in 2007, you indicated that the wording of the proposed Order was chosen to follow Schedule 7 to the Government of Wales Act 2006. Why is it no longer the case for the current proposed Order?

[26] **Jane Davidson:** This is a very broad proposed LCO, and when we started the process we thought that it would be convenient to use the wording of Schedule 7 to that Act to define the broad matters. However, the matters contained in the new proposed LCO reflect the extent of the competence that we are now seeking in light of our agreement with Whitehall. They have been clarified.

[27] **Janet Ryder:** I am a substitute on this committee, but I understand that the scope of matter 6.3 could be seen to have been widened quite significantly by the inclusion of the word ‘improving’. I think that I am right to say this—I am referring to the legal advice that we have received. The scope has been widened considerably by the inclusion of the word ‘improving’ in some places in section 2. You have obviously looked at this again quite considerably, and improving the situation would be more than just dealing with waste. You could define ‘improving’ as a proactive approach, whereby you are going to go in to change the situation completely. It could be classified as doing more than just dealing with the waste, in that you would be improving the situation. Would you like to elucidate on that?

10.20 a.m.

[28] **Jane Davidson:** ‘Improving’ is not in the matter on waste; that is in matters 6.2 and 6.3, which relate to pollution and nuisances. The critical point is that the list of the topics and the reach of the proposed LCO are the same; the exceptions are about clarifications made through dialogue with the UK Government to preserve the matters of the Ministers of the Crown.

[29] **Janet Ryder:** Are those exceptions all in article 3, which is a totally new addition to the proposed Order?

[30] **Ms Jones:** Those are the floating exceptions that apply to all matters. You will see

under matters 6.1, 6.2 and 6.3, specific exceptions from those matters, and you will also see further sections headed:

[31] 'Not included in matters 6.1, 6.2 and 6.3'

[32] and

[33] 'Not included in matters 6.2 and 6.3'.

[34] There are several places where exceptions appear in the proposed LCO, so getting them all, I am afraid, involves reading the whole thing.

[35] **Janet Ryder:** As article 3 seems to be a new addition to the proposed Order, can you see any way in which those floating exceptions or fixed exceptions would contradict what you are trying to do or, perhaps, even stop you doing what you want to do?

[36] **Jane Davidson:** No. The point that I made about the energy floating exception is that, in our view, the matters in relation to clarification are already covered by the fixed exceptions, so we do not need the floating exception too. That is why I raised that in the introduction, so that the committee could consider whether it thinks that we might need a floating exception on energy in addition to the specific fixed exceptions that are related to specific matters that have been discussed with specific departments in Whitehall.

[37] **Janet Ryder:** So, the matters relating to oil and the oil industry will not be relevant to anything that you might want to regulate regarding the use of oil in commercial garages and lorry parks. Is that right? Will you be free to regulate on how that oil is disposed of, even though those are technically part of the oil industry?

[38] **Jane Davidson:** The regulation of oil activities, including the storage of oil, is excepted from the Assembly's competence in relation to matter 6.3, but the regulation of pollution caused by oil activities would come within the Assembly's competence in relation to matter 6.2. That includes addressing leaks from oil storage depots. There is, in practice, considerable overlap on matters in relation to pollution and nuisance.

[39] **Janet Ryder:** So, you are confident that that is not going to create a conflict for you.

[40] **Jane Davidson:** We do not see that as creating a conflict at all; it is part of the clarification.

[41] **Lorraine Barrett:** Do you feel that the explanatory memorandum could be clearer in explaining the rationale for each of the exceptions, particularly given that, as we have heard, many did not feature originally in the proposed Order? Have you thought about how you are going to explain the extent of the competence being conferred by this proposed Order to the wider public and stakeholders?

[42] **Jane Davidson:** The overall rationale for the exceptions is set out in paragraph 25 of the explanatory memorandum, and that states, as you know, that the approach to this Order is to get legislative competence to follow the current boundaries of what are devolved and non-devolved issues. References are made under specific exceptions to the relevant legislation, but we would be very happy to consider any comments or recommendations from the committee on how we might present the explanatory memorandum. We have been living with this for a very long time, and it is good to have the opportunity to let a fresh set of eyes consider it, to see whether or not the explanatory memorandum is as helpful as it could be.

