



House of Commons
Welsh Affairs Committee

The proposed Legislative Competence Order in Council on additional learning needs

Second Report of Session 2007-08

*Report, together with formal minutes, oral and
written evidence*

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The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

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The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm. A list of reports of the Committee in the present Parliament is at the back of this volume.

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1 Introduction

Background

1. The Government of Wales Act 2006 introduced a new procedure whereby the National Assembly for Wales can bring forward proposals which would extend the Assembly’s law-making powers by way of Legislative Competence Orders in Council. The Orders do not themselves change the general law for Wales – they pave the way to subsequent changes in the law applying to Wales within the devolved areas of legislative competence. They do this by adding new “Matters” to the “Fields” of legislative competence set out in Schedule 5 of the Government of Wales Act 2006.

2. These proposals for draft Orders may be introduced by the Welsh Assembly Government, by committees of the National Assembly, or by individual Assembly Members.¹ They are subject to pre-legislative scrutiny by committees of the Assembly appointed for this purpose and, potentially, by committees of the House of Commons and the House of Lords. Whitehall agreement (“clearance”) is a necessary pre-requisite before a proposed Order is referred by the Secretary of State for Wales to each House at this pre-legislative scrutiny stage.

3. Following the pre-legislative scrutiny stage, the National Assembly may agree an actual draft Order. This may take account of committee recommendations (from either its own committees or Westminster) following pre-legislative scrutiny. The draft Order must then be laid before Parliament by the Secretary of State for Wales – and he or she may still decline to do so at this stage. If the draft Order is laid, it is considered by both Houses of Parliament, and may be debated by them. Draft Orders at this stage are not amendable and can only be approved or rejected. If approved by both Houses, and once it is given the royal assent in the Privy Council, direct law-making powers are devolved to the Assembly within the scope of the Order in Council. The Assembly then makes those laws in the form of Assembly Measures, which must be passed by the National Assembly but which require no further approval by either Whitehall or the UK Parliament.

Introduction of the additional learning needs proposed LCO

4. The first proposed Order to have been referred to Parliament by the Secretary of State, on the subject of additional learning needs, was introduced by the Welsh Assembly Government and published on 11 June.² The Secretary of State wrote on 26 July to the Chair of the Welsh Affairs Select Committee and to the Chair of the Select Committee on the Constitution, House of Lords, inviting these committees to undertake pre-legislative scrutiny.³ In this instance, both committees decided to accept this role.

¹ By ballot.

² Note: the proposed Order does not at any point use the term ‘additional learning needs’.

³ Letter from the Secretary of State for Wales to the Chair of the Welsh Affairs select committee, 26 July 2007 (Ev 19); letter from the Secretary of State for Wales to the Chair of the Select Committee on the Constitution, House of Lords, 26 July 2007.

House of Lords Select Committee on the Constitution

5. We note that the House of Lords Select Committee on the Constitution has examined the proposed Order, and has concluded that it raises “no matters of constitutional principle”.⁴

The Welsh Affairs Committee’s inquiry

6. On 31 July the Welsh Affairs Committee issued a press notice setting out the scope of our inquiry and inviting written submissions from interested parties. The purpose of this Committee’s inquiry was to examine the scope and “appropriateness” of the proposed Order under the terms of the Government of Wales Act (GOWA) 2006.

7. If adopted, the proposed Order would expand Field 5 of Schedule 5 of GOWA 2006 by adding a new matter, Matter 5.17, relating to education and training for “persons who have a greater difficulty in learning than the majority of persons of the same age” and for “persons who have a disability”. The proposed Matter includes a definition of the term “disability”, which in this context is intended to include persons who have a “physical or mental impairment”.⁵

8. In examining whether the proposed Order was within the scope and spirit of GOWA 2006, many of our questions were concerned with the legal definitions of these terms and their compatibility with existing legislation. We also wanted to explore the extent of the powers the proposed Order would devolve. The Committee heard oral evidence from the Parliamentary Under-Secretary of State, Wales Office, and from Jane Hutt AM, Minister for Children, Education and Lifelong Learning and Skills, Welsh Assembly Government, and officials.⁶ We were also able to draw on evidence received by the Committee appointed by the National Assembly for the purposes of examining the proposed Order during the course of its inquiry, which we followed closely.⁷

Joint scrutiny with the Assembly Committee

9. We had hoped to have been able to explore the possibility of working together with the Assembly Committee which was also examining this proposed Order. However, as noted above the proposed Order was referred to us on 26 July, shortly before the House of Commons rose for its summer recess. The Business Committee of the Assembly charged the Assembly Committee with reporting by 23 November (later extended to 30 November). In order to do so, the Assembly Committee began its evidence-taking as soon as the Assembly resumed after its summer recess, and held its first evidence on 20 September. As Jane Hutt AM told us, “we were anxious not to waste time in terms of being able to start the process”.⁸ The House of Commons returned on 8 October, and our own

⁴ Letter from Rt Hon Lord Holme of Cheltenham to the Secretary of State for Wales, 23 October 2007.

