

Evidence to the National Assembly for Wales Constitutional Affairs Committee

From the Chair of the Welsh Affairs Committee, House of Commons

Introduction

- 5 1. As Chair of the Welsh Affairs Select Committee, I am pleased to provide the National Assembly for Wales Constitutional Affairs Committee with this memorandum, which gives an overview of our work and some comments which may be helpful in the context of its current inquiry into Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters.
- 10 2. Terms of reference published by the Constitutional Affairs Committee state that its inquiry will consider:
- the approach taken to the drafting of Schedule 5 Matters in the Government of Wales Act, in particular the use of “fixed and floating exceptions” and the reasons behind the change in approach;
 - 15 • the implications of this for the development of the “Welsh Constitution” and the public’s understanding of the devolution of legislative competence to the Assembly.

My Committee has commented on the use of fixed and floating exceptions in its Reports on individual proposed Legislative Competence Orders (LCOs). These are available on our website: www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm.

20 This memorandum does not repeat all the specific recommendations we made in those cases, but instead comments on the emerging nature of Schedule 5 as a whole in the context of the Committee’s interest in “the development of the ‘Welsh Constitution’ and the public’s understanding of the devolution of legislative competence to the Assembly”.

25 *Work of the Welsh Affairs Committee*

3. The Committee is a cross-party committee of 11 Members of Parliament, presently made up of six Labour Party Members, three Conservatives, one Liberal Democrat and one Plaid Cymru. As one of the departmental select committees of the House of

Commons, the formal function of the Welsh Affairs Committee, set out in Standing Order No 152, is to examine the expenditure, administration and policy of the Wales Office, and relations with the National Assembly for Wales. In practice, the Committee has an interest in all aspects of Welsh business at Westminster and in the levels of co-operation between
5 the Welsh Assembly Government and Whitehall which are essential to providing a consistent and high standard of public services to the population of Wales under the devolution settlement.

4. The progress of devolution means that the interface between devolved and national government structures is more important than ever for our work. In the fields of healthcare,
10 social services, education and transport, and elsewhere, there are increasing differences between policies in England and those in Wales, with each country deciding what is best for its own residents. My Committee has a role in monitoring any gaps in provision or lack of co-ordination which may arise as a result of this and in highlighting examples of good practice. The fact that different decisions are taken can be beneficial to both sides, not least
15 in testing out different approaches and comparing results in order to share best practice and take better informed decisions in the future. However, there are sometimes unintended consequences and our recent work has highlighted some of these as well as providing evidence which is of wider interest about the provision of services in Wales generally and implications across the border.

20 5. Over the past two parliamentary sessions, the Committee has examined a range of subjects, including the cross-border provision of public services (looking specifically at further and higher education; health; and transport); the impact of globalisation on the Welsh economy; the Legal Services Commission's Cardiff office; the potential benefits of the 2012 Olympics and Paralympics for Wales; English language television broadcasting;
25 digital inclusion and Welsh ports.

6. Most recently, we have undertaken an in-depth inquiry into the relationship between Wales and Whitehall. This was inspired by evidence we took during our inquiries which indicated that decisions were sometimes being made centrally with no awareness of their potential impact on Wales. We also heard about some decisions being made in Cardiff
30 without regard for the impact they may have on those needing to cross the border regularly. The evidence we have taken during this inquiry also probed the understanding of

the Government of Wales Act 2006 within government and the civil service. We are aiming to produce a Report on this topic before Easter.

Pre-legislative scrutiny of LCOs

7. Since 2007, my Committee has also had responsibility for pre-legislative scrutiny of all
5 proposed Legislative Competence Orders (LCOs) laid before Parliament under the
Government of Wales Act 2006. The procedure established by the Act is one whereby
Parliament can agree to devolve a portion of its sovereignty to the National Assembly for
Wales, in response to a request for further powers made in the form of an LCO. Within this
structure, we believe it is very appropriate that Welsh MPs should have a central role as the
10 democratically elected representatives of Wales in the UK Parliament.

8. The pre-legislative scrutiny we conduct aims to establish a solid and reliable basis for
the Assembly to exercise its law-making powers within the framework of the devolution
settlement. Our role is to test the provisions of the proposed Order against the evidence that
is given to us.

15 9. The Committee's work on an LCO begins when the proposed Order is referred to us by
the Secretary of State for Wales. This is normally when a text has been agreed between the
Assembly Government and Whitehall. The process we have followed in dealing with
LCOs is to issue a call for written evidence and to hold one or more oral evidence sessions,
leading to a report and recommendations. However, we treat each LCO on a case by case
20 basis and will adapt the process to suit the individual proposal under consideration.

