

**MEMORANDUM FROM THE MINISTER FOR CHILDREN, EDUCATION,  
LIFELONG LEARNING AND SKILLS  
CONSTITUTIONAL LAW: LEGISLATIVE COMPETENCE, WALES**

**The National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008** (previously entitled National Assembly for Wales (Legislative Competence) Order 2007)

**Welsh Assembly Government Draft Legislative Competence  
Order relating to Education and Training (Additional Learning  
Needs)**

**Introduction**

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.33. It sets out the background to the provisions in the attached government draft Legislative Competence Order (LCO) which would confer additional legislative competence upon the National Assembly for Wales. It is laid in accordance with SO 22.32. It explains the scope of the power requested as well as explaining what account has been taken of recommendations made by the committees which scrutinised the proposed LCO to which this draft LCO relates; and the reasons for the differences between the two.

2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy. The UK Government's White Paper "Better Governance for Wales" published in June 2005 set out the UK Government's commitment to enhance the legislative powers of the National Assembly for Wales, as a democratically elected institution with its own detailed scrutiny procedures.

3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.

4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or a Legislative Competence Order, approved by the Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, via a Legislative Competence Order.

5. The draft Legislative Competence Order would confer further legislative competence on the National Assembly for Wales, in the field of Education and Training (field 5 within Schedule 5 to the 2006 Act). The text of Schedule 5 to the Government of Wales Act 2006 as it stands at the time of laying this Explanatory Memorandum is attached.

## **Background**

6. New legislative powers in respect of the specified “matter” will enable the Assembly Government, Assembly Members and Assembly Committees to bring forward coherent proposals for legislation, in the form of Measures, which are based on Welsh priorities and timescales. These Measures will be subject to thorough scrutiny and approval by the Assembly.

7. Education and training has been a devolved subject area for many years and the Assembly Government has wide ranging powers across the spectrum of education and training, including in relation to schools, nursery schools, universities, further and higher education institutions and special educational needs. The Assembly Government also has a range of primary legislative powers and there are also numerous secondary legislative powers in these areas, which makes different provision in relation to education and training in Wales. The Welsh Assembly Government has used these to develop a distinctive approach tailored to the particular circumstances of Wales

8. The Welsh Assembly Government set out in, *The Learning Country - Vision into Action*, the intention to ‘promote inclusion in education and learning’ and to introduce ‘an action plan in response to the recommendations of the Education, Lifelong Learning and Skills Committee Review of Special Educational Needs’.

9. The National Assembly’s former Education and Lifelong Learning and Skill’s Committee review of Special Educational Needs (SEN) provision in Wales concluded in March 2007 and examined many of the fundamental elements of the existing system, especially early identification and intervention, statutory assessment and statementing, and transition.

10. The legislative competence sought through this Legislative Competence Order will enable implementation of key components by Assembly Measure of the Welsh Assembly Government’s Special Educational Needs/Additional Learning Needs policy in Wales, including matters dealt with in the former Education, Lifelong Learning and Skills Committee review. The competence will also enable the Welsh Assembly Government to bring forward measures for special educational provision, children, young people and adults with additional learning needs. The principle of different educational provision for such individuals is already well established in law and practice in Wales.

11. In the wider context, meeting a diverse range of special educational needs requires close collaborative work not only interdepartmentally but also with a range of statutory and voluntary organisations within Wales. This collaborative approach to working is evidenced throughout our policies in relation to SEN with the use of collaborative working with stakeholders to develop policy.

12. Equality of Opportunity underpins all aspects of this work to ensure all children and young people have equal access to education, can reach their

full potential and barriers to learning are removed. In response to the Equality of Opportunity Committee's Report earlier this year, the Welsh Assembly Government emphasised the policy direction and assurance of the commitment to policy and service delivery being firmly focussed on the needs of the individual.

13. The legislative competence sought would support the above and also comply with other policy initiatives that impact upon ways of working with pupils with additional learning needs and to which the Assembly Government would wish to ensure collaborative working.

14. The proposal for these powers is also made in the context of the limitations to the current settlement which restricts the Welsh Assembly Government from tackling Welsh priorities and issues.

