



November 2009

Dear Sir/Madam

Subordinate Legislation Committee Consultations

The National Assembly for Wales Subordinate Legislation Committee has agreed to undertake two separate pieces of work:

1. Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters
2. Monitoring the outcome of the Committee's Reports on Statutory Instruments

The Committee would welcome your views on the inquiry into the Developments in Schedule 5 of the Government of Wales Act and Exceptions to Matters in Schedule 5, further details of this review can be found at annex 1.

We would also like to bring to your attention the call for evidence for our second review, which was issued in October. Details of the review into the outcome of the Committee's Reports on Statutory Instruments can be accessed here:

<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-legislation-dissolved/bus-committees-third-sleg-home/bus-committees-third-sleg-agendas-2.htm>

Please could you send your electronic response to:
legislation.committee@wales.gsi.gov.uk

Alternatively written responses can be sent to:
Subordinate Legislation Committee, Legislation Office, National Assembly for Wales,
Cardiff Bay, CF99 1NA.

When preparing your submission, please keep the following in mind:

- your response should address the issues before the Committee. Please reference your response clearly stating the titles to which you are responding;
- please indicate whether you are responding on behalf of an organisation, or as an individual;
- the National Assembly normally makes responses to public consultation available for public scrutiny and they may also be seen and discussed by Assembly Members at Committee meetings;

- **if you do not want your response or name published, it is important that you clearly specify this in your submission and your reasons for this.** However you should be aware that it may not be given the same weight by the Committee when considering the evidence. You should also be aware that the information you have provided in your response to this consultation, including company information, may be published or disclosed in accordance with the Freedom of Information Act 2000 (FOIA);
- please indicate whether or not you would be prepared to give oral evidence to the Committee.

The Committee welcomes any response in English and Welsh and will be considering responses early in the New Year. Please can you ensure any response is received by 30th December 2009 it may not be possible to consider any responses received after this date.

If you have any queries, please contact Steve George, Committee Clerk on 029 2089 8242 or Olga Lewis, Deputy Clerk on 029 2089 8155.

Yours faithfully,



Janet Ryder AM
Chair
Subordinate Legislation Committee

Ffon / Tel: 029 2089 8120
Ffacs / Fax: 029 2089 8021
Minicom: 029 2082 3280

E-bost / E-mail: legislation.committee@wales.gsi.gov.uk

Annex 1

The Development of Schedule 5 of the Government of Wales Act and Exceptions to Matters

Remit of the Subordinate Legislation Committee

The issue of how Schedule 5 of the Government of Wales Act 2006 is developing, in particular the exceptions to Matters, is being considered by the Committee under Standing Order 15.6(v); ‘any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers’.

Scope of the Inquiry

The inquiry by the Subordinate Legislation Committee 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;
- 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.

The outcome of this review will result in:

Recommendations for improving the approach to drafting of Legislative Competence Orders (LCOs) and the clarity of Schedule 5

Background - Scrutiny of Legislative Competence Orders (LCOs)

The areas within which the Assembly currently has legislative competence are set out in [Schedule 5 to the Government of Wales Act 2006](#).¹ A series of Assembly Powers Tracking Notes which show the extent of the Assembly's legislative competence and track additions (both approved and proposed) to Schedule 5 can be found here: [Assembly Powers Tracking Notes](#).²

In the course of the recent scrutiny of the proposed ‘Carers’ and ‘Environment’ Legislative Competence Orders, a new approach to exceptions to matters has become evident, together with new terminology for that approach. Exceptions are now classified as:

- **fixed**: specific to a particular matter or to the matters in a particular Field (and appearing in Part 1 (Matters) of Schedule 5 to the 2006 Act).
- **floating**: applying across all fields (and appearing in Part 2 (General restrictions) of Schedule 5 to the 2006 Act).

¹ http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidance-documents/legislation_fields/schedule-5.htm

² http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidance-documents/legislation_fields.htm

The House of Lords Constitution Committee has expressed concerns regarding certain features of the way in which this approach had been introduced, particularly as both the 'Carers' LCO and the 'Environment' LCO contain "floating" exceptions which are at least primarily relevant to fields other than those which contain the matters to be added by the LCO. Following a [critical report by the Constitution Committee](#)³ the original Carers LCO was divided into two separate LCOs, one on [Carers](#)⁴ and the other on [Exceptions to Matters](#).⁵ Both draft Orders have been approved by the Assembly and by both Houses of Parliament and so now await to be made by Her Majesty in Council.

The issue of floating exceptions was considered further by Legislation Committee 4 (LC4) when looking at the [Proposed Environment Legislative Competence Order](#).⁶ LC4 produced a [committee report](#)⁷, in general terms the report:

- i) agreed with broad competence being conferred on the National Assembly by the revised proposed Environment LCO but expressed reservations about how this competence was being constrained by extensive fixed and floating exceptions;
- ii) recommended that the Minister investigate ways in which the proposed Order could be simplified and suggested a number of ways in which this could be achieved;
- iii) recommended floating exceptions be removed from 3 fields because there were no matters in those fields and therefore to which the exceptions could apply;
- iv) expressed some concerns about the complexity of the revised proposed Environment LCO and more generally the developing complexity of Schedule 5 to the 2006 Act (echoing the views of the House of Lords Constitution Committee).
- v) made recommendations about the scrutiny process for LCOs generally.

The House of Lords Constitution Committee has also [reported](#)⁸ on the Environment LCO, stating, 'The Constitution Committee considers LCO 8, taken in the round, to be perilously close to the borderline of what is constitutionally acceptable'. This report also drew attention to another term, 'carve outs' which are exceptions to exceptions.

Your view

The Committee would welcome your opinion to assist this review. Areas on which the Committee would particularly like to receive your views include:

- the approach taken to the development of Schedule 5 and in particular the drafting of exceptions to matters;

³ <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/105/105.pdf>

⁴ <http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid.htm?act=dis&id=133005&ds=6/2009>

⁵ <http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid.htm?act=dis&id=133007&ds=6/2009>

⁶ <http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid/lco-ld7517-e.pdf?langoption=3&ttl=LCO-LD7517%20-%20The%20National%20Assembly%20for%20Wales%20%28Legislative%20Competence%29%20%28Environment%29%20Order%202009%20>

⁷ <http://www.assemblywales.org/cr-ld7575-e.pdf>

⁸ <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/159/159.pdf>

- the advantages and disadvantages of using “floating exceptions” in Schedule 5 instead of “fixed exceptions”;
- how the development of Schedule 5 affects your, and public, understanding of the devolution of legislative competence to the Assembly; and
- the impact of changes to Schedule 5 have on your ability to comment on legislative proposals that relate to your area of work.

It is important to note the Subordinate Legislation Committee is unable to scrutinise individual LCOs, as such this review will not be looking at the content of individual LCOs. Please ensure your response does not detail your concerns on particular topic areas but considers the changes to schedule 5.

Ffon / Tel: 029 2089 8120
Ffacs / Fax: 029 2089 8021
Minicom: 029 2082 3280

E-bost / E-mail: legislation.committee@wales.gsi.gov.uk