[43] On how we will communicate it, you will appreciate that my current focus is on

getting the appropriate competence to the Assembly. Once the proposed Order has received Royal Assent, we will want to use a range of communication channels and networks, in my department as well as across the Assembly, to explain the proposed LCO and the extent of the competence that has been transferred.

[44] **Lorraine Barrett:** How much thought did you give to the clarity of the law that will arise as a result of the proposed Order?

[45] **Jane Davidson:** Considerable thought has been given to that. In fact, having that number of exceptions is all about increased legal clarity, because, at the end of the day this is not a policy, it is legislative competence. Therefore, we are looking at the boundaries of the competence with as precise a set of arrangements as possible. The whole focus of the exceptions has been to give us that clarity, and to define the boundaries of the competence with greater precision.

[46] **Michael German:** May I just supplement that? At the very beginning, you said that you were looking for ways in which simplification of the proposed Order might occur, but you say that the exceptions are all there to provide clarity. Therefore, would reducing the number of exceptions not make it as clear?

[47] **Jane Davidson:** The issue is whether you and, subsequently, the Welsh Affairs Committee, in looking at the list of exceptions that has grown from dialogue with seven UK departments, feel that the exceptions are the *de minimis* approach in the context of the proposed LCO, and whether any of them—as we believe is the case with the floating exception on energy—do not add anything to the proposed LCO, because the clarity is already given in the fixed exceptions.

[48] **Michael German:** You have given us one candidate; are there any others that you would like to give as candidates for removal?

[49] **Jane Davidson:** The first of the three areas that the committee may wish to consider relates to the exception on energy. The fixed exception on the content and composition of fuel under matter 6.2 of the proposed LCO, which I mentioned at the beginning and which contains references to agricultural or forestry tractors, is a very detailed exception. We considered that it might be too detailed an exception for the transfer of legislative competence. You would expect us, when we deliver Measures in the future, to be looking for absolute, specific detail.

[50] The third area is the overlap between the fixed exceptions under matters 6.2 and 6.3, which deal with the regulation of specific activities in the territorial sea adjacent to Wales, and the marine licensing framework under the Marine and Coastal Access Bill. When we started this process, there was no Marine and Coastal Access Bill, so there is still an organic set of relationships in relation to this legislative competence and the Bill that is currently going through Parliament. Those are the three areas, and we will bring them to the attention of the Welsh Affairs Committee in a similar way.

[51] **Kirsty Williams:** Minister, the rationale for the inclusion of exceptions is quite clearly explained in the memorandum, but it does beg the question: could that not have been anticipated prior to the publication of the original proposed LCO? My concern is that we are now in a situation in which we have a considerably longer list of exceptions than when the proposed LCO was originally published. Why was that list not anticipated prior to the original publication?

[52] **Jane Davidson:** As I said at the beginning, the proposed LCO came forward very shortly after the election in 2007, when there had been broad agreement with the Secretary of

State about its principles; it was that election that conferred the powers on us in terms of taking this agenda forward. There are now arrangements in place, between the Assembly Government and our colleagues in Westminster, on the way in which LCO requests will be handled, but this predates those arrangements. In a sense, what this demonstrates is that it is far better to have those arrangements in place, so that both the Assembly committee and the Welsh Affairs Committee are looking at broadly similar proposals, which has not happened in this case.

10.30 a.m.

[53] **Kirsty Williams:** A large number of those exceptions involve excluding the regulation of various industries from the Assembly's legislative competence. What is meant, in the context of this proposed Order, by the term 'regulation'?

[54] **Jane Davidson:** Regulation is not defined in the draft Order, but is broadly understood to be setting rules or standards in relation to particular activities and putting in place a regime to ensure that those rules or standards are complied with. The concept of regulation is not new to Schedule 5; it is already used to define limits of legislative competence and it is also used in a number of places in the description of competence under Part 4 of the Government of Wales Act 2006. I understand from Elisabeth that the concept is well understood in law and it recurs in the legislative competence of the National Assembly for Wales as currently set out in law.