10. We recently reported on our fifteenth LCO and have now completed work on all
proposed Orders which have been laid before the House to date. We estimate that the
additional task of reporting on all LCOs has approximately doubled the work of the
Committee compared to our activity before the passage of the Government of Wales Act
25 2006. Whether the latest LCOs complete their remaining parliamentary stages will depend
on the date of the General Election, but my Committee has worked hard, diligently and
efficiently to make sure that they have every chance of doing so.

11. It is the general view of the Committee that the LCO process is working well and
increasingly so over time, thanks in large part to our consensual approach within the
30 Committee and our partnership approach with Assembly committees. In January 2010, we
published a Report, *Review of the LCO Process*, looking back at the operation of the

procedure after two years' experience.¹ We concluded that all parties to the process were now working more effectively and efficiently together. We also suggested some possible improvements for the future, including to our own working practices. I am also pleased that our work has been recognised elsewhere, not only in debates in the House, but also, for example by Sir Gus O'Donnell, Head of the Civil Service, when he gave evidence to us recently as part of our current inquiry into the relationship between Wales and Whitehall.

Transfers of competence through primary legislation

12. The LCO system is not the only means by which the Assembly can extend its legislative competence. Changes can be made to Schedule 5 to the Government of Wales Act as part of a Westminster Bill if Parliament is legislating on a policy area in which the Welsh Assembly Government has communicated a desire to modify the Assembly's competence. If the Assembly Government (or the Assembly) is seeking to modify the scope of Welsh Ministers' delegated powers, 'framework powers' can similarly be included in a Bill if its scope is appropriate. The scrutiny of such Bills is a matter for the whole House. Whilst members of my Committee sometimes serve on Public Bill Committees considering such legislation, the Welsh Affairs Committee as a body is not formally involved. However, there is nothing to prevent us from commenting if we choose to do so and time allows. This may be an aspect of the process in which a future Welsh Affairs Committee in the next Parliament would wish to be more involved, if, as expected, there is a decrease in the number of LCOs being referred to the Committee.

Developments in Schedule 5 to the Government of Wales Act

13. In our *Review of the LCO Process* we highlighted our concerns about the emerging complexity of the settlement under the Government of Wales Act 2006. In particular, we concluded that:

- There is an unacceptable lack of transparency to the 'Whitehall clearance' process (the negotiations between the Welsh Assembly Government and UK government departments to agree on a text for a proposed LCO).

¹Fifth Report of Session 2009-10, HC 155: www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm.

- Some complexity in the law in Wales has developed from the need to keep track of a range of legislative vehicles through which powers can be devolved either to the Assembly or Welsh Ministers.
- 5 • Some work remains to be done to establish a comprehensive and accessible ‘Welsh statute book’, which should be on-line and include a facility for public comment as well specialist comments and suggestions from professional and academic experts and lawyers. This should be combined with a more straightforward approach to the drafting of proposed Orders and Explanatory Memoranda on the part of the Wales Office and Welsh Assembly Government.
- 10 • Each LCO should be as well defined as possible and should reflect the intention that has been stated by ministers, Assembly members and MPs for each LCO to contain ‘what it says on the tin’.

Complexity

14. In the course of our pre-legislative scrutiny of LCOs, the view has been expressed to us
15 that complex policy is reflected in complex law. This applies not only to individual draft Orders, but also to Schedule 5 of the Government of Wales Act 2006 as a whole.

15. One of the most technically complex Orders we have considered was the proposed Environment LCO. This Order, which spent two years in the Whitehall clearance process, conferred legislative competence on the Assembly largely reflecting the existing executive
20 powers of the Welsh Assembly Government. As we received it, the Order contained a large number of exceptions to its Matters reflecting “topics which are relevant to waste or environmental protections, but where the Welsh Ministers do not have significant functions”.²

16. The Order presented for pre-legislative scrutiny included both ‘fixed’ and ‘floating’
25 exceptions as well as a number of ‘carve-outs’, or exceptions to exceptions, which do not themselves confer legislative powers but only take effect if they deal with cases that otherwise fall within the scope of an existing Matter. Several of the exceptions, for example regarding health and safety regulations, related to Matters that were already excluded from the Assembly’s competence under Part 2 of Schedule 5 to the Government

² EM, para 30

of Wales Act 2006 which prevents the functions of Ministers of the Crown from being modified by means of an Assembly Measure without the permission of the Secretary of State. Other exceptions were to be added to Schedule 5 under three fields that would not otherwise have been affected by the proposed Order.

