EXPLANATORY MEMORANDUM TO

THE NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (EXCEPTIONS TO MATTERS) ORDER 2009

2009 No.

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument changes the way in which exceptions apply to matters in Schedule 5 of the Government of Wales Act 2006 by making exceptions apply to all matters in this Schedule - unless the exception is matter specific.

2.2 This approach ensures that exceptions apply in all cases where they are relevant. It makes Schedule 5 clearer and easier to understand by applying exceptions to all matters listed in it.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. The Committee may consider that this Order is an unusual use of the power to amend Schedule 5. Section 95(1) and (3) of the 2006 Act provides the vires for these amendments. Section 95(1) provides vires for amending Part 2 of Schedule 5, to which the list of exceptions that applies to all Matters will be added. Section 95(3) provides the general vires for amending provisions of the Government of Wales Act 2006 (the Order amends sections 94 and 101 of the Act, as well as Schedule 5). The nature of the exceptions is not changed by providing that they be of general application and that they be listed in that part of the Act which concerns general limitations on the Assembly's competence.

3.2. The same result could have been achieved by using the tables currently in the Schedule and amending them by adding a new matter to the exceptions listed each time a further matter is inserted into Schedule 5. However, this would not be an economical or reliable drafting solution and would make an already complex schedule more cumbersome and difficult to understand. There is no significant conceptual difference between restrictions and exceptions in the sense that both carve out certain matters from the Assembly's primary legislative competence and these amendments mean that all limitations of a general nature will be in one place in the Schedule, while those of a specific application will continue to be in Part 1. Part 3 of Schedule 5 is also renamed to make clear that it relates only to the general restrictions in Part 2 but is not relevant to the exceptions to matters now included in that Part. The

primary intention of this amendment is to improve the clarity of the Act and thus the understanding of the boundary of the devolution settlement.

4. Legislative Background

4.1 Under Part 3 of the 2006 Act, the legislative competence of the Assembly is defined by section 94 and Schedule 5 of that Act. Part 1 of Schedule 5 specifies the matters in relation to which the Assembly has power to legislate by Assembly Measure. Part 2 of Schedule 5 lists general restrictions on that power and Part 3 lists exceptions to those general restrictions. Section 95 (1) of the 2006 Act enables Her Majesty, by Order in Council, to amend Schedule 5 so as to add new matters to Part 1; to vary or remove a matter, or add, remove or vary a field; or to amend Part 2 or Part 3. Section 95 (3) specifies that an Order in Council under that section may make such modifications of any enactment – including the 2006 Act itself – as Her Majesty considers appropriate in connection with the provision made by the Order in Council.

4.2 It has sometimes been necessary to include, in the definition of matters in Part 1 of Schedule 5, exceptions to those matters, so as to make it clear that a matter does not include a particular area of policy. It has also proved necessary in many cases to apply the same exception to more than one matter. When the first matters were inserted into Schedule 5, each matter was drafted to show what was not included in the scope of the description; as the schedule became more populated, it was realised that this drafting approach would lead to considerable repetition as exceptions often applied to more than one matter. A new approach was taken and brought into effect by the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132). Exceptions to matters set out in Part 1 of Schedule 5 are now listed in tables, with the number of the matter to which each exception applies being identified against that exception.

4.3 This draft Order makes technical amendments to Section 94 and Schedule 5 of the 2006 Act. The effect of these amendments is to apply the exceptions which are currently listed in the tables to all matters in Part 1 of Schedule 5. The table of exceptions is replaced by a list of exceptions, set out in a new paragraph A1 in Part 2 of Schedule 5. Section 94 of the 2006 Act is amended to make it clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph..

4.4 The proposed Order does not add any new exceptions. It amends exceptions 2 and 8 under the heading of Highways and Transport so as to preserve the scope of Matter 10.1 (road charging).

5. Territorial Extent and Application

Although this instrument extends to the whole of the United Kingdom its practical application is limited to Wales as it amends provisions which will define the scope of the Assembly's legislative competence.

