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## Proposed Additional Learning Needs LCO Committee

### Committee Membership

|                            |                          |                     |
|----------------------------|--------------------------|---------------------|
| Eleanor Burnham<br>(Chair) | Welsh Liberal Democrats  | North Wales         |
| Alun Cairns                | Welsh Conservative Party | South West<br>Wales |
| Jeff Cuthbert              | Labour                   | Caerphilly          |
| Carwyn Jones               | Labour                   | Bridgend            |
| Janet Ryder                | Plaid Cymru              | North Wales         |

## Summary

The conclusions and recommendations of the Proposed Additional Learning Needs LCO Committee are as follows:

1. We agree, in principle that legislative competence in the area provided for by Matter 5.17 should be conferred on the National Assembly for Wales.
2. We recommend that the Welsh Assembly Government carries out wide consultation on any proposals for Measures deriving legislative competence from Matter 5.17.
3. We are content that the scope of the proposed Order extends beyond children and young people to all 'persons', irrespective of age.
4. We are content that the term 'greater difficulty in learning than the majority of persons of the same age' in Matter 5.17(a) of the proposed Order is sufficiently broad to encompass those who, for whatever reason, have additional learning needs and consequently require additional support for learning.
5. We recommend that the Welsh Assembly Government amends the definition of disability set out in Matter 5.17(b) of the proposed Order to include the word 'communication' so that the revised definition would read as follows:

'A person has a disability for the purposes of this matter if that person has a physical, mental or **communication** impairment.'
6. We recommend that the Welsh Assembly Government take steps to ensure that the reason for excluding travel arrangements from Matter 5.17 and the relationship between Matter 5.10 and Matter 5.17 are made clear either in the proposed Order or Explanatory Memorandum.

7. We recommend that the Welsh Assembly Government extends the scope of Matter 5.10 so that it includes travel provision for persons receiving higher education, either by amending the proposed Order, or by bringing forward another Legislative Competence Order, to provide the appropriate amendment to Matter 5.10.

8. We recommend that the Welsh Assembly Government amend Article 2 (1) of the proposed Order to accurately reflect Part 1 of Schedule 5 to the Government of Wales Act 2006 so that Article 2 (1) reads as follows:

‘Field 5 (education and **training**) of Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.’

# 1. Introduction

## *Background*

1. On 12 June 2007, the Minister for Education, Culture and the Welsh Language<sup>1</sup> laid before the Assembly the proposed *National Assembly for Wales (Legislative Competence Order) 2007* ('the proposed Order') and Explanatory Memorandum, in accordance with Standing Order 22.13 and 22.14. Copies of these documents are attached at Annex 1. This was accompanied by a statement by the Minister in plenary.<sup>2</sup>
2. On 19 June 2007, the Business Committee agreed to refer the proposed Order to a committee for detailed consideration, in accordance with Standing Order 22.16.<sup>3</sup>
3. Following a resolution in plenary on 4 July, the Proposed Additional Learning Needs Legislative Competence Order Committee ('the Committee') was established, in accordance with Standing Order 21, to consider the proposed Order.<sup>4</sup>

## *Scope of the Committee's scrutiny*

4. At our meeting on 12 July we agreed the scope of our work, as set out below:
  - (i) to consider the general principles of the proposed Order, i.e. that legislative competence as specified in Matter 5.17 be conferred on the Assembly; and

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<sup>1</sup> On 19 July 2007 the Minister's title changed to the Minister for Children, Education, Lifelong Learning and Skills

<sup>2</sup> RoP p59-84, 12 June 2007.,see also Welsh Assembly Government, Carwyn Jones, Minister for Education, Culture and the Welsh Language, *Additional Learning Needs – Legislative Competence Order*, Cabinet Written Statement

<sup>3</sup> National Assembly for Wales, Business Committee, BC(3)-02-07, Committee Minutes, 19 June 2007

<sup>4</sup> RoP, p23-24. 4 July 2007

(ii) to consider whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on Additional Learning Needs, and in particular, whether the terms of the proposed Order are too broadly or too narrowly defined.

### *Evidence*

5. We issued a general call for evidence and invited key organisations from within the fields of education and training to submit written evidence to inform our work. A copy of the consultation letter is attached at **Annex 2**. A list of written submissions is attached at **Annex 3**.

6. We took oral evidence from a number of witnesses, details of which are attached at **Annex 4**. Supplementary written evidence received from the Minister for Children, Education, Lifelong Learning and Skills is attached at **Annex 5**.

7. The following report and recommendations represent the conclusions we have reached based on the evidence received during the course of our work.

## 2. Principle of the proposed Order

### *Background*

8. The proposed Order seeks to confer further legislative competence on the Assembly in Field 5 (education and training) of Part 1 of Schedule 5 to the *Government of Wales Act 2006*.<sup>5</sup> Article 2(1) of the proposed Order seeks to insert a new Matter, Matter 5.17, relating to additional learning needs.

9. The Explanatory Memorandum accompanying the proposed Order suggests that conferral of legislative competence as specified in Matter 5.17 would enable the Welsh Assembly Government ('the Assembly Government') to meet the commitments set out in its strategic document on education and training, *The Learning Country - Vision into Action*<sup>6</sup>:

"...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.'<sup>7</sup>

10. The Explanatory Memorandum also states that the legislative competence sought would enable the Government to implement key components of its policy agenda on special educational and additional learning needs. This was reaffirmed by the Minister for Children, Education, Lifelong Learning and Skills (the Minister) when giving evidence to the Committee.<sup>8</sup>

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<sup>5</sup> The *Government of Wales Act 2006*, c.32, Schedule 5

<sup>6</sup> Welsh Assembly Government, *The Learning Country – Vision into Action*, October 2006

<sup>7</sup> Welsh Assembly Government, *Memorandum from the Minister for Education, Culture and Welsh Language, Constitutional Law: Legislative Competence, Wales, Proposal for a Government Legislative Competence Order relating to Education and Training (Additional Learning Needs)*

<sup>8</sup> RoP p5-6, 20 September 2007, Proposed Additional Learning Needs LCO Committee; and RoP p4-5, 18 October 2007, Proposed Additional Learning Needs LCO Committee

### *Evidence from the Minister*

11. The Minister explained the limitations on the Welsh Assembly Government's current legislative powers in the area of special educational and additional learning needs and stated:

"...our current legislation does not allow us to tackle the emerging substantial issues around additional learning needs."<sup>9</sup>

12. She identified some of the issues that the Welsh Assembly Government may seek to address if legislative competence in respect of Matter 5.17 was conferred on the Assembly, namely:

- strengthening the status of the Special Educational Needs Code of Practice;
- reform of the Special Educational Needs Statutory Assessment Framework; and
- altering the range of individuals with the right to appeal to the Special Educational Needs Tribunal for Wales.<sup>10</sup>

### *Evidence from organisations*

13. There was widespread support among those giving evidence for the principle of the proposed Order. In welcoming the Assembly Government's decision to bring forward the proposed Order, Estyn stated that the proposals provided:

"...a timely opportunity to harmonise existing legislation and guidance in order to overcome key weaknesses of the statutory framework for special educational needs.