⁵ Ev 22

⁶ Ev 1-18

⁷ Proposed additional learning needs LCO Committee, National Assembly for Wales, www.assemblywales.com

⁸ Q 52

evidence sessions took place on 7 and 21 November – by which time the Assembly Committee had completed its evidence-taking.

10. In this case, the proposed Order was referred to the Assembly and to the Welsh Affairs Committee at the same time. Since then, however, the Welsh Assembly Government has published and referred to the Assembly further proposed Orders – before the clearance process with Whitehall departments has been completed. The Assembly Committee charged with examining the Environmental Protection and Waste Management proposed Order has completed its inquiry and published its report,⁹ and the Assembly Committee appointed for the scrutiny of the proposed Order relating to vulnerable children has already begun its evidence-taking.

11. Although the Assembly Committee appointed to scrutinise the proposed Order relating to vulnerable children is well underway, the proposed Order has not yet been referred to parliamentary committees by the Secretary of State for pre-legislative scrutiny. This rules out the possibility of joint scrutiny, unless the Assembly process is to be repeated subsequently should revised proposed Orders be published. If this were to be the case it would be for the Assembly to decide on its own procedure under the terms of GOWA 2006.¹⁰

12. When asked why the Welsh Assembly Government had published proposed Orders and referred them to the Assembly for pre-legislative scrutiny before the clearance process with Whitehall departments was complete, the Assembly Minister told us, “I cannot see that this will happen again in terms of timetabling.”¹¹

13. On 3 December, however, the Welsh Assembly Government laid before the National Assembly its proposed Order on affordable housing, and published it the following day. This is the third proposed Order to have been published and referred to the Assembly before the process of agreement with Whitehall departments has been completed. These proposed Orders have therefore not yet been referred to Westminster committees for pre-legislative scrutiny. This once again rules out the possibility of joint working between the Assembly and Westminster committees, and leaves open the question of what will happen should the text of the proposed Orders which are referred to Westminster committees differ from the text of those which have been examined and reported on by committees of the Assembly. **We regret that the Assembly Committee appointed to conduct pre-legislative scrutiny on the proposed Order on environmental protection and waste management has completed its inquiry and published its report before the proposed Order has been referred to Parliament by the Secretary of State. We further regret that the publication of the proposed Order on affordable housing and its referral for pre-legislative scrutiny before its clearance in Whitehall is another example of how this process is not working as anticipated.**

14. **We regret that due to timetabling considerations it was not practicable to explore the possibility of working jointly with the Assembly Committee on the proposed Order**

⁹ *Proposed Environmental Protection and Waste Management LCO Committee*, National Assembly for Wales, 30 November 2007.

¹⁰ Government of Wales Act 2006

¹¹ Q 52

relating to people with additional learning needs. However, we are grateful to the Assembly Committee for keeping us informed of the course of its inquiry at every stage, and appreciate the opportunity for members of the Welsh Affairs Committee to attend its meetings in an observer capacity. Future timetabling arrangements should allow greater opportunities for the Assembly and Westminster committees to work together.

15. We regret that this opportunity appears to have been ruled out in the case of some proposed Orders by their publication and examination prior to completion of the process of engagement with Whitehall departments. The Welsh Affairs Committee would wish to explore the possibility of working more closely with Assembly committees in the pre-legislative scrutiny of proposals for draft Legislative Competence Orders. We would wish to consider experimenting with some degree of joint scrutiny where practicable.

