

**MEMORANDUM FROM MINISTER FOR CHILDREN, EDUCATION,
LIFELONG LEARNING AND SKILLS**

CONSTITUTIONAL LAW: DEVOLUTION, WALES

**The National Assembly for Wales (Legislative Competence) (Education)
Order 2010**

**Proposal for a Legislative Competence Order relating to the
conduct and governance of schools.**

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached government proposed Legislative Competence Order (LCO) which would confer additional legislative competence upon the National Assembly for Wales (the Assembly). It is laid in accordance with SO 22.13 and explains the scope of the power requested.
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 Assembly, 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 Assembly 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 LCO, 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 LCO.
5. The proposed LCO would confer further legislative competence on the Assembly, in the field of Education and Training (Field 5 within Schedule 5 to the 2006 Act) [Attached at Annex A is a copy of Schedule 5 showing the

legislative competence that the Assembly has acquired to date and the mechanism by which it was conferred].

Background

6. New legislative powers in respect of the specified “matters” will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward 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 in Wales is a long devolved policy area. In Wales, prior to the creation of the Assembly in 1999, the extensive education executive powers for education in Wales, were exercised by the Secretary of State for Wales. Education is also one of the Fields listed in the Government of Wales Act 1998 within which functions were transferred from the Secretary of State for Wales to the Assembly at its inception. The constitutional changes made by the 2006 Act then vested those executive powers in the Welsh Ministers and in addition extensive legislative competence for education and training has already been added to Field 5.¹ School governance is however one of the parts of education law for which the Assembly does not have competence.
8. The statutory basis for school governance has existed in much the same form since the introduction of the Locally Managed School Model brought into being for Wales and England by the Education Reform Act 1988. Other than Pupil Referral Units, every maintained school has to have a governing body. The governing body sets the strategic direction of the school and monitors and evaluates progress. The governing body receives an individual school budget and is responsible for allocating resources in a way that it deems fit to support the strategic direction and to discharge its functions (that is its powers and duties) effectively.
9. In addition to the constitutional context, the policy context for the Assembly Government’s request for the conferral of legislative competence on the Assembly has several elements.
10. Foremost, the Assembly Government wishes to raise standards of attainment in all schools. In pursuit of this the Assembly Government has piloted a Schools Effectiveness Framework to stimulate, promote and

¹ <http://www.assemblywales.org/bus-home/bus-legislation.htm>

facilitate more and better collaboration. As it expands and develops the framework will need to take increasing account of school governing bodies because governance provides the accountability mechanism within which schools operate, the means by which outcomes are monitored and evaluated; the means by which resource allocation decided, and the responsibility for taking action to improve outcomes.

11. Secondly, the Assembly Government is committed to 14-19 Learning Pathways which is a Wales wide initiative in which all learners aged 14-19 will take part. The intention is to provide parity between vocational and academic learning. The success of 14-19 Learning Pathways very much depends on schools, further education institutions (FEIs) and other learning providers working together, sometimes with learners attending several establishments.
12. The Assembly Government encourages local authorities and further education institutions to consider how provision is planned and organised so that it is effective in terms of what is offered and more efficient in how it is delivered. The number of school pupils in Wales continues to decline with a commensurate rise in surplus capacity. The Assembly Government is challenging local authorities to consider how schools are organised and how they, and others, can work together to create an effective network of providers. The Assembly Government is supporting these changes with capital investment under the 21st Century Programme, the aim being to have schools of the right standard in the right places.
13. The Webb Review of the Mission and Purpose of Further Education in Wales (Promise and Performance: December 2007) has emphasised the need for collaboration to be the basis for the delivery of post-14 learning in Wales. The review underlined the importance of providers working collaboratively and it highlighted the value of utilising the potential for new governance arrangements between schools and FEIs (for which the Assembly has competence under Matter 5.13 of Field 5, Schedule 5 of the 2006 Act). This LCO for school governance would complement Matter 5.13. The Assembly Government's Skills that Work for Wales Strategy has also identified the need to transform the way the post-11 provider network operates and collaborates so as to improve effectiveness and efficiency. It pointed to the need to reshape the learning network to enable and empower providers to work in partnership in order to deliver learning provision tailored for the learner. In line with this theme of needing more and better collaboration, the Deputy Minister for Skills made a written statement to the Assembly on 30 April 2009 stating the Assembly Government's intention to reform governance arrangements for further education institutions. The

Minister is establishing a review group to advise him about options for reform.