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<sup>9</sup> RoP p5, 20 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>10</sup> RoP p5-6, 20 September 2007, Proposed Additional Learning Needs LCO Committee



In particular, the proposed order has the potential to help to improve:

- equality of access to services for learners of all ages and with diverse types of additional learning needs and disabilities;
- the quality of provision in all sectors of education and training;
- partnership working across agencies; and
- the accountability of all providers for the quality of provision and value for money.”<sup>11</sup>

14. Some of those giving evidence emphasised the need for wide consultation on future Measures deriving legislative competence from Matter 5.17.<sup>12</sup>

### *Conclusion*

15. We note the broad support that exists for the proposed Order and, in particular, that no organisation has opposed, in principle, the conferral of legislative competence in relation to additional learning needs. We acknowledge the reasons put forward by the Minister for seeking legislative competence.<sup>13</sup> **We agree, in principle that legislative competence in the area provided for by Matter 5.17 should be conferred on Assembly.** We believe it will provide an opportunity for the Assembly to bring forward Measures aimed at improving the current statutory framework for Special Educational Needs and the learning experience of those with additional learning needs and disabilities.

16. While agreeing in principle that legislative competence should be conferred, in considering whether the proposed Order is too narrowly or broadly drawn and, having considered the evidence, we believe that further consideration is required in respect of the drafting of Matter 5.17(b) and the

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<sup>11</sup> Estyn, written evidence, ALN8

<sup>12</sup> Association of Directors of Education in Wales, written evidence, ALN4; Rights NOT, written evidence, ALN10; and Welsh Local Government Association, written evidence, ALN13

<sup>13</sup> Annex 6, National Assembly for Wales Proposed Additional Learning Needs LCO Committee (ALN(3)-08-07(mins)) 22 November 2007

exclusion of travel arrangements from Matter 5.17. These issues are explored in subsequent sections of the report.

17. In bringing forward any proposals for Measures deriving legislative competence from Matter 5.17 it will be important to consult widely with stakeholders and others who might be affected by changes to the current system.

18. We recommend that the Welsh Assembly Government carries out wide consultation on any proposals for Measures deriving legislative competence from Matter 5.17.

### 3. Scrutiny of the proposed Order

19. Many of those giving evidence raised concern that the terms of the proposed Order were unclear and insufficiently broad. The following section explores the key issues that emerged during our consideration of the proposed Order.

#### Persons

##### *Background*

20. The proposed Order extends beyond children and young people to 'persons'. Indeed, the Explanatory Memorandum makes it clear that the legislative competence being sought would allow the Assembly to make Measures in relation to additional learning needs not only for children and young people, but for adults.<sup>14</sup> This would be a departure from the current statutory framework for Special Educational Needs (SEN) which relates specifically to children and young people, i.e. those who have not attained the age of 19, as defined by the *Education Act 1996*.<sup>15</sup>

##### *Evidence from organisations*

21. There was broad support in the evidence received for the proposed Order to cover of all 'persons' which would, according to Estyn:

“...provide a framework for improving the learning outcomes and quality of provision and support for all learners with additional needs and disabilities, irrespective of age.”<sup>16</sup>

22. In Estyn's view, the proposed Order would provide an opportunity to tackle age-related inequalities which exist within the current special

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<sup>14</sup> Explanatory Memorandum, para 10

<sup>15</sup> The *Education Act 1996* (c.56)

<sup>16</sup> Estyn, written evidence, ALN8

educational needs framework, and would facilitate improvements in transition arrangements;<sup>17</sup> an area explored in Part 3 of the Education, Lifelong Learning and Skills Committee report on its policy review of Special Educational Needs.<sup>18</sup>

### *Conclusion*

23. In view of the evidence received, we are content that the scope of the proposed Order extends beyond children and young people to all 'persons', irrespective of age.

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<sup>17</sup> Estyn, written evidence, ALN8

<sup>18</sup> Education, Lifelong Learning and Skills Committee, *Policy Review of Additional Educational Needs, Part 3: Transition*, March 2007

Greater difficulty in learning than the majority of persons of the same age

### *Background*

24. Matter 5.17(a) of the proposed Order provides for persons who have a 'greater difficulty in learning than the majority of persons of the same age'.

### *Evidence from organisations*

25. There were varying levels of support in the evidence received for this term. In their evidence, both the Disability Rights Commission (DRC)<sup>19</sup> and Estyn<sup>20</sup> indicated they were content with the term, which was an improvement on the current definition of Special Educational Needs as defined in the *Education Act 1996*.<sup>21</sup> A child has 'special educational needs' for the purposes of the *Education Act 1996* if he or she has a learning difficulty which calls for special educational provision to be made for him or her. A child has a 'learning difficulty' for the purposes of the 1996 Act if -

"he or she has significantly greater difficulty in learning than the majority of children of his or her age;

he or she has a disability which either prevents or hinders him or her from making use of educational facilities of a kind generally provided for children of his or her age in schools within the area of the local education authority."<sup>22</sup>

26. Others giving evidence argued that the term 'greater difficulty in learning than the majority of persons of the same age' did not differ substantially from the definition in existing legislation<sup>23</sup> and that it was

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<sup>19</sup> RoP p19, 20 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>20</sup> RoP p8, 4 October 2007, Proposed Additional Learning Needs LCO Committee

<sup>21</sup> The *Education Act 1996* (c. 56)

<sup>22</sup> The *Education Act 1996* (c.56) , Section 312

<sup>23</sup> Children's Commissioner for Wales, written evidence, ALN5; and Rights NOT, written evidence, ALN10

imprecise and open to interpretation<sup>24</sup>. In its evidence, Rights NOT stated the term:

“...seems very similar to that in current law, both embodying the concepts of ‘greater difficulty’ and ‘majority of’. Parents are not clear what is meant by either concept nor about who will make decisions...

Questions asked (by parents) included:

‘Greater difficulty in learning’ what? How much difficulty is ‘greater’?

What is ‘the majority’? Is it 51%? If so, is it the top or middle 51%?”<sup>25</sup>

27. It was suggested that further consideration should be given to the meaning of the ‘majority of persons’ and how it would be determined.<sup>26</sup>

28. The Children’s Commissioner for Wales felt that the term was not drawn widely enough and would only cover those with an identified difficulty in learning.<sup>27</sup> The Children’s Commissioner for Wales pointed out that children and young people may require additional support for a variety of reasons. It went on to suggest that the proposed Order be extended to include ‘persons who have additional learning needs as a consequence of other causes (e.g. looked after children; bullying; young carers)’, or, as in the *Education (Additional Support for Learning)(Scotland) Act 2004*, to those ‘who, for whatever reason, require(s) additional support for learning’. The definition used in the 2004 Act is as follows:

“A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided’ and

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<sup>24</sup> Rights NOT, written evidence, ALN10; and RoP p14, 20 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>25</sup> Rights NOT, written evidence, ALN10

<sup>26</sup> Rights NOT, written evidence, ALN10; RoP p14, 20 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>27</sup> Children’s Commissioner for Wales, written evidence, ALN5 and RoP p7-9, 13, 27 September 2007, Proposed Additional Learning Needs LCO Committee

'the reference to school education includes, in particular, such education directed to the development of personality, talents and mental and physical abilities of the child or young person to their fullest potential.'<sup>28</sup>

29. The definition in Scottish legislation was also favoured by Rights NOT who felt it was more enabling than that in the proposed Order.<sup>29</sup>