5 17. Concerns were raised during the scrutiny process, both by ourselves and in the Assembly, about the use of terms and definitions and the exceptions to Matters listed in the proposed Order. In its report, the National Assembly for Wales Legislation Committee No. 4 highlighted the sheer complexity that the use of exceptions creates within the LCO and ultimately within the Government of Wales Act 2006.³ In our Report we suggested that
 10 “there is a danger that excessive use of these practices could risk making the Government of Wales Act 2006 unwieldy and impenetrable”.⁴ In October 2009, the Lords Constitution Committee reported on the proposed Order. It endorsed our views on the use of exceptions and concluded as follows:

15 The Constitution Committee considers LCO 8 [the Environment LCO], taken in the round, to be perilously close to the borderline of what is constitutionally acceptable. A common thread is the opaque nature of the evolving ‘written constitution’ that is the Government of Wales Act 2006. To this effect, the Constitution Committee agrees with the Welsh Affairs Committee that “LCOs should be drafted with the aims of clarity and simplicity in mind” and, indeed, recalls that clarity and
 20 transparency in the law are elemental to the core constitutional principle of the rule of law. The Wales Office, it is recommended, should actively explore ways in which the proposed Environment LCO may be simplified. The Constitution Committee also urges the importance of user-friendly explanations of the Assembly’s evolving legislative competence, both in the case of individual LCOs and, on a regular basis,
 25 of Schedule 5 as a whole. The concept of an evolving ‘written constitution’ for one of the four countries of the Union demands no less.⁵

18. At the end of our respective inquiries, I wrote jointly with the Chair of the Assembly Committee to the Secretary of State for Wales and the First Minister to suggest that they review the use of exceptions in this Order. The letter drew attention to the complexity of
 30 the legislative settlement that is developing under Schedule 5 of the Government of Wales Act 2006. In response, the Secretary of State noted that environmental concerns are relevant to policy and legislation in many areas and pointed to the highly complex nature of existing environmental legislation, which was reflected in the draft Order.

³ National Assembly for Wales Legislation Committee No. 4 Report on the National Assembly for Wales (Legislative Competence) (Environment) Order 2009.

⁴ Twelfth Report of Session 2008-09, The National Assembly for Wales (Legislative Competence) (Environment) Order 2009, HC (2008-09) 678.

⁵ HL (2008-09) 159, paragraph 9.

19. In his response, the then First Minister, Rt Hon Rhodri Morgan AM, added that “You will appreciate that the precise terms of LCOs are the product of detailed discussions with Whitehall departments. Much of the complexity of drafting, in the form of detailed exceptions from competence, has arisen as a result of these negotiations”. In the case of the Environment LCO, it appears that the Order was technically complex because of the existing complexity of environmental policy and legislation, as well as the wide range of EU legislation affecting environmental matters. Further complexity was added because of the need to reflect a complex division of reserved and devolved competencies which had been agreed as a result of the negotiations between the Welsh Assembly Government and Whitehall.

20. Often, a proposal to extend competence results from the Welsh Assembly Government’s wish to implement a particular policy initiative. In these cases, the need to provide precise boundaries to the competence sought can result in a technically complex draft instrument. Given that LCOs transfer law-making powers to the Assembly in perpetuity, we consider that there is scope in future for the Welsh Assembly Government (or the Assembly committees or individual AMs who are also able to initiate draft Orders) to put forward more proposals which would be justified by a wider constitutional argument, rather than a limited or short term policy aim. This might result in simpler policy intentions reflected in simpler drafting. A recent example is provided by the Sustainable Housing LCO, which might be regarded as much more wide-ranging than the Environment LCO, but is much simpler in legislative terms.

21. We commented in similar terms in our recent Report on the Education LCO (relating to school governance). Noting that Field 5 (education and training) is arguably already approaching a high level of transfer of legislative powers, we questioned whether the opportunity should have been taken to complete the transfer of legislative powers in education, with the inclusion of any necessary exceptions, rather than enacting another LCO whose boundaries were drawn to match the more immediate policy intentions of the Assembly Government. We concluded that:

...given the extent of devolution that has already occurred in education, we ask whether it would be best to transfer all remaining legislative powers in the area, with clear exceptions in areas such as teachers’ pay and conditions, and we invite the Assembly Government to consider that view.⁶

⁶ Seventh Report of 2009-10, The Proposed Legislative Competence Order relating to School Governance, HC 274.

22. The complexity of Schedule 5 to the Government of Wales Act 2006 is clearly affected by the nature of the individual instruments made under it. However, its structure as a whole also has to support a dynamic devolution settlement which is subject to frequent amendment, and to define the boundary between devolved and reserved competencies with absolute precision. As evidence given to you by legal expert witnesses has suggested, this in itself is a complex task, necessitating intricate drafting.

23. Any decision to give effect to Part 4 of the Government of Wales Act will add further urgency to the need for clarity about the scope of the Assembly's competence.