14. A further theme that has emerged since the creation of the Locally Managed School Model is the growing emphasis placed on children and young people having a voice in their schools. The Assembly Government intends that the United Nations' Convention on the Rights of the Child will continue to underpin its policies. Article 12 of the UNCRC states that a child capable of forming his or her own views has the right to express those views freely in matters affecting the child. Children and young people have an interest in how schools are governed and they need an effective voice. Every school in Wales must by law have a School Council comprising pupils of all ages. In secondary schools, the School Council may nominate pupils from years 11, 12 or 13 to be associate pupil governors who may attend governing body meetings and play a part in policy formulation and decision making.
15. The Assembly Government has commissioned studies of school governance in recent years². These have considered the quality and capability of whole school governing bodies and governor training. The evidence is that the effectiveness of governing bodies varies and the training available to governors is uneven, with weaknesses in consistency of approach, availability and take-up by governors.
16. In July 2009 the Assembly's Enterprise and Learning Committee published its report 'The Role of School Governors'. The report identified some of the issues described above about training and the effectiveness of governing bodies. Taking the Committee report and other evidence together, the Assembly Government wishes to have the means to address these issues.
17. This proposed LCO will provide the Assembly with competence in relation to school governance. The Assembly now has competence for much of the education law. School governance underpins and relates to how schools work and what they do. It is thus a core part of the law for education. Gaining competence for school governance and the other topics dealt with

² *School Governance and Improvement in Wales – Universities of Birmingham and Glamorgan, 2004.*

The Annual Report of Her Majesty's Chief Inspector of Education and Training in Wales 2007-08. Local Authority Training Provision for School Governors in Wales – All Wales Centre for Governor Training and Research. 2008.

Training Provision for Governing Body Chairs - All Wales Centre for Governor Training and Research. 2007.

The Quality of Training and Support Provided by LEAs to School Governors – Estyn, 2003.

The Training of School Governors in Wales – Education Dept, University of Swansea. 2000.

in this draft Order would therefore allow the Assembly to consider legislation including the potential consolidation of education law for Wales.

Current Legislative Framework

18. Current law for the government of maintained schools, mainly set out in Part III, Chapter 1 of the Education Act 2002 (EA 2002), requires every maintained school in Wales to have its own governing body which is responsible for the local management of that school. This places governing bodies in a central and critical position for the successful and efficient delivery of education in a maintained school setting. This also includes the requirement for local authorities to provide information and training for governors as they see fit to enable them to discharge their functions. Such information and training is free of charge to governors.
19. Current primary legislation in respect of governing bodies deals with topics which include the following:
 - the constitution, functions and membership of governing bodies (principally sections 19, 20, 23 and 34 of EA 2002);
 - the means by which governing bodies may collaborate or federate, including collaboration with Further Education Institutions (“FEI”) (sections 24-26 EA 2002 and section 166 of the Education and Inspections Act 2006 (“E&I Act 2006”));
 - the governing body’s responsibility for the conduct of the school and to promote high standards (sections 21 and 29B EA 2002 and section 38 of the E&I Act 2006); and
 - powers to provide community facilities; to control school premises; and to determine session times; (sections 27-28; 31; 32; EA 2002 respectively).
20. Primary legislation also places requirements on governing bodies concerning their relationships with stakeholders, for example, by providing parents with an annual report, to hold a parents evening and have a process in place for dealing with complaints (sections 30; 33; and 29).
21. Complementing and supporting these core responsibilities and requirements, governing bodies also have functions in relation to innovation in schools (section 1 of the EA 2002, with sections 2-5 setting out administrative arrangements); the formation of bodies (sections 11-13 of the EA 2002); the behaviour, discipline and welfare of pupils (section 88 of the E&I Act 2006 and section 61 SSFA 1998), including home-school agreements (section 110 SSFA 1998); consultation with pupils (Section 176 of the 2002 Act); admissions (section 43 E&I Act 2006), and further powers