30. In giving evidence to the Committee, Estyn did not support extending the scope of the proposed Order, as suggested by the Children's Commissioner for Wales and stated:

"We in Estyn have considered very carefully the distinction between 'additional learning needs' and 'social inclusion'... We have concluded that, if you take the vulnerable groups that the children's commissioner's office draws attention to, such as looked-after children, you will find that they are more at risk of having additional learning needs, but not every one of them will have them. So, under the heading of 'additional learning needs', the definition of 'greater difficulty in learning' will automatically pick up anyone who is a member of any other vulnerable group, who has a learning difficulty. However, you cannot assume that every looked-after child, every child from a travelling family, or every member of an ethnic minority group has additional learning needs; that is not the case."<sup>30</sup>

#### *Evidence from the Minister*

31. In explaining the rationale behind the term 'greater difficulty in learning than the majority of persons of the same age', the Minister suggested it would enable an extension of the existing definition of special educational needs and stated:

"...the proposed LCO has been drafted broadly to give the Assembly the flexibility to make Measures that benefit persons who have additional learning needs that do not amount to special educational needs under the education Act 1996, or to significant learning difficulty as laid out in the Learning and Skills Act 2000."<sup>31</sup>

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<sup>28</sup> The Education (Additional Support for Learning)(Scotland) Act 2004 (ASP 4)

<sup>29</sup> Rights NOT, written evidence, ALN10

<sup>30</sup> RoP, p10, 4 October 2007, Proposed Additional Learning Needs LCO Committee

<sup>31</sup> RoP p7, 18 October 2007, Proposed Additional Learning Needs LCO Committee

32. The Minister went on to suggest that the term in the proposed Order was comparable to that of the definition in the *Education (Additional Support for Learning)(Scotland) Act 2004*. She stated:

“...the Scottish model does not, in reality, go any further than our proposed legislative competence Order, because any person who comes under the definition of having a greater difficulty in learning than the majority of those their age would invariably require additional support.”<sup>32</sup>

33. She asserted that Matter 5.17(a) had been drafted in the broadest possible terms and could enable the Assembly, by Measure, to make provision for persons whose difficulty in learning was as a consequence of social circumstance e.g. looked after-children and young carers, or emotional difficulties.<sup>33</sup>

### *Conclusion*

34. Having considered the concerns raised by those giving evidence and taking into account assurances received from the Minister, we are content that the term ‘greater difficulty in learning than the majority of persons the same age’ in Matter 5.17(a) is sufficiently broadly drawn to encompass those who, for whatever reason, have additional learning needs and consequently require additional support for learning.

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<sup>32</sup> RoP p8, 18 October 2007, Proposed Additional Learning Needs LCO Committee

<sup>33</sup> RoP p8-9, 18 October 2007, Proposed Additional Learning Needs LCO Committee



## Definition of disability

### *Background*

35. Matter 5.17(b) of the proposed Order provides for 'persons who have a disability'. It defines disability as 'a physical or mental impairment'. In general terms, the effect of a definition within a Matter would be to set a limit on the future power of the Assembly to legislate. As currently drafted the proposed Order would constrain the application of provision made in future Measures deriving legislative competence from Matter 5.17 to disabled persons with either a 'physical or mental impairment'.

### *Evidence from organisations*

36. Serious concern was raised in much of the evidence received about the definition of disability in the proposed Order. It was perceived by many of those giving evidence to be insufficiently broad so as to capture the full range of disabilities. It was felt that the definition could, albeit inadvertently, exclude some groups of disabled people. A number of alternative suggestions for a definition were put forward, all of which sought to further define the term.

37. In their evidence both the DRC and Citizens Advice Bureau believed that the definition of disability used in the proposed Order was overly simplistic and open to misinterpretation.<sup>34</sup> It was suggested that the definition could be subject to dispute and result in extensive case-law.<sup>35</sup>

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<sup>34</sup> Citizens Advice Bureau, written evidence, ALN6; Disability Rights Commission, written evidence, ALN7

<sup>35</sup> Citizens Advice Bureau, written evidence, ALN6; Disability Rights Commission, written evidence, ALN7 and RoP p16, 20 September 2007, Proposed Additional Learning Needs LCO Committee

38. The DRC questioned whether the definition in the proposed Order was as broad as that in the *Disability Discrimination Act 1995* (DDA) and pointed out:

“...the definition in the Disability Discrimination Act applies not only to people who have a disability, but also to people who have had a disability... a person may have recovered from an episode of mental ill health but still needs some form of support or provision on standby in school. People who have recovered from conditions such as leukaemia and other forms of cancer may still face discrimination in schools.”<sup>36</sup>

39. The DRC went on to suggest that the definition should be amended to reflect that used in the DDA and stated:

“This will make it clear that pupils with conditions which have a long term and a severe adverse impact on the ability to undertake daily activities are covered, and that those with progressive conditions are covered from the point of diagnosis without having to demonstrate severity of the condition of necessity. So for example, a child diagnosed with leukaemia or diabetes can be covered and arrangements planned for them at the point of diagnosis.”<sup>37</sup>

40. The All Wales Speech and Language Therapy Managers’ (AWSLTM) Committee raised concern that the definition used in the proposed Order would not cover the full range of communication disabilities. The AWSLTM Committee outlined the difficulties faced by those with Communication Support Needs (CSN). It emphasised the importance of early intervention for children with CSN as well as the need for timely and appropriate educational provision and support.

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<sup>36</sup> RoP p16-17, 20 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>37</sup> Disability Rights Commission, written evidence, ALN7

41. The AWSLTM Committee proposed that 'communication' should be added to the definition of disability to make clear that the proposed Order extended to persons with CSN.<sup>38</sup> This view was shared by RNID Cymru who stated:

"... a communication disability is a separate category to either "physical or mental impairment;... the LCO should be amended to reflect this.

This LCO is an opportunity to redress the balance. It is time to give recognition and an equal voice to everyone who needs help with communication"<sup>39</sup>.

42. The RNIB Cymru raised concern that those with sensory loss would fall outside the scope of the proposed Order. It suggested that the definition of disability should be amended so that 'sensory loss' was explicitly included.<sup>40</sup>

43. On commenting on the definition of disability in the proposed Order Estyn suggested that it was "not quite broad enough".<sup>41</sup> It highlighted the need for consistency in defining terms and suggested a more appropriate alternative was that used by the Equality of Opportunity Committee in its report on service provision for disabled people:

"A disabled person is one who has a physical or mental impairment or long-term health condition that has an impact on their day to day lives."<sup>42</sup>

### *Evidence from the Minister*

44. In her evidence, the Minister advised the Committee that the proposed Order had been broadly drafted to encompass all persons with a disability.<sup>43</sup>

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<sup>38</sup> AWSLTM Committee, written evidence and RoP p4, 6-7, 11, 18, 27 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>39</sup> RNID Cymru, written evidence, ALN14

<sup>40</sup> RNIB Cymru, written evidence, ALN11

<sup>41</sup> Estyn, written evidence, ALN8

<sup>42</sup> National Assembly for Wales, Equality of Opportunity Committee, *Service Provision for Disabled Young People: 'Why is it that disabled young people are always left until last?'*, January 2007.

<sup>43</sup> Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 6 October 2007.