[55] **Kirsty Williams:** You said yourself that it is not clearly defined in the context of this proposed LCO. Will the lack of a definition of regulation in the context of this proposed LCO potentially lead to difficulties later when implementing Measures under this proposed LCO?

[56] **Jane Davidson:** No, because it is a concept well understood in law. Elisabeth, do you want to add anything else?

[57] **Ms Jones:** No, Minister.

[58] **Kirsty Williams:** So, how would you describe the implications of such exceptions for the Assembly's legislative competence? For example, could the exceptions give rise to difficulties in certain circumstances? On Janet's issue of the regulation of oil activities, which is in matter 6.3, an oil activity is defined as including the storing of oil. Therefore, depending on the meaning of your word, 'regulation', which is accepted in general terms, is it possible that if the Assembly sought to legislate for higher criminal penalties for statutory nuisance and if such legislation were regarded as an evolving regulation of oil activities, would that be excluded?

[59] **Jane Davidson:** As I have said, the regulation of oil activities is excepted in relation to nuisances, but the regulation of pollution caused by oil activities would come within the Assembly's competence in relation to matter 6.2 on pollution. There are some areas of exception on one element in order to ensure that they are covered by the other.

[60] **Kirsty Williams:** Would it not be clearer and would it not provide the Assembly with more opportunities if that exception were removed from all aspects of the proposed LCO? Do you not agree that there is scope for misunderstanding if certain exceptions apply to certain parts of the proposed LCO, but do not apply to others?

[61] **Jane Davidson:** We must remember that we are operating from the general principle that we want the proposed LCO to reflect the executive competence of the Welsh Ministers, and that is what this does. Clearly, if the regulation on pollution comes within the competence, which, for example, includes addressing leaks from oil storage depots, that is

because we wanted to ensure that we had the widest range of powers with which to tackle those issues, which already fall within the executive competence of Welsh Ministers.

[62] **Joyce Watson:** Many definitions have been included in this proposed LCO, so what are the benefits of those definitions? Furthermore, why is it better to include the definitions in the proposed LCO rather than in the subsequent proposed Measure?

[63] **Jane Davidson:** Definitions aim to clarify the scope of the competence because it is a broad proposed LCO and we believe that the scope needs to be as clear as possible. So, we believe that the definitions usefully serve to clarify competence and will therefore contribute towards making good law.

[64] **Joyce Watson:** Could the approach taken inadvertently constrain the Assembly's ability to make its own laws?

[65] **Jane Davidson:** We do not accept that it will constrain the Assembly's ability to create its own laws. The issue is to be absolutely clear now about the scope of the competence so that we do not need to discuss it when we come to look at delivering Measures.

[66] **Joyce Watson:** Was it really necessary to include a definition of Wales in the proposed Order?

[67] **Jane Davidson:** It was in this particular context, because Wales is defined for the purposes of the Government of Wales Act 2006 as including the landmass of Wales and the territorial sea surrounding Wales. That is the definition of 'Wales' that applies generally to Assembly competence. Following discussions with the UK Government about the Marine and Coastal Access Bill, it was agreed that the territorial sea will be excluded from the competence in matter 6.1 because of the executive competence that will come to Welsh Ministers under the Bill. Where the term 'Wales' is used anywhere in the environment field in Schedule 5 to the Government of Wales Act, the landmass definition of Wales should apply, rather than the Government of Wales Act 2006 definition. This narrow definition applies only where the actual word 'Wales' is used in a matter within that field or in an exception that applies within that field. In all other aspects, the definition of 'Wales' for the purposes of the environment field is the same as it is generally within the Government of Wales Act. You can tell that I was reading my legal advice there.

[68] **Michael German:** I think that what you are saying is that there are two Waleses.

[69] **Jane Davidson:** Yes. There is a 'Wales' for the purposes of the Government of Wales Act, which includes the sea, and there is the more limited definition of 'Wales' that has been used in this Bill because its focus is on land, which includes beaches and the effect of the sea on land.