in the case of voluntary aided and foundation schools, where the school is the admissions authority (Part III, Chapter 1 of the SSFA 1998 (as amended) applies); religious worship (sections 70-71 SSFA 1998, as amended by section 55 E&I Act 2006); and charging (section 457 of the EA Act 1996). Voluntary and foundation school governing bodies may propose prescribed alterations to the school, closure of the school, or change of category (sections 28, 29, 30, 35 SSFA 1998).

22. Local Authorities and the Assembly Government have powers of intervention in schools causing concern (Part I, Chapter IV of the SSFA 1998 as amended by Part 4 of the EA 2002 and the E&I Act 2006). These powers provide a means for Local Authorities and the Assembly Government to take action in schools that are failing and/or are badly managed or cause concern. The powers include the appointment of interim executive boards of appointed governors to temporarily govern schools that fall in these categories. Welsh Ministers also have powers to direct governing bodies under sections 496 and 497 of the EA 1996 (as amended), should they consider a body is acting unreasonably or is failing to discharge its duties (except in the case of a voluntary school where a Local Authority arrangement under section 409 EA 1996 applies), and to resolve disputes between governing bodies under section 495 of the EA 1996.
23. Section 22 of the EA 2002 covers the requirement of LEAs to provide free information and training to school governors.

Scope

24. It is proposed that three Matters be inserted into Field 5 (education and training) in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to legislate on the issues described in the Matters by way of Assembly Measures.
25. Article 2 of the proposed LCO would insert new Matters 5.2A, 5.2B and 5.2C into Field 5. The following paragraphs describe each Matter in turn.
26. Matter 5.2A would provide the Assembly with competence to legislate with respect to the conduct and governance of schools maintained by local education authorities. With respect to governance it would allow the Assembly to legislate for the constitution and membership of governing bodies, which is currently set by Part III, Chapter 1 of the EA 2002, and for the training of governors; in short the structures for decision making and the quality of that decision making. The Assembly could pass legislation in relation to the creation (or abolition) of, and the allocation of functions amongst, bodies responsible for school governance. With regards to conduct the Assembly would have the competence to legislate for how a

body should conduct a school. For clarity, substantive changes to school finance and school staffing are not within the competence which would be created by this LCO. If new governance arrangements were created under the LCO, some linked changes to the persons or bodies with functions relating to staffing and finance would be required and so, to that extent, staffing and finance matters are within competence.

27. Matter 5.2B would provide the Assembly with competence to legislate in relation to securing collaboration between persons or bodies with functions in relation to schools maintained by a local education authority (federation of governing bodies would fall within the scope of Matter 5.2A). The Assembly already has the competence for and in connection with securing collaboration between a FEI and a school maintained by a local education authority under Matter 5.13. The current provisions relating to federation and collaboration in respect of school governing bodies are found at sections 24 - 26 of the Education Act 2002.
28. Matter 5.2C would provide competence for the Assembly to legislate in relation to the conferring of authority to establish a body, such as an educational body that can provide services to schools and FEI's and could be able to exercise functions on behalf of local education authorities. It reflects and extends (in that it allows schools to provide services to a FEI) provision in respect of governing bodies found in sections 11 and 12 of the Education Act 2002.

Geographical limits of any Assembly Measure

29. Section 94 of the 2006 Act prohibits 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.
30. 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

31. This proposed 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 2006 Act, the Assembly may not by Measure alter (remove or modify) the functions of Ministers of the Crown without the consent of the Secretary of State. 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 remove or modify those functions.

Conclusion

32. 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 proposed LCO to which this Explanatory Memorandum relates.