2 The proposed Order on additional learning needs

The “identifiable need” for the proposed Order

16. Describing the role of this Committee in conducting pre-legislative scrutiny of the proposed Order, the Parliamentary Under-Secretary of State told us:

The role of [the Welsh Affairs Committee] and the role of Wales Office Ministers is to ensure that there has been an established identifiable need for bringing this Order forward and that the powers are being sought for a particular purpose.¹²

... it is for a very specific, identifiable need: Wales priorities and Wales issues.¹³

17. The Welsh Assembly Government’s explanatory memorandum identified a general requirement which the Order is intended to address:

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 ... 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.¹⁴

The memorandum goes on to note that the proposed Order seeks to address “limitations to the current settlement which restricts the Welsh Assembly Government from tackling Welsh priorities and issues” in areas where “the current executive powers of the Welsh Ministers are not sufficient to tackle these issues”.¹⁵

18. Particular issues identified by the Welsh Assembly Government in its memorandum were:

- The Welsh Assembly Government has no power to alter the statutory threshold which activates a Local Education Authority’s (LEAs) formal Special Educational Needs (SEN) duties.
- Welsh Ministers’ Code of Practice in relation to SEN has relatively weak legal force.
- The formal system of statementing is highly prescriptive.

¹² Q 10

¹³ Q 42

¹⁴ Ev 23

¹⁵ Ev 24

- The Welsh Assembly Government has no power to alter the range of individuals with rights to appeal to the SEN Tribunal for Wales.
- The current system does not allow for local dispute mechanisms to be concluded before proceeding to appeals.
- There is no statutory requirement for LEAs to provide advocacy services for children with SEN in Wales.
- The Welsh Assembly has little scope to confer by regulations additional specific duties upon LEAs in relation to SEN.¹⁶

19. Reference was also made to the Welsh Assembly Government's policy document, *The Learning Country – Vision into Action*, and to the review of special educational needs undertaken by the Assembly's Education, Lifelong Learning and Skills Committee as a guide to the Welsh Assembly Government's policy priorities in this area, and to give a better understanding as to why this competence was being sought.¹⁷

Powers for a purpose

20. We were keen to establish the purpose for which the Welsh Assembly Government might use the additional competence being sought – not in any great detail, but to gain at least some indication of its intentions in the immediate to medium term. Such an understanding is key to this Committee's role in being able to scrutinise the appropriateness of the powers sought under the terms of a proposed Order.

21. The White Paper *Better Governance for Wales* indicated that the powers sought under LCOs might be “something very specific”, “something rather wider”, or “something considerably wider”.¹⁸ The proposed Order on additional learning needs, although restricted to the field of “education and training”, is indeed widely drawn.

22. In our earlier inquiry into the LCO process, we were told that the expectation was that proposed Orders would be introduced with specific Measures to be made under them in mind.¹⁹ The Parliamentary Under-Secretary of State told us during that inquiry:

... we would hope that we are not looking at a generality, a sort of broad brush of Orders in Council, but ... at quite focused Orders in Council.²⁰

The whole purpose of the Order in Council process is to allow the Assembly to pass laws and make Measures with a specific purpose in mind ... so no, this idea that

¹⁶ Ev 24

¹⁷ *The Learning Country – Vision into Action*, Department for Education, Lifelong Learning and Skills, Welsh Assembly Government October 2006; *National Learning and Skills Assessment Update, Statements of priorities for change 2007-2010*, Department for Children, Education, Lifelong Learning and Skills, Welsh Assembly Government, October 2007.

¹⁸ *Better Governance for Wales*, White Paper June 2005, Cm 6582 para 3.18

¹⁹ 2nd Report of the Welsh Affairs Committee, *Legislative Competence Orders in Council* (HC 175, Session 2006-07), para 6

²⁰ *ibid*; Q 10

there would be a sort of portmanteau of Orders in Council where things could be slotted in in the future, we do not envisage that.²¹

23. As the Parliamentary Under-Secretary of State confirmed to us in evidence on 8 November:

It is ... for Parliament to decide on a case-by-case basis whether legislative competence in a certain area should be devolved. There will be many questions that must be asked to make this determination. ... Is the Assembly's description of the purpose for which these powers are being sought in the immediate future clear? Are these powers for a purpose?²²

24. In evidence, the Assembly Minister told us:

I recognise that for the Committee to fulfil its scrutiny role you do need to have some idea – more of an idea than perhaps we have given you so far – of what the Assembly might wish to pursue if the new power is approved.²³

I do believe I have only given you an indication of what Measures could emanate from this competence.²⁴