[70] **Joyce Watson:** My last question is: why does the definition in the proposed Order refer to the definition contained in the Interpretation Act 1978, rather than take account of the meaning of 'Wales' contained in the 2006 Act? Is that what you were explaining?

[71] **Jane Davidson:** Yes. That is the question that I have just answered.

[72] **Jonathan Morgan:** Could you tell me the purpose of Article 3 of the proposed Order?

[73] **Jane Davidson:** Article 3 covers the floating exceptions. As Elisabeth explained in response to the Chair, these exceptions are intended to be used in non-devolved areas, and they are potentially relevant to a number of matters.

[74] **Jonathan Morgan:** Why does the proposed Order contain exceptions that do not appear to relate to field 6, namely the environment?

[75] **Jane Davidson:** The floating exceptions in this proposed Order have been included on the basis of their relevance to the matters being scrutinised today. The original proposed LCO applied the transport exceptions to environment matters, for example. An exception does not have to be in the same field as a matter to be relevant to it. Transport, energy and water interrelate closely with the environment, so in a sense, it is not surprising that it was necessary to include exceptions in those areas.

[76] **Jonathan Morgan:** What is curious about this proposed Order is that it is the first that seeks to bring in exceptions in areas over which we do not actually have competence. Why are exceptions being provided in relation to fields 4 and 19 when there are currently no matters under either field to which these exceptions could apply?

[77] **Jane Davidson:** Field 4 is energy, and field 19 is water, and they are subjects that relate to the environment and therefore to matters within the proposed LCO. There is an obvious link between energy and the emissions produced by power stations and the pollution competence, and between water quality and the pollution competence. As I said, an exception does not have to be in the same field as a matter for it to be relevant, but it helps our colleagues in the UK Government to have clarity about where the exceptions lie.

[78] **Jonathan Morgan:** What evidence is there to suggest that these changes have to be made at this time? This section is rather unusual in comparison to other competence Orders.

[79] **Jane Davidson:** Yes, but of course, this proposed LCO is very broad. The aim of the exceptions is to provide greater clarity about the extent of the competence afforded by the proposed LCO. These exceptions are largely in areas that are not devolved to Wales, but which are potentially relevant to matters that are devolved. It is, in a sense, a belt and braces approach to ensure clarity.

10.40 a.m.

[80] The committee may consider whether it feels that they are already covered to some extent by, for example, the protection in the Government of Wales Act 2006, by the functions of the Minister of the Crown.

[81] **Jonathan Morgan:** However, this goes further in the sense that it excepts matters in fields for which competence has not yet been conferred. At some point in the devolution process, competence might be sought. A future piece of legislation might confer competence for those matters in those fields, but this seeks to restrict future competence.

[82] **Jane Davidson:** No, it does not at all. It is only clarification in relation to this proposed LCO. It does not, in any way, restrict future bids for competence in any of those fields.

[83] **Kirsty Williams:** I think that the point that Jonathan was making was that, should those competences be sought and granted to the National Assembly in future, we would already have legislation in place that would preclude us from acting in those areas. Therefore, you would have to come back to amend this legislation because we would have excepted things that were not within our competence at the time, but now were. Therefore, why tie ourselves up in a process that would require us to come back at a later date to amend this legislation, which has excepted certain aspects? At the moment, that is not a problem, because we do not have those competences. However, in 10 years' time, we may gain those

competences and, on the basis of the legal advice that we have received at least, our ability to use them could be curtailed.

[84] **Jane Davidson:** Elisabeth, do you want to come in on this?

[85] **Ms Jones:** By all means. Committee members are absolutely right that these exceptions will apply across the board, so they will apply to future matters as well. It is the matter that matters, so to speak, rather than the field. It was necessary to include them in this floating exception form, which is a cross-cutting form, because, from the UK Government's point of view, for us to negotiate a fixed exception—an exception relating to the water supply industry, for instance—simply in relation to pollution was not satisfactory, because water itself is such a cross-cutting subject that it touches on so many fields within Schedule 5. The exception was negotiated on the basis that it completely reflects the current state of devolved and non-devolved executive power, but also with an eye to the future in that the Welsh Assembly Government would have been extremely reluctant to agree to floating exceptions in areas where it was foreseeable that the executive competence would change in the near to medium future. So, there was certainly an attempt to future-proof in that sense, and where the Minister felt that the situation was too fast-moving or developing, we argued very strongly for fixed rather than floating exceptions. We succeeded in those negotiations.