15. The main issues which have been identified are:

- a) there is no power to alter the statutory threshold which activates a Local Education Authority's formal SEN duties;
- b) case law has established that the Welsh Ministers' Code of Practice in relation to SEN has relatively weak legal force because LEAs must merely "have regard" to it. This means that, provided an authority gives an intelligible good reason for departing from the Code, it may do so. Social services guidance issued under s.7 of the Local Authority Social Services Act 1970, for example, is much stronger in that case law has established that authorities are expected to comply with it;
- c) the formal system of statementing is highly prescriptive. Whilst there are Assembly powers to make regulations about the operation of this process, these do not permit it to make fundamental changes to the structure of the statementing process;
- d) there is no power to alter the range of individuals with rights to appeal to the SEN Tribunal for Wales. Accordingly, at present it cannot provide a right of appeal for children (as opposed to parents and/or carers) even if a child has the necessary capacity to bring an appeal. In relation to children, this contrasts with, for example, the Children Act 1989 which, in a number of instances, gives children the right to make applications to the courts;
- e) the current system does not allow for local dispute resolution mechanisms to be concluded before proceeding to appeals to the Tribunal;
- f) there is no statutory requirement for LEAs to provide advocacy services for children with SEN. This is in marked contrast to the position in relation to social services for children in respect of whom the Children Act 1989 places an express duty upon authorities to make advocacy arrangements. The current powers do not permit similar provision to be made as regards SEN;
- g) there is little scope for the Assembly by regulations to confer additional specific duties upon LEAs or anyone else in relation to SEN.

16. In this way, the current executive powers of the Welsh Ministers are not sufficient to allow the Welsh Assembly Government to tackle these issues.

## **Scope**

17. Independent reports over recent years and current work commissioned by the Assembly Government indicate that changes are required to the existing statutory framework for special educational needs (SEN). The Education Act 1996 sets out the framework for the provision of SEN education. This places duties on schools and Local Education Authorities (LEA) and sets out prescriptive arrangements for statementing and appeals, and enables the Assembly to issue a Code of Practice on the delivery of SEN. The Welsh Ministers currently have few powers to make changes to the statutory framework set out in the 1996 Act.

18. The draft LCO will insert a new Matter (Matter 5.17) under Field 5: Education and Training in Schedule 5 to the Government of Wales Act 2006 to enable changes to be made by way of Assembly Measure, in relation to any aspect of the organisation and delivery of SEN in Wales. This legislative competence would also enable an extension of the existing definition of SEN to include additional educational needs and thereby impose obligations upon public bodies in relation to that extended category of learner and to implement any desired alteration in policy in relation to the structure of the statementing process and the provisions of the SEN Tribunal.

19. The principal purpose, therefore, of this LCO is to empower the Assembly to make Measures under Part 3 of the 2006 Act that will give effect to whichever recommendations or subsequent policy development are taken forward in due course by the Welsh Ministers. The intention is to ensure that Measures can be made across a wider range of areas connected with the provision of education for children and adults whose educational needs diverge from those upon which the mainstream education system currently is focussed. The reform of current provision about children's' special educational needs is an area of priority for the Welsh Assembly Government.

## **Reports from Assembly and Parliamentary Committees on the Proposed LCO**

20. There were two main recommendations arising from the Assembly LCO Scrutiny Committee report. The first was that the definition of disability should be amended to include the word "communication". The Welsh Assembly Government takes the view that the words "physical or mental impairment" would include a communication impairment and that to insert a specific reference to communication impairment could have the unintended consequence of casting doubt on the generality of the current formulation. The Welsh Assembly Government notes that the Welsh Affairs Committee has concluded that the current formulation is sufficient.

21. The other main recommendation related to extending the scope of Matter 5.10 to include travel provision to and from higher education institutions. The House of Commons Welsh Affairs Committee similarly recommended that Matter 5.10 be amended so as to include the provision for travel

arrangements for those in higher education. As the proposed LCO was worded, any Assembly Measure dealing with persons falling within Matter 5.17 could make provision, amongst other things, for the travel of persons who are receiving primary, secondary or further education or training by also engaging the enabling power under Matter 5.10. Such a Measure could not have made provision for the travel to and from higher education institutions.

22. Policy in respect of travel to higher education institutions in Wales is dealt with by way of the Welsh Ministers' wide ranging grant making powers provided by the Teaching and Higher Education Act 1998 and it is not envisaged that this position will change. However, the Welsh Assembly Government has accepted the Committees' recommendation to the extent that a Measure could make provision about the travel to and from higher education institutions of persons described in new matter 5.17. A new Article 2 (2) has therefore been inserted in the draft LCO which extends the scope of the Assembly's existing legislative competence in Matter 5.10 accordingly.