In addition, she gave the following assurance:

“...the LCO covers anyone with a mental, physical, sensory or communication impairment...”<sup>44</sup>

45. The Minister argued that any attempt to further define the definition, for example by adding a specific reference to ‘communication impairment’, could compromise the scope of the proposed Order and stated:

“Inserting “communications impairment” would cast doubt on the generality of the definition we have used – “physical or mental impairment”. For the purposes of proposed matter 5.17, communication impairment is a physical impairment and therefore no further definition is required. Inserting “communications impairment” might imply a limitation on the generality of the description currently used in the proposed LCO. An unintended consequence of doing so would be to cast doubt as to whether Measures made under this proposed LCO could make provision for other impairments, such as sensory impairment or perhaps in relation to other descriptions of physical and mental impairments that may arise in the future.”<sup>45</sup>

46. The Minister explained that the same definition of disability as provided for in the DDA had not been used in the proposed Order since the DDA definition focused on a ‘substantial and long-term adverse effect’ and a person’s ability in relation to ‘normal day to day activities’. She believed that the DDA definition would not capture all those persons who were intended to be included. The Minister argued that adopting the DDA definition could cast doubt on whether infants with a disability were captured. She stated:

“The normal day to day activities of an infant tend to be carried out, to a large extent, by or with the assistance of his or her parent or other carer regardless of whether the child has a disability. In other words, in terms of ability to carry out normal day to day activities, child developmental milestones are such that it can

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<sup>44</sup> RoP p11, 18 October 2007, Proposed Additional Learning Needs LCO Committee; and Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 23 October 2007

<sup>45</sup> Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 23 October 2007

often be difficult to see what extra help is given to a disabled as opposed to a non-disabled infant. Accordingly, it is difficult to show that any impairment of the child has a substantial and long-term adverse impact on the child's abilities to carry out normal day to day activities."<sup>46</sup>

47. The Minister asserted that, by leaving the term 'physical or mental impairment' unqualified, should it prove necessary, the courts would use the World Health Organisation's (WHO) definition of disability to assist in interpreting the term.<sup>47</sup> The WHO's definition of disability was as follows:

"...any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being."

48. The Minister advised that the WHO definition captured a wider range of individuals than the DDA. The WHO definition had not been adopted in the proposed Order since:

"...any future Measure would be constrained to that particular definition. Experience has shown us that the understanding and definition of disability is continuously evolving. Therefore we believe that flexibility is required here and it would be better to leave it undefined so that, in the future, it could operate by reference to developments in the understanding of disability."<sup>48</sup>

### *Conclusion*

49. We share concerns raised in the evidence about the definition of disability, in particular that the definition, as currently drafted, would not extend to all persons with CSN. We believe it is essential for the definition to be as wide as possible and to capture the fullest range of disabilities.

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<sup>46</sup> Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 23 October 2007

<sup>47</sup> Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 6 October 2007

<sup>48</sup> Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 6 October 2007

50. We note the views of the Minister and the intention that the proposed Order should encompass all persons with a disability. Nevertheless, we remain concerned that the definition, as currently drafted, could, albeit inadvertently, exclude those with CSN. We believe that a specific reference to communication impairment would provide greater clarity and ensure that those with CSN were covered by the proposed Order. **We recommend that the Welsh Assembly Government amends the definition of disability set out in Matter 5.17(b) of the proposed Order to include the word ‘communication’ so that the revised definition would read as follows:**

**‘A person has a disability for the purposes of this matter if that person has a physical, mental or communication impairment.’**

51. In doing so, we do not wish to compromise the scope of the proposed Order nor restrict the application of the definition.

## Exclusion of travel arrangements

### *Background*

52. The Explanatory Note to the proposed Order states:

“Express provision is made in the new matter 5.17 to exclude travel arrangements for persons receiving education or training to and from the places where they receive it. The purpose of this provision is ensure that the legislative competence of the Assembly to make provision about education related travel arrangements does not extend beyond the terms of matter 5.10 in Part 1 of Schedule 5 to the 2006 Act.”<sup>49</sup>

53. Matter 5.10 provides for:

“Provision about the travel of persons receiving primary, secondary or further education or training to and from the schools or other places where they receive it.”<sup>50</sup>

### *Evidence from organisations*

54. Concern was raised by some of those giving evidence about the exclusion of travel arrangements from the proposed Order.<sup>51</sup> This highlighted a lack of clarity about the purpose of the exclusion.

55. In evidence to the Committee, Estyn stated:

“...lack of access to transport is a major barrier to equality of access to education and training for learners with additional learning needs and disabilities. The exclusion from the Order of travel arrangements for persons receiving education or training to and from the places where they receive it has the potential to

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<sup>49</sup> Explanatory Note to *The National Assembly for Wales (Legislative Competence) Wales Order 2007*

<sup>50</sup> *The Government of Wales Act 2006*, c.32, Schedule 5, Field 5, Matter 5.10

<sup>51</sup> Disability Rights Commission, written evidence, ALN7 and RoP p17-18, 20 September 2007, Proposed Additional Learning Needs LCO Committee; Estyn, written evidence, ALN8; RNIB Cymru, written evidence, ALN11; and SNAP Cymru, written evidence, ALN12

perpetuate current inequalities, unless specifically addressed within other legislation.”<sup>52</sup>

56. Both the DRC and RNIB Cymru suggested the lack of transport provision for disabled pupils attending extra-curricular activities was a major problem, which often led to feelings of social isolation.<sup>53</sup>

### *Evidence from the Minister*

57. In evidence to the Committee, the Minister explained that the existing powers of the Assembly, set out in Matter 5.10, would allow the travel needs of learners with additional learning needs and disabilities to be addressed by future Measures.<sup>54</sup> She confirmed that Matter 5.10 was sufficiently broadly drawn to encompass travel arrangements for persons attending work-placements, work-based learning and extra-curricular activities.<sup>55</sup>

58. However, the Minister accepted that, while Matter 5.10 covered primary, secondary and further education and training it did not extend to higher education.<sup>56</sup>

59. We consider that there is a lack of clarity in the proposed Order about the exclusion of travel arrangements. Having considered the Minister’s evidence we understand the intention behind the exclusion but are concerned that it is not made clear in Matter 5.17. **We recommend that the Welsh Assembly Government take steps to ensure that the reason for excluding travel arrangements from Matter 5.17 and the relationship between Matter 5.10 and Matter 5.17 is made clear either in the proposed Order or Explanatory Memorandum.**

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<sup>52</sup> Estyn, written evidence, ALN8

<sup>53</sup> Disability Rights Commission, written evidence, ALN7 and RoP p17-18, 20 September 2007, Proposed Additional Learning Needs LCO Committee; and RNIB Cymru, written evidence

<sup>54</sup> RoP p14, 20 September 2007, Proposed Additional Learning Needs LCO Committee

<sup>55</sup> RoP p15, 18 October 2007, Proposed Additional Learning Needs LCO Committee

<sup>56</sup> RoP p14, 18 October 2007, Proposed Additional Learning Needs LCO Committee



60. Notwithstanding the above recommendation, we acknowledge that Matter 5.10 could be relied upon to provide the Assembly with legislative competence to make travel arrangements for persons with additional learning needs and disabilities undertaking primary, secondary or further education and training. We welcome the coverage of work placements, work-based learning and extra-curricular activities under Matter 5.10.