[86] **Jane Davidson:** In essence, it is a balance issue, because at the same time as seeking the powers that we are seeking—and the original committee strongly supported our seeking those powers—we also have to be able to give sufficient comfort to our colleagues in Westminster with regard to those powers being granted. Therefore, we have to make sure of that, and so we negotiated very hard for a set of exceptions that, broadly, are exceptions around the matters—the fixed exceptions, as Elisabeth mentioned. We have made no proposals on this side for floating exceptions.

[87] **Kirsty Williams:** I understand the difficulty that the Minister has faced in the negotiations with Westminster.

[88] **Jane Davidson:** Any such proposals have come from the UK Government. However, it is very important to us now to be able to move through the legislative competence in order to deliver Measures in the Assembly, according to the proposals that we made originally. Those are not changed in any way by this; that is the critical point. The list of topics has not changed; there is a set of clarifications here, but what we want to do with this has not changed either. The list of exceptions is about clarity in terms of our engagement with the UK Government.

[89] **Michael German:** I will bring Jonathan in in a moment, but I just wish to pick up on a point that Elisabeth made about future-proofing and its relationship to Schedule 7 post a referendum. Does all of your future-proofing mean that there is no beneficial impact on the competences provided to the National Assembly for Wales following a referendum?

[90] **Ms Jones:** Technically, there is no impact, because changing an exception in Schedule 5 has no automatic effect on Schedule 7. On comparing the two, the differences between the floating exceptions that this proposed Order would introduce into Schedule 5 and the exceptions in Schedule 7, which are all floating, relate to the fact that the Assembly has less competence under Schedule 5 than it would have in the future under Schedule 7. We sought only to except things where the Assembly would have competence if this proposed LCO goes through.

[91] **Michael German:** So, to be clear for the record, you are saying that there will be no narrowing or broadening of the exceptions in Schedule 7 as a result of the actions that we are taking with this proposed LCO?

[92] **Ms Jones:** That is true.

[93] **Jonathan Morgan:** Why are some of the exceptions relating to fields 4, 10 and 19 framed differently from those included in Schedule 7 to the 2006 Act in relation to the corresponding subject? For example, the Schedule 7 exception relating to water and flood defence refers to the appointment of water or sewerage undertakers, but section 3 of the proposed Order refers to the appointment and regulation of water and sewerage undertakers. Why the difference?

[94] **Jane Davidson:** My understanding is that it is because Schedule 7 itself has been amended, so the new terminology relates to the amended Schedule 7. Is that right, Elisabeth?

[95] **Ms Jones:** Yes.

[96] **Michael German:** I think that Keith would like to add an explanation.

[97] **Mr Bush:** That is absolutely right, and that is why the paper that was circulated revised paragraphs 42 and 43 to refer instead to the electricity generation exception in Schedule 7, which, in this proposed Order, is a rather narrower exception than the Schedule 7 exception. It is different.

[98] **Michael German:** Do you want to comment on that, Elisabeth?

[99] **Ms Jones:** As Keith says, the corresponding exception in the proposed Order is narrower in that the exception would not be triggered, that is, the Assembly would have competence in relation to power stations where the planning permission would be given by the Welsh Ministers. So, again, we have tried to reflect the boundaries between devolved and non-devolved competence.

[100] **Lorraine Barrett:** Before I ask my question, I will mention something that I have just thought of in relation to the second definition of Wales. This is almost a rhetorical question, if you will allow me to ask it, Chair. The Minister said that the second definition refers to land and beaches. When the tide is in, is a beach land or water? Perhaps I will just leave that on the table.

[101] **Michael German:** I think that we should have an answer on that.