6. European Convention on Human Rights

Wayne David MP, Parliamentary Under Secretary of State for Wales, has made the following statement:

"*In my view the provisions of The National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009 are compatible with the Convention rights*"

7. Policy background

7.1 The current approach of linking each exception to specific matters involves trying to anticipate all the circumstances in which a particular exception might be relevant to a particular matter. Where both the Government and the Welsh Assembly Government have agreed that an area of policy remains the UK Government's responsibility and primary legislation in those areas would in all circumstances remain the preserve of Parliament, it would be the intention to except such areas from the Assembly's legislative competence in all cases where they were relevant. It would appear more straightforward to recognise this by making such areas general ("floating") exceptions to the Assembly's competence, where there is any matter in Part 1 of Schedule 5 which is relevant to one of those areas.

7.2 If amendments to Schedule 5 had continued on the basis of applying specific exceptions to each matter, the table of exceptions would itself have become more cumbersome and harder to follow because certain exceptions would need a large number of matters to be listed against them. There would also have been a risk of perverse and inconsistent consequences if the UK Government and the Welsh Assembly Government failed to anticipate all matters to which an exception should apply. The considerable time and effort incurred in identifying scenarios where a particular exception may be relevant to a particular matter would not necessarily succeed in capturing every eventuality.

7.3 The move to "floating" exceptions will not lessen the current flexibility of the Schedule in terms of applying exceptions to matters. It will not, for example, preclude exceptions applying only to one matter in Schedule 5 or applying to several matters (as part of the definition of those matters). But it will at the same time recognise that there are some areas which are, generally, not intended to be within the competence of the Assembly, even though they could be interpreted as relating to one or more matters in Part 1 of Schedule 5.

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

7.5 The inclusion of "floating" exceptions within Part 2 means that all limitations that are of general application will be in one place in the Schedule (whilst any exception that is of specific application to a matter will be included in Part 1 of the Schedule). To recognise the extended scope of this part of the Act it is intended to amend the heading to read "Exceptions to Matters and General Restrictions".

Changes to the Order following pre-legislative scrutiny

7.6 The provisions of this order were originally part of another order which was subject to pre-legislative scrutiny by the National Assembly for Wales Legislation Committee No 3, the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee. That Order was the proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 which contained a matter relating to carers as well as these changes in relation to exceptions. The National Assembly for Wales Committee considered but did not raise any concerns in its report on that part of the proposed Order which relates to this draft Order.

7.7 The Welsh Affairs Committee noted that the changes with regard to exceptions were essentially technical and there was agreement that that they would enhance transparency and make the reading of Schedule 5 far more straightforward. It concluded:

"We accept that the revision of the list of excepted matters in Part 1 of Schedule 5 of the Government of Wales Act 2006 does not in any way broaden or change the Welsh Assembly's legislative competence. There is some doubt about whether such a change to the structure of Schedule 5 was envisaged as part of the LCO process. However, given that there is unlikely to be an opportunity for further primary legislation amending the Government of Wales Act 2006, we can see some logic in tidying up loose ends which may have emerged during the implementation process, so long as this is designed to clarify rather than alter the fundamental settlement that the 2006 Act embodies. We await with interest the findings of the Constitution Committee".

7.8 The Constitution Committee of the House of Lords concluded that the proposed Order should be split so that both legislatures were able to consider and vote separately on the different issues of adding to the

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

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

8. Consultation Outcome

There has been no consultation on this draft Order. However, a proposed Order which included this provision was subject to pre-legislative scrutiny by both a National Assembly for Wales Scrutiny Committee and the Welsh Affairs Committee, as described above, who each invited submissions of evidence as part of their inquiries.

9. Guidance

No guidance has been, or will be, issued in relation to this Order. This Explanatory Memorandum explains the scope and policy context of the Order.

10. Impact

A Regulatory Impact Assessment has not been prepared for this instrument as it only changes the way exceptions apply to the legislative competence of the National Assembly for Wales, and so has no impact on business, charities or voluntary bodies.

11. Regulating small business

This legislation does not apply to small business.

12. Monitoring & review

This draft Order changes the way exceptions apply to the legislative competence of the National Assembly for Wales. The monitoring or review of any Assembly Measures brought forward is primarily a matter for the Welsh Assembly Government and/or the National Assembly for Wales.

13. Contact

Queries about the content of the instrument or this memorandum should be addressed to Geth Williams (Tel:020 7270 0554 or email geth.williams@walesoffice.gsi.gov.uk)

Sue Olley (Tel: 029 2089 8484 or email susan.olley@walesoffice.gsi.gov.uk) can answer legal queries about the instrument.