61. We are concerned that the Assembly does not have legislative competence to provide travel arrangements for persons with additional learning needs and disabilities receiving higher education. We believe that the legislative competence of the Assembly in respect of Matter 5.10 should be extended to higher education. This would enable the Assembly to make Measures under Matter 5.10 for those persons with additional learning needs and disabilities in higher education. **We recommend that the Welsh Assembly Government extends the legislative competence of the Assembly in respect of Matter 5.10 to higher education, either by amending the proposed Order, or by bringing forward another Legislative Competence Order, to provide the appropriate amendment to Matter 5.10.**

## 4. Other issues

### Field 5 (education and training)

62. Article 2 (1) of the proposed Order refers to 'Field 5 (education) of Part 1 of Schedule 5 to the Government of Wales Act 2006'. This is technically incorrect since Field 5 of the Schedule relates to 'education and training'. We recommend that the Welsh Assembly Government amend Article 2 (1) of the proposed Order to accurately reflect Part 1 of Schedule 5 to the Government of Wales Act 2006 so that Article 2 (1) reads as follows:

'Field 5 (education and training) of Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.'

### Pre-legislative scrutiny by committees of the House of Commons and House of Lords

63. In preparing its report on the proposed Order, in accordance with Standing Order 22.21, the Committee must, as far as is reasonably practicable take account of any recommendation on the proposed Order that has been made by any committee of the House of Commons or the House of Lords or any Joint Committee of both Houses of Parliament.

64. We understand that the Welsh Affairs Committee of the House of Commons is currently undertaking pre-legislative scrutiny of the proposed Order and has not yet reported.

65. We note that the Constitution Committee of the House of Lords has considered the proposed Order and concluded that it does not raise any issues of constitutional principle.

## Annex 1

*Draft Order laid before the National Assembly for Wales and Parliament under section 95(5) of the Government of Wales Act 2006, for approval by resolution of the Assembly and of each House of Parliament.*

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### STATUTORY INSTRUMENTS

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**2007 No.**

## **CONSTITUTIONAL LAW**

### **DEVOLUTION, WALES**

## **National Assembly for Wales (Legislative Competence) Order 2007**

*Made* - - - - *\*\*\**

*Laid before the National Assembly for Wales*

*Laid before Parliament* *\*\*\**

*Coming into force in accordance with Article 1*

At the Court at Buckingham Palace, the *\*\*\** day *\*\*\** of *\*\*\** 2007

Present

The Queen's Most Excellent Majesty in Council

In accordance with section 95(5) of the Government of Wales Act 2006<sup>(1)</sup> a draft of this order has been laid before the National Assembly for Wales and Parliament and approved by the Assembly and each House of Parliament.

Accordingly, Her Majesty, in pursuance of section 95(1) of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order as follows:-

#### **Citation and commencement**

**1.** This Order may be cited as the National Assembly for Wales (Legislative Competence) Order 2007 and it comes into force on the day after the day on which it is made.

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<sup>(1)</sup> (c.32).

## Annex 1

### Amendments to Schedule 5 to the Government of Wales Act 2006

2.—(1) Field 5 (education) of Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.

(2) After matter 5.16 insert—

*“Matter 5.17*

Education and training for—

- (a) persons who have a greater difficulty in learning than the majority of persons of the same age as those persons;
- (b) persons who have a disability.

A person has a disability for the purposes of this matter if that person has a physical or mental impairment.

This matter does not include travel arrangements for persons receiving education or training to and from the places where they receive it. ”

Clerk to the Privy Council

### EXPLANATORY NOTE

*(This note is not part of the Order)*

This order amends Schedule 5 to the Government of Wales Act 2006 (“the 2006 Act”). The effect of the order is to extend the legislative competence of the National Assembly of Wales to make new laws for Wales by Measure under section 93 of the 2006 Act.

Article 2 inserts a new matter 5.17 into field 5 of Part 1 of Schedule 5 to the 2006 Act. The new matter is about education and training for persons with learning difficulties and persons with disabilities. Any provision of an Assembly Measure relating to the new matter 5.17 will be within the legislative competence of the Assembly by virtue of the terms of that matter and section 94(4) of the 2006 Act.

Express provision is made in the new matter 5.17 to exclude travel arrangements for persons receiving education or training to and from the places where they receive it. The purpose of this provision is ensure that the legislative competence of the Assembly to make provision about education related travel arrangements does not extend beyond the terms of matter 5.10 in Part 1 of Schedule 5 to the 2006 Act.

**MEMORANDUM FROM THE MINISTER FOR EDUCATION, CULTURE AND  
WELSH LANGUAGE**

**CONSTITUTIONAL LAW: LEGISLATIVE COMPETENCE, WALES**

**Proposal for a Government 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) 22.14. It sets out the background to the provisions in the attached government proposed Legislative Competence Order (LCO) which would confer additional legislative competency upon the National Assembly for Wales. 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 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 proposed 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).

## Annex 1

### 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 ELLS 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

## Annex 1

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.

## Annex 1

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. It is proposed that the Matter be inserted 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.

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

20. 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.



## Annex 1

21. 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**

22. 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 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.

23. In respect of the SENTW 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.

24. Discussions will take place with the appropriate UK Government Departments regarding the future of these Minister of the Crown Functions.

### **Conclusion**

25. 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.

Carwyn Jones  
Minister for Education, Culture and the Welsh Language

June 2007

## Annex 2

Y Pwyllgor ar y Gorchymyn Arfaethedig  
Ynghylch Anghenion Dysgu Ychwanegol

Proposed Additional Learning Needs  
Legislative Competence Order Committee



Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales

Bae Caerdydd / Cardiff Bay  
Caerdydd / Cardiff CF99 1NA

25 July 2007

Dear Colleague

### Consultation - Proposed Additional Learning Needs LCO Committee - The National Assembly for Wales (Legislative Competence) Order 2007

The Proposed Additional Learning Needs LCO Committee was established on 4 July 2007 to consider and report on the proposed National Assembly for Wales (Legislative Competence) Order 2007. The Committee has agreed the scope of its scrutiny as follows:

- The general principles of the proposed Order ie, that legislative competence as specified in 'Matter 5.17' be conferred to the Assembly
- Whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on Additional Learning Needs, in particular whether the terms of the proposed Order are too broadly or too narrowly defined.

The purpose of the Committee's work is to scrutinise the drafting of the proposed Order and, as such, the Committee will avoid engaging in detailed discussions on proposed Measures which could be brought forward as a result of the conferral of legislative competence, reviewing existing policies in this area or from replicating work already undertaken by former subject committees.

Further information on the proposed Order and its accompanying Explanatory Memorandum together with a Guide to the Legislative Process can be found at <http://www.assemblywales.org/bus-home/buslegislation.htm>

The transcript of the Committee's first meeting is available at:  
<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third-assem/bus-committees-third-alm-home/bus-committees-third-alm-agendas.htm?act=dis&id=55161&ds=7/2007>

I am writing to invite you to submit evidence to the Committee.

In particular the Committee would like to receive evidence on the following:

Tel: 029 2089 8025 GTN: 1208  
Llinell Union / Direct Line: 029 2089 8025  
Ffacs / Fax: 029 2089 8021  
Minicom: 029 20823280  
E-bost / E-mail: [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk)

## Annex 2

1. Would the terms of the proposed Order allow for the implementation of the policy agenda on additional learning needs by means of Measures? If not how would the proposed Order need to be re-drafted and why?
2. Is it appropriate for the proposed Order to cover all persons? If not, how should the proposed Order be re-drafted and why?
3. Is the definition of disability in the proposed Order appropriate? If not, how should the definition be re-drafted and why?
4. Are the terms of the proposed Order drafted appropriately, too narrowly or too broadly? If necessary, how should the proposed Order be re-drafted and why?