[102] **Ms Jones:** The definition of the land mass of Wales is down to the mean low water mark of spring tide, so it is regardless of whether the tide is in or out. Also, as you will see, the Assembly will have competence over waste that is deposited from land into the sea, so even if it is below the mean low water mark, litter dropped by people will be within your competence.

[103] **Lorraine Barrett:** Thank you. So, that was not an original thought on my part.

[104] I have a few questions on matter 6.1. Keep Wales Tidy has some concerns about the following exception provided in relation to matter 6.1. It believes that it should be revisited because it would prevent any action on tackling litter from the marine environment. I do not know whether you have seen Keep Wales Tidy's responses. What is the purpose and effect on matter 6.1 of the final exception relating to matter 6.1 that refers to the territorial sea adjacent to Wales? I am not sure whether I have confused matters by bringing in the Keep Wales Tidy response.

10.50 a.m.

[105] **Jane Davidson:** All the issues around matters related to the sea are covered by the fact that we have the Marine and Coastal Access Bill going on in parallel, as it were. We have been through long and complex negotiations with our colleagues in Westminster, and colleagues in the Scottish and Northern Irish Governments, to have a strategic regulatory approach in the context of the Marine and Coastal Access Bill, which has now been agreed across the whole of the UK, and which gives Welsh, Scottish and Northern Irish Ministers substantial additional powers in those areas. So, that is now excepted from the proposed LCO, which predated those discussions.

[106] **Lorraine Barrett:** Is it okay for me to carry on, Chair?

[107] **Michael German:** I just had a supplementary question, but I think that you had something that you wanted to ask.

[108] **Lorraine Barrett:** Yes, but I was not sure whether you wanted to expand on that.

[109] **Michael German:** No.

[110] **Lorraine Barrett:** Does the exception conflict with matter 6.1? Matter 6.1 permits a Measure to be made that allows the disposal of waste in the sea adjacent to Wales, but the exception prohibits a Measure being made that covers the deposit of any substance or object in the sea adjacent to Wales from vehicles, vessels, and so on. Is there any conflict there?

[111] **Jane Davidson:** The exception does not cover all eventualities set out in matter 6.1. For instance, the disposal of waste by persons on land into the sea, as Elisabeth was saying, will fall within the Assembly's competence. The Assembly Government can already take action to tackle litter deposited in the sea from ships. However, as that will now be covered by the Marine and Coastal Access Bill, the Assembly will not gain competence in that area through the proposed LCO.

[112] **Michael German:** I was just surprised that you had to put an exception in for an area in which you are going to get the competence at some stage in the near future. Would it be simpler just to leave it out, given that the competence is coming in your direction anyway, as you have just said?

[113] **Jane Davidson:** The issue is that the competence that is being granted under the Marine and Coastal Access Bill is executive competence, not legislative competence.

[114] **Michael German:** Thank you.

[115] **Lorraine Barrett:** Finally, does this exception prevent action from being taken on tackling litter from the marine environment?

[116] **Jane Davidson:** No. As I said, the Assembly Government can already take action to tackle litter deposited in the sea from ships and so on, but that will not fall within the legislative competence, it will stay within the executive competence, which is the approach that has been taken by the four nations across the UK in the context of the Marine and Coastal Access Bill.

[117] **Lorraine Barrett:** I think that that has answered my next question, which was, 'If not, why not?'

[118] **Jane Davidson:** I just have a further point, if it is helpful. When we started the LCO process, there was no Marine and Coastal Access Bill. Therefore, these elements of the

proposed LCO changed because the Bill came forward for pre-legislative scrutiny during our discussions with the UK Government departments.

[119] **Kirsty Williams:** Minister, can you clarify whether radioactive waste is covered by the proposed Order?

[120] **Jane Davidson:** Yes, radioactive waste does fall within the scope of matter 6.1, but the National Assembly's competence will be limited by the floating exception on nuclear energy and nuclear installations, which fall outside the National Assembly's competence for all matters. Radioactive waste from nuclear installations will therefore not fall within the scope of matter 6.1, but the exception to the above is the disposal of very low-level radioactive waste from nuclear-licensed sites, which, as well as all radioactive waste from sources that are not defined as nuclear installations, such as hospitals and universities or research institutions, would fall within the scope of matter 6.1.