25. In his statement to the Assembly on 28 November, the Secretary of State remarked:

Let me be clear that there is no case whatsoever for the Assembly to be required to supply every detail of future, perhaps unforeseen, Assembly Measures. Under the 2006 Act, Parliament's responsibility is to transfer enduring competence to the Assembly and it must accept that there will be scope for the implementation of policy not yet contemplated.²⁵

We also note that the White Paper *Better Governance for Wales* observed that “This consideration could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future”.²⁶

26. We appreciate that in the longer term powers devolved under the terms of this proposed Order would be used to introduce legislation for which there are no current proposals. However, given that this is the first proposed Order to have been referred to this Committee, we can speculate that it is high on the list of the Welsh Assembly Government's legislative priorities. Further, the Parliamentary Under-Secretary of State referred to “the very specific purposes” for which the Welsh Assembly Government was seeking these additional powers in relation to additional learning needs.²⁷ The argument that the additional competence is being sought “to produce and deliver better services for those learners in Wales who have additional learning needs” seems to us to be entirely

²¹ 2nd Report of the Welsh Affairs Committee, *Legislative Competence Orders in Council* (HC 175, Session 2006-07), Q 3

²² Q 2

²³ Q 58

²⁴ Q 59

²⁵ Statement to the National Assembly by the Secretary of State for Wales, 28 November 2007

²⁶ *Better Governance for Wales*, White Paper June 2005, Cm 6582, p 24 para 3.21

²⁷ Q 40

circular, while the Parliamentary Under-Secretary of State's observation that the points listed in the accompanying memorandum "provide quite a good basis ... for guessing what Measures would be brought forward" does not give us the assurance we seek.²⁸

27. The Assembly Government presumably has particular Measures in mind, since the Parliamentary Under-Secretary of State told us that it is "happy that the scope of the Field is sufficient to allow them to carry out the policies they feel are necessary",²⁹ and that the Assembly Government:

did not want to add to it, broaden it or take simply in block the Scottish model, because that did not suit what they were intending to do with this particular Order in Council.³⁰

28. We are satisfied the explanatory memorandum produced by the Welsh Assembly Government to accompany this proposed Order addresses a widespread consensus that there is an identifiable need for such an Order, but the evidence provided did not do so effectively or convincingly. We will look for such clarity in the future.

29. While not asking for "every detail"³¹ of future Assembly Measures, nevertheless we believe that it would have been helpful for this Committee to have been given a clearer indication of the most immediate legislative proposals for which the additional competence being sought is considered necessary. This would then enable the Committee to judge the appropriateness of the proposed Order.

30. We agree that a Legislative Competence Order is the most appropriate way forward for this proposal, given that it does not fit within the scope and purpose of existing bills.

²⁸ Qs 57, 6

²⁹ Q 13

³⁰ Q 40

³¹ Statement to the National Assembly by the Secretary of State for Wales, 28 November 2007

3 Definitions of terms used in the proposed Order

The definition of disability

31. The proposed Order’s definition of disability is intended to be broader than any of the definitions under existing legislation.³² The Assembly Minister told us:

... we are going beyond the Learning and Skills Act 2000, we are going beyond the Disability Discrimination Act, we are going beyond the WHO definition³³

We have sought to be as broad as possible in terms of definitions ... we wanted to ensure ... that we had the widest possible scope.³⁴

32. The Disability Discrimination Act 1995 (later supplemented by provisions contained in the Disability Discrimination Act 2005) defines disability as follows:

... a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

33. The World Health Organisation 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.³⁵

“Impairment” is further defined as:

... any loss or abnormality of psychological, physiological, or anatomical structure or function.³⁶

34. The definition contained in the proposed Order specifies that:

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

This definition therefore excludes any reference to a “substantial and long-term adverse effect on [a person’s] ability to carry out normal day-to-day activities”. The Parliamentary Under-Secretary of State confirmed that:

³² Q 24

³³ Q 66

³⁴ Q 65

³⁵ World Health Organisation, document A29/INFDOCI/1, Geneva 1976

³⁶ *ibid*

This definition has been adopted by the Assembly to capture a wider range of individuals than those who would be captured under the definitions used by the Disability Discrimination Act 1995 and by the World Health Organisation.³⁷

35. We acknowledge that, as the Assembly Minister told us, “it is going to be a question of the Assembly deciding on detailed definitions in the Measures” which could subsequently be introduced under the proposed Order.³⁸ Mr Huw Davies, Senior Welsh Legislative Counsel to the Welsh Assembly Government, said that when drawing up Measures, “It will be for the Assembly to decide precisely what sorts of definitions it wants to impose.”³⁹ However, in considering the proposed Order itself, it is also important to be clear as to exactly what its scope is intended to encompass.