Public understanding

24. You have recently heard evidence from Welsh Legislative Counsel, who described the 'dual nature' of Schedule 5.⁷ The Act is called upon to function both as a principled constitutional statement, "an evolving 'written constitution' for one of the four countries of the Union" (in the words of the Lords Constitution Committee), and a technical legal document providing absolute certainty as to the boundaries of the Assembly's competence. As such it is an example of how law-making, particularly in the constitutional arena, is not carried out in a legalistic vacuum, but is a matter for engagement by the public and stakeholders.

25. Most legislative processes have some inherent complexity. Any system which changes the rules according to which people are governed can only be simplified to a certain extent without risking the essential checks and balances which ensure fairness and equal treatment under the law. Whilst much has been made in the media of the perceived complexity of the LCO process in particular, I note that successive surveys have detected a very low level of understanding of the legislative system at Westminster amongst the public.

26. Nevertheless, the public in Wales needs to understand the system in order to engage with the process. Legislators must make efforts to explain the steps involved and to make the system as transparent and accessible as possible, particularly with a new system such as LCOs. The media also has a public service duty in this regard.

⁷ 4 Feb, para 231.

27. My Committee has itself recognised the need to redouble its efforts in this area. In our recent work on LCOs we have pursued, amongst other issues, the conventions surrounding the titles of LCOs, which are at present named after the field(s) in which they insert matters. This has led to unhelpful titles (such as the naming of the backbench fire
 5 sprinklers LCO after the “housing” field) and the potential for confusion (with three “housing” LCOs being presented in 2009). My Committee does not consider that the name of the LCO should be dictated by where it is placed in legislation. Instead the name should reflect and communicate the contents of the LCO. We were pleased that in the case of the sprinklers LCO, the instrument was renamed. However, this recommendation has
 10 not yet been implemented with regard to other Orders.

28. In our letter to the Secretary of State and the then First Minister on the Environment LCO, we emphasised the need to ensure that Explanatory Memoranda accompanying proposed Orders explain clearly and precisely what powers they will confer on the National Assembly in terms which are easy for the lay-person to understand. In his
 15 response, the Secretary of State acknowledged the “need for a user-friendly explanation of the Assembly’s evolving legislative competence” and agreed to work towards this as a priority. We were pleased that, in its final draft, the Environment LCO was accompanied by an additional explanatory document, which briefly summarised the LCO process and the new powers the Assembly would gain by means of the instrument. It is our view that a
 20 similar short summary should be published alongside all substantial proposed Orders.

Online resources

29. We are aware of some efforts to present the law relating to Wales in a more user-friendly manner. For example, two services provided by the National Assembly for Wales via its website, the Assembly powers tracking notes and the regularly updated version of
 25 Schedule 5 to the Government of Wales Act 2006 provide a useful tool for those wishing to monitor the growing competence of the Assembly.⁸

30. Nevertheless, more work is needed to provide a comprehensive picture of powers devolved both to the Assembly and to Welsh Ministers in an accessible and regularly updated form. One promising vehicle is *Wales legislation online*, a service supported by

⁸ http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidancedocuments/legislation_fields.htm and 40 http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidancedocuments/legislation_fields/schedule-5.htm

the National Assembly for Wales and the Welsh Assembly Government in conjunction with Cardiff University and the Wales Governance Centre, which aims to provide “an accurate, comprehensive and current statement of the devolved functions in Wales and of the laws made in Wales”.⁹ This site is currently being revised better to reflect legislation since the Government of Wales Act 2006. However, when the Wales Governance Centre gave evidence to our inquiry into Wales and Whitehall, its representatives said that they had experienced significant difficulties in securing funding for the project and described it as “a hand-to-mouth operation”.¹⁰

Transparency

31. There is an unhelpful lack of transparency to negotiations between the UK and Welsh Assembly Governments on LCOs. The Committee to date has had no access to the substance of these negotiations. We have not been made aware of any sticking points in relation to individual Orders, been given any explanations for delays or formal updates on progress. In practical terms, the difficulty in predicting when a proposed Order will be referred to us makes it harder for us to plan a programme of work which balances pre-legislative scrutiny of LCOs with our other activities. It is likely to have had a similar effect on other interested parties (e.g. the voluntary sector, campaign groups etc. with an interest in a particular LCO). I am also of the view that this lack of transparency is unhealthy in the context of democratic devolution.

32. In our Review, we recommended that the Wales Office should provide us with a monthly update on the progress of all proposed Orders together with an explanation of any delays. We would then be able to call ministers and officials to account to the Committee for any unjustified delays. The Government has not yet provided its formal response to these recommendations, but my Committee intends to continue to press this approach through active scrutiny, including in our most recent inquiry into the relationship between Wales and Whitehall.

10 March 2010

⁹ <http://www.wales-legislation.org.uk/>

¹⁰ HC 246-iv, Q 386