[121] **Kirsty Williams:** Thank you. Could you explain why there is an exception about the regulation of the provision of postal services in relation to matter 6.1?

[122] **Jane Davidson:** That exception clarifies and reflects the fact that regulatory arrangements for postal services, as set out in the Postal Services Act 2000, have not been devolved to Wales. Any provision made by the National Assembly under matter 6.1, the matter relating to waste, would therefore not apply to the provision of postal services by a person who holds a licence from the Postal Services Commission authorising that person to convey letters from one place to another.

[123] **Kirsty Williams:** You have made the point consistently this morning that you are satisfied that all the exceptions applying to matter to 6.1 will not undermine the effectiveness of any proposed Measure brought forward under that matter. This committee may have concerns that that would be the case. However, for the record, could you confirm that you are confident that that is not the case?

[124] **Jane Davidson:** If you take the example of the postal services, although the proposed LCO contains an exception in the context of postal services, the proposed Order will still provide the Assembly with competence in relation to unaddressed material being delivered to premises, providing the persons delivering it are not regulated by the Postal Services Commission. So, it is further clarity on devolved and non-devolved functions. However, it still gives us additional powers in other areas.

[125] **Ms Jones:** That is rather a good example of the effect of the use of the word 'regulation' in an exception. If, for example, that exception simply said, 'the provision of postal services', then it would have been a wider exception. As the exception is about the regulation of the provision of postal services by a person holding a licence under the 2000 Act, it is clear that the Assembly cannot impose further obligations on those persons or change that existing statutory regime. However, we can attack and address issues relating to mail as long as we do not change that regulatory regime.

[126] **Michael German:** I would like to ask you about junk mail, Minister, which many people regard as waste. Does that mean that the Assembly would not have competence to deal with junk mail?

[127] **Jane Davidson:** Not when it is delivered by the Postal Services Commission, but otherwise, yes.

[128] **Michael German:** Not when it comes from the Post Office, is that what we are saying? Not when the Royal Mail delivers it?

[129] **Ms Jones:** Not when the Royal Mail or another person licensed by the Postal Services Commission delivers it. However, as I understand it, a great deal of junk mail is delivered by transport operators, who would not necessarily have such a licence.

[130] **Michael German:** So we would have no ability to control anything that comes through the post and is delivered by postal services; we would only have competence over items delivered by other private sector providers.

[131] **Jane Davidson:** It is important to point out that, under the waste competence, we have powers to prevent waste. There are a number of ways in which we can tackle some of these issues.

[132] **Jonathan Morgan:** Looking at the way in which this proposed Order has been constructed in comparison with the original proposed Order, and, in particular, at matter 6.2, what was so wrong with the original matter 6.2 that it had to be split into a new matter 6.2 and matter 6.3?

[133] **Jane Davidson:** It was about clarity. The original matter looked at pollution and nuisances. In order to have proper clarity on these issues, we divided it so as to have competence over nuisance as a separate matter. So, matter 6.2 was redrafted accordingly.

[134] **Jonathan Morgan:** One of the significant changes, looking at the original matter 6.2, is the fact that the reference to hazardous substances has been removed from the proposed Order. Why?

[135] **Jane Davidson:** The policy objective is that legislative competence under matter 6.2 should extend to hazardous substances in so far as they cause, or are likely to cause, pollution, or as waste. It is not necessary, therefore, to mention hazardous substances in order to ensure that pollution caused by hazardous substances or hazardous waste is within our competence. If they were mentioned, along with other examples of the sort of things that might cause pollution or waste, that might have led to less clarity rather than more.

[136] **Jonathan Morgan:** So, you are confident that not including it, in essence, allows you to include it?

[137] **Jane Davidson:** Yes.

[138] **Jonathan Morgan:** Okay. I think that I am clear on that.