23. Alongside but separate to this latter recommendation, is one that has emerged from the consideration that has been given to the proposed Learner Travel Measure which has highlighted that the Assembly's legislative competence under Matter 5.10 does not extend to children under the age of two. This lacuna has been addressed by insertion of the reference to nursery education in Article 2 (2).

24. The Welsh Affairs Committee also recommended that the proposed Legislative Competence Order be amended to refer to the World Health Organisation's definition of disability from time to time, by including a power for the Welsh Ministers to substitute some other definition by statutory instrument should circumstances make that desirable.

25. The Welsh Assembly Government has given careful consideration to this recommendation. It has concluded that it would not be appropriate for the Assembly's legislative competence to be determined by reference to a definition that neither the UK Parliament nor the Assembly itself has any control over. The draft LCO does not now refer to persons who have a disability and so the need for a definition of "disability" has been removed.

26. However the Welsh Assembly Government did identify a different problem with the definition of "disability" in the proposed LCO. The problem was that it covered those with progressive health conditions but only if those persons also suffered an identifiable impairment. This definition would not have covered persons in the early stages of a progressive health condition where their physical and mental characteristics or abilities were not affected. That would not have been consistent with the definition in the Disability Discrimination Act 1995 ("DDA 1995"). The DDA 1995 now provides that persons with cancer, HIV infection and multiple sclerosis are disabled for the purposes of that Act. These three conditions were inserted by amendment in the DDA 2005 because, whilst it was possible for people with these conditions to be diagnosed without any adverse effects or symptoms, they might be discriminated against immediately. Therefore the proposed LCO needed

amendment so as to capture all the disability discrimination jurisdiction of the SEN Tribunal for Wales. New paragraph (b)(ii) in new matter 5.17 addresses the issue. However, paragraph (b)(ii) goes wider than merely mirroring the provisions in the DDA 1995 because it will give the Assembly legislative competence to make provision about those who have been diagnosed with a progressive health condition even though there is no impairment and that competence is not limited to only those who have cancer, HIV or multiple sclerosis.

27. The House of Lords Constitution Committee published a report on the scrutiny of Legislative Competence Orders on 4 December 2007 but has not drawn particular attention to any aspects of the proposed LCO to which this draft LCO relates.

### **Persons with a past disability**

28. The proposed LCO excluded persons who no longer have a disability. This was not consistent with the definition of disability in the Disability Discrimination Act 1995 which applies not only to persons who have a disability but also to persons who have had a disability. The draft LCO now encompasses persons who have had a physical or mental impairment and persons who have had a progressive health condition. The amendment will ensure that such persons are captured by the jurisdiction of the SEN Tribunal for Wales and enable the Assembly to make provision by Assembly Measure, to extend the scope of the SEN Tribunal for Wales to consider claims of disability discrimination in admission or exclusion decisions under Chapter 1 of Part 4 of the DDA, from persons with past disabilities.

### **Constitutional Issues**

29. The House of Lords Constitution Committee concluded on 23 October 2007 that no matters of constitutional principle arise from the proposed order.

### **Geographical limits of any Assembly Measure**

30. Section 93 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly's legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

31. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales.

## **Minister of the Crown functions**

32. This draft Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 of the Act, the Assembly may not by measure alter the functions of the Minister of the Crown without the consent of the Secretary of State for Wales. In relation to any future proposals that may impact on Minister of the Crown functions the appropriate UK Government Departments will be consulted and agreement sought to any future proposals to change or modify those functions.

33. In respect of the SEN Tribunal for Wales there are a number of Minister of Crown functions, which are the responsibility of the Secretary of State, the Lord Chancellor and to a minor extent the HM Treasury. In relation to the SEN jurisdiction of the tribunal, these functions relate to the appointment and removal of members and the President of the Tribunal, and the number of individual tribunals that may exercise the jurisdiction of the Tribunal. In relation to the disability discrimination in the education field jurisdiction of the Tribunal, Minister of the Crown functions are more extensive and also encompass the procedure of the Tribunal.

34. The UK Government has confirmed that it is content with the scope of the draft legislative competence Order. .

## **Conclusion**

35. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the provisions of the government draft LCO to which this Explanatory Memorandum relates.

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