Physical or mental impairment

36. Both this Committee and the Assembly Committee examined whether the term “physical or mental impairment” needed to be qualified in order to ensure that persons with a sensory or communications impairment, for example, would be included within its scope.

37. Regarding sensory impairment,⁴⁰ the Parliamentary Under-Secretary of State told us:

... a sensory impairment is a physical disability. Such persons would come within the scope of this Order in Council providing that they receive education or training.⁴¹

This was also confirmed in written evidence to the Assembly Committee by the Assembly Minister.⁴²

38. Regarding communication impairment,⁴³ the Assembly Minister confirmed in a letter to the Assembly Committee that:

... ‘communications impairment’ would be covered by the current ... definition that we have given on ‘physical or mental impairment’.⁴⁴

The Assembly Parliamentary Service Legal Division confirmed that:

... it seems clear that a communication impairment will inevitably fall under either a ‘mental’ or a ‘physical’ impairment.⁴⁵

³⁷ Q 16

³⁸ Qs 68, 74

³⁹ Q 78

⁴⁰ Arising from, for example, hearing or visual impairment, multi-sensory impairment or from physical and medical difficulties (Memorandum submitted to the Assembly Committee by Estyn).

⁴¹ Q 36

⁴² *Clarification of issues relating to the scope of the LCO on additional learning needs*, Jane Hutt AM, 6 October 2007 para 1.3

⁴³ Arising from, for example, neurological conditions, autistic spectrum disorder, mental illness, stammering (Memorandum submitted to the Assembly Committee by the Royal College of Speech & Language Therapists).

⁴⁴ Letter from Jane Hutt AM to the Chair of the Assembly Committee, 23 October 2007

⁴⁵ Note by the Assembly Parliamentary Service Legal Division to the Assembly Committee on the definition of “disability” in the proposed Order (not printed here).

39. When asked to confirm whether persons who have a sensory or communication impairment (and other conditions) would fall within the scope of the proposed Order, the Wales Office noted in a supplementary memorandum to us that these impairments fall “within the WHO definition”, which would be referred to by the Welsh Assembly Government.⁴⁶ **While we accept that it is the Welsh Assembly Government’s intention to refer to the WHO definition of disability, we are not convinced that the courts will inevitably do so.**

40. The Welsh Assembly Government’s view is that the term “physical or mental impairment” should be left unqualified, to allow for the development of the term “disability”. As the Assembly Minister told us:

We do not wish to qualify it because we think then it will be restrictive ... we have not qualified it and it is actually recognising that there is ... a developing definition of disability.⁴⁷

41. Further, if an additional category of sensory or communication impairment was added to the proposed Order’s definition of disability, it would imply that the term “physical or mental impairment” is not all-embracing. As the Wales Office noted in a subsequent memorandum:

If the definition were extended the Assembly believe it would cast doubt on and imply a limitation to the generality of the description currently used in the Order. An unintended consequence of this would be to cast doubt as to whether Assembly Measures made under the Order could make provision for other impairments or perhaps in relation to other descriptions of physical or mental impairments that may arise in the future. That would undermine the whole purpose of this Order.⁴⁸

The Assembly Minister confirmed, in a letter to the Chair of the Assembly Committee:

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 ... [and] ... cast doubt as to whether Measures made under this proposed LCO could make provision for other impairments⁴⁹

Advice prepared by the Assembly Parliamentary Service Legal Division for the Assembly Committee noted:

... if a definition is a broad one (as ‘physical or mental impairment’ appears to be) then there are risks in grafting on to it references to specific conditions which are already covered. For example, adding a specific reference to ‘communication impairment’ could give the impression that ‘physical or mental impairment’ is not as all-encompassing a definition as it would otherwise appear to be.

⁴⁶ Ev 26

⁴⁷ Q 67

⁴⁸ Ev 27

⁴⁹ Letter from Jane Hutt AM to the Chair of the Assembly Committee, 23 October 2007

It is a principle of statutory interpretation that if there are a number of similar specific situations and only some of them are mentioned then the intention must be to exclude the ones which are not.⁵⁰

42. From the evidence we have received, it is clear that those with a sensory or a communication impairment who are also engaged in education or training would fall within the scope of the proposed Order. We therefore do not believe it is necessary to qualify the term “physical or mental impairment” by adding reference to sensory or communication impairment in order to ensure that these are included in the terms of the proposed Order as drafted. We also believe that to do so would restrict the scope of the proposed legislative competence, as it would imply that anything not included was excluded from its scope.