[139] **Janet Ryder:** Could the Minister please explain the purpose of the exception in matter 6. 2(d)(i), which excludes Measures from providing financial support for the production of renewable energy for consumption in transport? Why is it necessary?

[140] **Jane Davidson:** The purpose of that exception is to ensure that the Assembly does not have legislative competence in relation to the provision of financial support in connection with the production of renewable energy for consumption in transport where we do not have executive powers as Assembly Ministers in relation to the content and composition of transport fuels. That was a specific exception sought by the UK Government to ensure that the devolved settlement was preserved.

[141] **Janet Ryder:** So, the Assembly would not be able to legislate, for example, to allow finance to be provided to local authorities to use waste gases from waste facilities as a fuel for their vehicles?

11.00 a.m.

[142] **Jane Davidson:** We could give money, because the Government of Wales Act 2006 provides broad powers for us to do anything that we consider to be appropriate to the social, economic and environmental wellbeing of Wales. We provide financial support regularly, do we not? However, we could not legislate on that because it would not be within our devolved functions.

[143] **Joyce Watson:** The evidence that we heard from Keep Wales Tidy and the Welsh Local Government Association suggested that some exceptions relating to energy-related activities and carbon capture could limit the scope of future Assembly action in relation to climate change. Is that the case?

[144] **Jane Davidson:** Matter 6.2 provides the Assembly with broad competence in relation to pollution, which includes the emission of various greenhouse gases. So, we are content with that.

[145] **Joyce Watson:** In your letter to the original committee on 1 October 2007, you stated that the proposed Order would allow the Assembly to seek to reduce the emissions of greenhouse gases by improving resource efficiencies and reducing waste. Is that still the case?

[146] **Jane Davidson:** Yes.

[147] **Joyce Watson:** We have talked a lot this morning about marine issues, so why are executive powers on marine licensing being given to the Welsh Ministers through the Marine and Coastal Access Bill while legislative competence in this area is excluded from the National Assembly for Wales in this proposed LCO? Why should Welsh Ministers have these powers and not the National Assembly for Wales?

[148] **Jane Davidson:** As I said at the beginning, I have always taken the view that Assembly powers should follow the executive responsibilities of Ministers. We have put that to the UK Government. An important issue is that the Marine and Coastal Access Bill is not only an England-and-Wales Bill; it applies to the whole of the UK. Similar regulatory arrangements are being considered across the UK.

[149] **Michael German:** Finally, on your satisfaction with the exemptions, Kirsty has already asked you about matter 6.1, so could you tell me on the record that, in your view, all the exceptions applying to matters 6.2 and 6.3 will never undermine the effectiveness of any future Measure that may be brought forward under those matters?

[150] **Jane Davidson:** Before I hand over to the lawyer, all I can say as a politician is that that is exactly the question that I asked the lawyers throughout this process. [*Laughter.*] That is to ensure that we have the greatest degree of competence for the Assembly in relation to the executive powers held by the Welsh Ministers in this context.

[151] **Ms Jones:** We have sought to agree only those exceptions that reflect the current boundaries of executive competence. The exception to that, as the Minister explained, is that the Welsh Ministers will acquire new executive powers under the Marine and Coastal Access Bill but the Assembly will not get legislative competence in that area because of the parallel, and hard fought, negotiations on the Bill held with the UK Government, as well as because it is a UK Bill.

[152] On whether proposed provisions in any future Measure might be constrained, given that that would also include backbench Measures, I would have to be a typical lawyer and say that it would be very foolish of me to answer that question with an unqualified 'yes or no'.

[153] **Michael German:** We will conclude on that point. Thank you, Minister, for coming here at short notice and for answering our questions today. I also thank your officials. We will now move to private session to discuss these matters.

11.05 a.m.

**Cynnig Trefniadol
Procedural Motion**

[154] **Michael German:** I move that

the committee resolves, in accordance with Standing Order No. 10.37(vi), to exclude the public from the remainder of the meeting and any future meetings at which it is to discuss the key issues and its report.

[155] I see that the committee is in agreement.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 11.05 a.m.
The public part of the meeting ended at 11.05 a.m.*