If you wish to submit evidence please send, preferably by email or on disk, otherwise in hard copy to Ruth Hatton, Deputy Committee Clerk, Proposed Additional Learning Needs LCO Committee, National Assembly for Wales, Cardiff Bay CF99 1NA. The email address is [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk). Please entitle the email *Consultation ALN LCO*.

**Submissions should be sent to arrive by Friday 21 September 2007. All submissions will be acknowledged. It may not be possible to take into account responses received after this date.**

When putting together your submission would you please keep the following in mind:

- Your response should be as succinct as possible. Please reference your response using the title applied above.
- The National Assembly normally makes responses to public consultation available for public scrutiny and they may also be seen and discussed at Committee meetings. **If you do not want your response or name published it is important that you specify this at the end of your submission.**
- Please indicate whether you are responding on behalf of an organisation, or as an individual.
- Please indicate whether or not you would be prepared to give oral evidence to the Committee.

The Committee will consider responses to the written consultation during the autumn.

If you have any queries please contact the Clerks, Gareth Williams (tel: 029 2089 8008), Liz Wilkinson (tel: 029 2089 8025) or Ruth Hatton, the Deputy Clerk (tel 029 2089 8019).



**Eleanor Burnham AM**  
Chair

Tel: 029 2089 8025 GTN: 1208  
Llinell Union / Direct Line: 029 2089 8025  
Ffacs / Fax: 029 2089 8021  
Minicom: 029 20823280  
E-bost / E-mail: [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk)

## Annex 3

### Consultation responses

| Reference | Organisation  |
|-----------|---|
| ALN1      | All Wales Forum of Parents & Carers of People with Learning Disabilities  |
| ALN2      | All Wales People First  |
| ALN3      | All Wales Speech and Language Therapy Managers' Committee<br><br>All Wales Speech and Language Therapy Managers' Committee (supplementary submission) |
| ALN4      | Association of Directors of Education in Wales  |
| ALN5      | Children's Commissioner for Wales<br><br>Children's Commissioner for Wales (supplementary submission)   |
| ALN6      | Citizens Advice Cymru   |
| ALN7      | Disability Rights Commission<br><br>Disability Rights Commission (supplementary submission)   |
| ALN8      | Estyn   |
| ALN9      | Pembrokeshire NHS Trust   |
| ALN10     | Rights NOT  |

| Reference | Organisation                       |
|-----------|------------------------------------|
| ALN11     | RNIB Cymru                         |
| ALN12     | SNAP Cymru                         |
| ALN13     | Welsh Local Government Association |
| ALN14     | RNID Cymru                         |

Reponses to the consultation can be found at:

[www.assemblywales.org/bus-home/buslegislation/bus-legislation-lco/bus-legislation-lco-in-prog/bus-legislation-lco-2007-1/bus-legislation-lco-2007-1-writevid.htm](http://www.assemblywales.org/bus-home/buslegislation/bus-legislation-lco/bus-legislation-lco-in-prog/bus-legislation-lco-2007-1/bus-legislation-lco-2007-1-writevid.htm)

## Annex 4

### Schedule of Oral Evidence

| Date              | Witnesses  |
|-------------------|--|
| 20 September 2007 | Minister for Children, Education, Lifelong Learning and Skills<br><br>Welsh Local Government Association<br><br>Disability Rights Commission |
| 27 September 2007 | Children's Commissioner for Wales<br><br>All Wales Speech and Language Therapy Managers Committee  |
| 4 October 2007    | Estyn  |
| 18 October 2007   | Minister for Children, Education, Lifelong Learning and Skills   |

Transcripts of oral evidence sessions can be found at:

[www.assemblywales.org/bus-home/bus-committees/bus-committees-third-  
assem/bus-committees-third-ain-home.htm](http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third-<br/>assem/bus-committees-third-ain-home.htm)

Annex 5

Jane Hutt AC/AM  
Y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau  
Minister for Children, Education, Lifelong Learning and  
Skills



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

Eich cyf/Your ref  
Ein cyf/Our ref LF/CH/0015/07  
Ms Eleanor Burnham AM  
Chair of the Additional  
Learning Needs LCO  
Committee  
Pierhead Street  
National Assembly for Wales  
Cardiff Bay  
CARDIFF  
CF99 1NA

8<sup>th</sup> October 2007

Dear Eleanor,

I am writing to you following my appearance at your Committee on 20 September 2007 to enclose a self explanatory note which seeks to clarify a number of issues raised on the scope of the proposed legislative competency order (LCO). I hope it is helpful.

Best wishes,

Jane

JANE HUTT AM  
Minister for Children, Education, Lifelong Learning and Skills

## **WELSH ASSEMBLY GOVERNMENT EVIDENCE**

### **CLARIFICATION OF ISSUES RELATING TO THE SCOPE OF THE LEGISLATIVE COMPETENCY ORDER (LCO) ON ADDITIONAL LEARNING NEEDS (ALN)**

Following the Additional Learning Needs (ALN) Legislative Competency Order (LCO) committee meeting on 20 September 2007, I set out below further clarification on issues relating to the scope of the LCO.

In doing so, I believe it is important at the outset to reiterate that the draft Order that is being scrutinised by the Committee is designed to secure legislative competence for the National Assembly for Wales in the area of additional learning needs. If secured, it will allow the National Assembly for Wales to subsequently introduce Assembly Measures, which would allow primary legislation to be amended as it applies to additional learning needs in Wales.

#### **1. Does the scope of the LCO include the following persons?**

##### **1.1 An older person who has a learning disability and wishes to return to the workplace**

1.1.1 The scope of the proposed LCO is intended to cover persons in Wales of any age (so includes the older person) provided they are in receipt of Education or Training and have (i) a greater difficulty in learning than the majority of persons of the same age as those persons; and/or (ii) a disability.

1.1.2 Securing or facilitating employment is not within the scope of the proposed LCO.

##### **1.2 Persons in sheltered employment**

1.2.1 Such persons will fall within the scope of the proposed LCO provided they are in receipt of Education or Training and meet the criteria of Matter 5.17(a) and/or (b).

1.2.2 Such persons may also fall within the scope of Matter 5.8. The National Assembly for Wales ('The NAW') already has legislative competence to pass measures which fall within the scope of matter 5.8 – to provide services intended to encourage, enable or assist people to:

- (a) participate effectively in education or training;
- (b) take advantage of opportunities for employment; or
- (c) participate effectively in the life of their community.

##### **1.3. Persons with sensory impairment**

The LCO is broadly drafted to encompass all persons with a disability. For the purpose of matter 5.17 a person has a disability if that person has a physical or mental impairment. Sensory impairment is a physical disability. Such persons would therefore come within the scope of the LCO provided that they receive Education or Training.

##### **1.4. Those who are more able and talented**

1.4.1 The scope of the proposed LCO as drafted does not cover those children defined as more able and talented who currently do not fall within the SEN regime (the definition of SEN excludes gifted children).