The courts and the WHO definition of disability

43. Both the Assembly Minister and the Parliamentary Under-Secretary of State told us that by leaving the term “physical or mental impairment” unqualified, the courts will look to the World Health Organisation’s definition of disability (quoted above at paragraph 33) for assistance in interpreting the term.⁵¹

44. The Parliamentary Under-Secretary of State told us that the WHO definition “has been a feature of case law under the Disability Discrimination Act 1995”,⁵² and in a subsequent note the Wales Office confirmed:

It is correct that the definition has been a feature of case law and that the courts have looked to the WHO’s definition of disability to interpret the term.⁵³

45. This being the case, we explored the reasons as to why the proposed Order did not incorporate the WHO definition of disability. The Parliamentary Under-Secretary of State told us that:

It was decided that it was not appropriate simply to replicate [the] WHO definition within the Order as understanding and definitions of disability are constantly evolving. Thereby, by leaving the definition open ... it can operate in the future by reference to developments in the understanding of disability. So there is a clear intention behind the reasons why it is left.⁵⁴

The Assembly Minister, in evidence to the Assembly Committee, wrote:

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

⁵⁰ Note by the Assembly Parliamentary Service Legal Division to the Assembly Committee on the definition of “disability” in the proposed Order (not printed here); Ev 31-32

⁵¹ Qs 24, 65, 66, 69

⁵² Q 24

⁵³ Ev 31

⁵⁴ Q 24

individuals, the Assembly would not have the legislative competence to make Measures in relation to the new category of disabled individuals.⁵⁵

46. In evidence, the Assembly Minister told us:

... it is important to stress that we have not adopted the WHO definition, because if we did and the WHO subsequently amended its definition ... the Assembly would not have legislative competence to make measures in relation to the new category of disabled people. So you can see that we do not want to be trapped by a WHO definition which might change, because once you put a definition down that is it.⁵⁶

47. The Parliamentary Under-Secretary of State said in evidence to us that as the WHO definition is not included in the proposed Order, the Assembly would:

... refer to existing definitions, including that of the WHO, but also to evolving definitions from other organisations to establish what is meant by disability. ... the Welsh Assembly Government and Whitehall are content that this allows the flexibility that Assembly Government Ministers are looking for.⁵⁷

The competence which the proposed Order would devolve is more widely drawn than the WHO definition. The Parliamentary Under-Secretary of State acknowledged, however, that if the WHO definition were included in the Order, or if a more precise definition was otherwise applied, it could be broadened at a later date. Therefore, the WHO definition of disability could be adopted and included in the proposed Order, together with the power to amend that definition by statutory instrument should the WHO definition change. A subsequent note by the Assembly Minister to the Assembly confirms that, “The definition of disability in the proposed LCO could ... be amended by Measure”.⁵⁸

48. In examining the proposed Order’s definition of disability, we were curious that the Parliamentary Under-Secretary of State should observe:

... this is an appropriate discussion for the Welsh Assembly Government Ministers and the National Assembly for Wales to have when they bring forward Measures as opposed to us trying to make that decision for them.⁵⁹

We believe it is appropriate – indeed, necessary – for a parliamentary committee conducting pre-legislative scrutiny of a proposed Order in Council to include as part of its scrutiny an examination of the terms used and, in this particular case, to explore the extent to which courts would rely on the WHO definition of disability.

⁵⁵ *Clarification of issues relating to the scope of the LCO procedure on additional learning needs*, Jane Hutt AM, 6 October 2007 para 3 (responses to further issues raised).

⁵⁶ Q 69

⁵⁷ Q 27

⁵⁸ Letter from Jane Hutt AM to the Chair of the Assembly Committee, 6 October 2007, *Responses to further issues raised*, point 1.