1.4.2 However, able and talented children who currently fall under the SEN regime do come within the scope of the LCO.

##### **1.5. Those discriminated by association; - for example a person with a sensory impaired parent**



- 1.5.1 At the LCO committee on 20 September 2007, the Disability Rights Commission suggested that the wording of the proposed LCO implies that 'all people associated with education and training are covered for example, a disabled parent of a non disabled child.
- 1.5.2 'Associated' persons fall outside the scope of the proposed LCO. The LCO is intended to give the NAW legislative competence to make measures in relation to Matter 5.17 which concern direct participants of Education or Training.

## **2. Travel Provisions**

### **2.1 Whether Matter 5.10 of Part 1, Schedule 5 of GOWA 2006 or the draft Learner (Travel) Wales measure provides the Assembly with legislative competence to make provision for travel arrangements for persons with SEN or ALN.**

2.1.1 The draft Learner (Travel) Wales measure is intended to make provision to enable Local Authorities (LAs) to provide in specified circumstances, free transportation to children with statements of SEN to and from school; to place a duty on LAs to consider whether it is necessary for travel arrangements to be made for a non statemented child with learning difficulties or disability to attend school; and to enable the NAW to make regulations concerning travel arrangements for young persons aged 16-19 in receipt of education or training. Whilst this measure does not extend the travel provision to adults, the Assembly already has legislative competence under Matter 5.10 to pass measures that make provision about the travel of adults receiving primary, secondary or further education or training to and from the place where they receive it'

2.1.2 Matter 5.10 is widely drafted to enable the NAW to pass measures that make provision about the 'travel of persons receiving primary, secondary or further education or training to and from the schools or other places where they receive it'.

2.1.3. Express provision is made in Matter 5.17 to exclude travel arrangements for purely legal technical reasons.

## **RESPONSES TO FURTHER ISSUES RAISED**

**These are cross referenced to the transcript for the 20 September 2007 for ease of reference.**

### **1. Paragraph 30 - response to Jeff Cuthbert's question regarding primary legislation and the 'ability to amend the definition of special education needs and disability'**

The proposed LCO is intended to confer legislative competence on the National Assembly for Wales ('NAW') to make laws in the form of Measures in relation to Matter 5.17. An Assembly Measure may make any provision that can be made by an Act of Parliament subject to limitations set out in Part 3 of the Government of Wales Act 2006. Assembly Measures would therefore enable the NAW to create new legislation or modify existing legislation applicable to Wales subject to limitations in Part 3 of the 2006 Act. For example, the definition of special education needs in the Education Act 1996 could be extended by Measure to include 'additional learning needs' The definition of disability in the proposed LCO could similarly be amended by Measure.

### **2. Paragraph 34 – response to Janet Ryder's question regarding 'persons who have a greater difficulty in learning'**

The proposed LCO has been drafted broadly to give the NAW flexibility to make Measures that benefit persons who have additional learning needs that do not amount to SEN for the purposes of the Education Act 1996 or a 'significant learning difficulty' for the purposes of the Learning Skills Act 2000.

The definition used in section 13(5) of the Learning and Skills Act 2000 refers to persons who have a 'significantly greater difficulty in learning than the majority of persons of the same age of those persons' in order to benefit from learning difficulty provision. Two steps must be surmounted before a person is captured by this definition. First, the person must have a greater difficulty in learning than the majority. Second, that greater difficulty must be of a particular character in that it must be 'significantly' greater than the difficulties of the majority. A key purpose which the NAW may wish to legislate by Measure would be special educational provision for persons with additional learning needs. The definition under the Learning and Skills Act would not allow the Assembly flexibility to make Measures that benefit such individuals. The proposed LCO consequently omits the word 'significantly' to ensure that persons with additional learning needs are captured by Measures made under the LCO.

### **3. Paragraph 46 – response to Joyce Watson in relation to what constitutes a physical or mental impairment.**

Section 1 of the Disability Discrimination Act 1995 ("the 1995 Act") provides that a person has a disability if he has:

- (a) a physical or mental impairment and
- (b) that impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day to day activities.

Whilst the words 'physical or mental impairment' are not defined in the 1995 Act, it does state that mental impairment includes an impairment resulting from or consisting of a mental illness only if the illness is a 'clinically well-recognised illness'.

For assistance in interpreting the term 'physical or mental impairment', the courts tend to look to the World Health Organisation's definition of disability which defines disability as '*any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being*'. By omitting to refer to 'substantial and long-term adverse effect' and 'normal day to day activities' as required by the 1995 Act, the WHO definition captures a wider range of individuals. The LCO has not adopted the WHO definition because if it did and the WHO subsequently amended its definition with a view to capturing yet a wider range of individuals, the Assembly would not have legislative competence to make Measures in relation to the new category of disabled individuals.

Section 1(b) of the 1995 Act focuses on a persons' ability in relation to 'normal day to day activities and provides that an impairment is to be taken to affect the ability of the person concerned to carry out "normal day to day activities" if it affects one of the following:  
Mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects;  
Speech, hearing or eyesight,  
Memory or ability to concentrate, learn or understand; or  
the perception of the risk of danger.

The activities of a child tend to be carried out to a large extent by or with the assistance of the child's parent or carer regardless of whether the child has a disability. In other words in terms of ability to carry out normal day to day activities, child developmental milestones are such that it can often be difficult to see what extra help is given to a disabled as opposed to a non disabled child and accordingly difficult to show that any impairment of the child has a substantial and long term adverse effect on the child's abilities to carry out normal day to day functions. For this reason the term 'impairment' is not included in the proposed LCO. Any subsequent measure

could if thought fit, isolate certain categories of impairment for the purpose of conferring educational benefits.

**4. Paragraph 50 – response to Janet Ryder regarding the ‘Disability Discrimination Act 1995’**

The Welsh Ministers currently have devolved disability discrimination functions in relation to schools under Chapter 1 of Part IV of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001 and Disability Discrimination Act 2005). Such functions include the power to make regulations or orders in Wales.

If the proposed LCO is approved, the NAW will have the power to make Measures that create or modify provisions in the Discrimination Disability Act 1995 (as amended) which fall within the scope of Matter 5.17 subject to limitations set out in Part 3 of the Government of Wales Act 2006.

The Welsh Ministers also have some functions in relation to disability discrimination in the education field of the Special Education Needs Tribunal for Wales. The majority of functions however continue to be exercised by Ministers of the Crown. Discussions will take place with the appropriate UK Government Department regarding the future of the Minister of the Crown functions.

**Jane Hutt AM**  
**Minister for Children, Education, Lifelong Learning and Skills.**

Jane Hutt AC/AM  
Y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgillau  
Minister for Children, Education, Lifelong Learning and Skills



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

Eich cyf/Your ref  
Ein cyf/Our ref

Ms Eleanor Burnham  
Chair  
ALN LCO Scrutiny Committee  
National Assembly for Wales  
Cardiff Bay  
CARDIFF  
CF99 1NA

23<sup>rd</sup> October 2007

*Dear Eleanor,*

Thank you again for inviting me to attend your Scrutiny session on the proposed ALN LCO on Thursday 18 October when I hope that I was able to provide both clarification and confirmation on a number of the outstanding issues that were still exercising your members. I did, also promise to write to you on a number of issues on which I agreed that I would further reflect.

The first was whether travel arrangements for those persons who fall within the scope of the proposed LCO (proposed matter 5.17) could be extended to those who receive higher education. You will be aware that matter 5.10 is the relevant Measure power in respect of travel for those receiving education or training. Matter 5.10 gives the National Assembly for Wales ("NAW") the legislative competence to make Measures that can make provision about the travel of those receiving primary, secondary or further education or training (subject to the exceptions listed in that matter). Matter 5.10 does not extend to those receiving higher education but I will look further at this issue in light of the Committee's report.

Secondly, the Committee asked that I should consider amending the proposed Order so that it explicitly included "communications impairment" in the definition of "disability". In

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responding to this may I start by giving you my assurance, as I sought to do at the Committee on 18 October, that any 'communications impairment' would be covered by the current 5.17 b) definition that we have given on 'physical or mental impairment'. This issue is intrinsically linked to the third issue raised by the Committee, which is the suggestion that the definition of disability be removed entirely from the proposed LCO. I will therefore deal with both of these issues together.

However, before I deal specifically with those issues, I think the Committee would find it helpful if I explained further our thinking as to why the definition provided in the proposed LCO is used. I have already provided quite detailed information on this in my written submission to the Committee of 6 October.

The Committee have clearly recognised that we have not used the same definition as that provided in the Disability Discrimination Act 1995 (DDA). That order provides that in order to be disabled a person must have:

*"a physical or mental impairment; and that impairment must have a particular consequence, namely a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities".*

I am of the view that if this definition was adopted it would not capture all those that we would wish to be caught. The DDA definition focuses on a person's abilities in relation to 'normal day-to-day activities'. I am concerned that this may leave some doubt as to whether infants with a disability are captured.

The normal day to day activities of an infant tend to be carried out, to a large extent, by or with the assistance of his or her parent or other carer regardless of whether the child has a disability. In other words, in terms of ability to carry out normal day to day activities, child developmental milestones are such that it can often be difficult to see what extra help is given to a disabled as opposed to a non-disabled infant. Accordingly, it is difficult to show that any impairment of the child has a substantial and long-term adverse impact on the child's abilities to carry out normal day to day activities. This is an issue that crops up as a matter of law with reasonable frequency in the admittedly different context of the social security legislation, but in relation to the same underlying point.

For these reasons, we have not adopted the second 'impairment' limb provided for in the DDA. Any subsequent Measure could however, if thought fit, isolate certain categories of

impairment for the purposes of conferring educational benefits. A measure for example could establish a policy for pupils with Autistic Spectrum Disorder (ASD) or those with long term medical needs. By leaving the term 'physical or mental impairment' unqualified, we believe that the courts would look to the World Health Organisation's ("WHO") definition of disability for assistance in interpreting the term (this has been a feature of case law under the DDA and we see no reason why it would not be replicated for our purposes). That definition is as follows:

*"any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being"*

Unlike the DDA, the approach adopted by the WHO does not refer to "substantial and long-term adverse effect" and "normal day-to-day activities". The courts have interpreted the WHO definition by taking into account the views of recognised experts in the disability field. This means, therefore, that a wider range of individuals are captured under that approach and therefore, the definition used in the proposed LCO would also give a wider scope than the DDA definition.

Given that position, I think it is a fair question to ask why we have not replicated the WHO definition in the proposed LCO. We think that would be unwise because any future Measure would be constrained to that particular definition. Experience has shown us that the understanding and definition of disability is continuously evolving. Therefore we believe that flexibility is required here and it would be better to leave it undefined so that, in the future, it could operate by reference to developments in the understanding of disability.

The above paragraphs will go some way, I think, to explaining why we do not think it is necessary or desirable to insert "communications impairment" into the definition of disability. Inserting "communications impairment" would cast doubt on the generality of the definition we have used – "physical or mental impairment". For the purposes of proposed matter 5.17, communication impairment is a physical impairment and therefore no further definition is required. Inserting "communications impairment" might imply a limitation on the generality of the description currently used in the proposed LCO. An unintended consequence of doing so would be to cast doubt as to whether Measures made under this proposed LCO could make provision for other impairments, such as a sensory impairment

or perhaps in relation to other descriptions of physical and mental impairments that may arise in the future. That would undermine the whole purpose of this proposed LCO and therefore I am minded to keep the general definition that we have used in the current draft.

As a consequence of the perceived issues arising from the use of "physical or mental impairment" as a definition for "disability", you have asked me to consider whether a definition is actually required at all. I believe that a definition is required but that definition should not be too specific. If "disability" were not to be defined in the proposed LCO, then "disability" might give the impression that it encompasses all types of disability. For example, it could encompass financial disability. Dealing with such issues is not the purpose of this proposed LCO in so far as it relates to "disabilities". In deciding on the definition used in the current draft, I have undertaken a balancing exercise in ensuring, on the one hand, that the definition is sufficiently wide to embrace all the issues we wish to deal with including your prime example of 'communications impairment' but, on the other hand, that it is not so wide that it loses sight of the prime objective we are seeking to achieve by introducing this proposed LCO. Subject to any further views that the Committee may have, at the moment I am satisfied that we have struck that balance and that the wording used in the proposed LCO is appropriate.

I hope this is helpful.



**JANE HUTT AM**  
**Minister for Children, Education, Lifelong Learning and Skills**

# **Proposed Additional Learning Needs LCO Committee**

## **Minutes (ALN(3)-08-07)**

**Date: Thursday 22 November 2007**

**Time: 9.30 – 9.50 am**

**Venue: Committee Room 1, Senedd, National Assembly for Wales**

### **Assembly Members in Attendance**

Eleanor Burnham (Chair), North Wales

Alun Cairns, South Wales West

Jeff Cuthbert, Caerphilly

Carwyn Jones, Bridgend

Janet Ryder, North Wales

### **Legislation Office Officials in Attendance**

Liz Wilkinson, Clerk

Gareth Williams, Clerk

Ruth Hatton, Deputy Clerk

### **Others in Attendance**

Joanest Jackson, Legal Adviser

David Blair, Members' Research Service

## **Item 1: Introduction, Apologies and Substitutions**

1.1 The Chair welcomed Committee Members and members of the public to the meeting.

The Committee resolved to exclude the public from the remainder of the meeting in accordance with Standing Order 10.37(vi).

### **Private session**

## **Item 2: The National Assembly for Wales (Legislative Competence) Order 2007 –consideration of Committee's report**

2.1 The Committee considered its draft report.

### **Section 2 Paragraph 15: Amendment proposed by Alun Cairns AM**



line 5 - after “legislative competence” insert

“However one Member remains concerned that the Minister has not adequately explained how the new powers conferred by Matter 5.17 would be used. Despite this”

So that the amended paragraph would read as follows:

“We note the broad support that exists for the proposed Order and, in particular, that no organisation has opposed, in principle, the conferral of legislative competence in relation to additional learning needs. We acknowledge the reasons put forward by the Minister for seeking legislative competence. However one Member remains concerned that the Minister has not adequately explained how the new powers conferred by Matter 5.17 would be used. Despite this we agree, in principle that legislative competence in the area provided for by Matter 5.17 should be conferred on the Assembly.”

Following discussion the amendment was voted on by a show of hands.

### **Amendment defeated**

2.2 The Committee unanimously agreed the report.