⁵⁹ Q 31

Leaving “disability” undefined

49. Given the questions which arose in evidence – both to ourselves and to the Assembly Committee – regarding the use of the term “physical or mental impairment” as a definition of disability, the desirability of including such a definition at all was raised. Jane Hutt AM’s view was as follows:

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 Order then ‘disability’ might give the impression that it encompasses all types of disability. For example, it could encompass financial disability.⁶⁰

Acknowledging that “the omission of any definition of ‘disability’ is an option which calls for careful consideration”, the Assembly Parliamentary Service Legal Division’s advice was that the Minister’s view “reflects a cautious approach”.⁶¹ The Division noted that “the practice in existing legislation on disability is to define that term”, but concluded that “if a definition is needed then it should be as wide and general as possible”.

50. A subsequent memorandum to this Committee from the Wales Office noted:

... flexibility is required here and it would be better to leave it undefined so that in the future it could operate by reference to WHO or other definitions and developments in the understanding of disability.⁶²

51. We believe it is right that the proposed Order does include a definition of its use of the term “disability”. We recommend that for reasons of clarity, certainty and appropriateness the proposed Order be amended to refer to the World Health Organisation’s definition of disability from time to time. The proposed Order could therefore include the power for the Assembly Government to substitute some other definition by statutory instrument, should circumstances make that desirable.

Significantly greater difficulty in learning

52. The Education Act 1996 defines someone with learning difficulty as having “significantly greater difficulty in learning than the majority of persons of his age”. However, the proposed Order does not contain the word “significantly”, referring only to “persons who have a greater difficulty in learning than the majority of persons of the same age”. The Wales Office confirmed to us that:

The proposed Order has been drafted to give the Assembly flexibility to make Measures that benefit persons who have additional learning needs that do not amount to special educational needs ... or a ‘significant learning difficulty’.⁶³

Jane Hutt AM told us:

⁶⁰ Letter from Jane Hutt AM to the Chair of the Assembly Committee, 23 October 2007

⁶¹ Note by the Assembly Parliamentary Service Legal Division to the Assembly Committee on the definition of “disability” in the proposed Order, paras 4-5

⁶² Ev 31

⁶³ Ev 29; Q 75

... we want to have that flexibility to benefit those people who do not fit in the SEN or the Learning and Skills Act's 'significant learning difficulty'. ... It is about the greater difficulty of learning in the majority, and also ... that greater difficulty must be of a particular character in that it must be significantly greater than the difficulties of the majority. We would not have that flexibility under the Learning and Skills Act, and indeed that is why we do not have the word 'significantly' in the LCO.⁶⁴

53. The Wales Office's subsequent memorandum to this Committee advised that if the proposed Order were amended to refer instead to "significantly greater difficulty in learning", this would "not allow the Assembly flexibility to make Measures that benefit persons with additional learning needs".⁶⁵ **We accept the advice of the Assembly Minister and of the Wales Office, and agree that the reference to "greater difficulty in learning" as contained in the proposed Order would allow the Assembly to introduce Measures for persons with additional learning needs in such a way that reference to "significantly greater difficulty in learning" would not. We believe this is an appropriate degree of competence to devolve.**

Additional needs arising from circumstances

54. The Assembly Minister stated that the proposed Order would cover not only persons whose difficulty in learning arose out of their ability to learn, but also persons whose need for support arises from their circumstances.⁶⁶ Child carers, for example, could be treated as having a learning difficulty.⁶⁷ Both the Assembly Minister and the Wales Office confirmed that there were no limits to the circumstances that could be recognised under the Order as giving rise to a learning difficulty, which could be "for any reason whatsoever".⁶⁸ Measures made under the proposed extended competence would apply, for example, to "looked-after" children, to children suffering from bullying, or those who live with parents who have mental health or substance abuse problems, or who fall behind due to truancy or bad behaviour.

55. It is clear that the Wales Office and the Welsh Assembly Government are confident that the scope of the proposed Order covers persons whose need for additional support arises from their circumstances.

The Scottish definition: additional support for learning

56. In Scotland, provision for additional support for those in education and training is set out in the Education (Additional support for learning) (Scotland) Act 2004. Section 1 of that Act states:

A child or young person has additional support needs ... where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of

⁶⁴ Q 75

⁶⁵ Ev 29

⁶⁶ Q 77

⁶⁷ *ibid*; Ev 28

⁶⁸ *ibid*

additional support to benefit from school education provided or to be provided for the child or young person.

The term “for whatever reason” applied to additional support needs in Scottish legislation seemed to us to range more widely than the qualifying terms used in the proposed Order relating to additional learning needs. We were concerned to establish whether this term captured a broader range of people than the language used in the proposed Order.

57. In evidence, the Assembly Minister told us, “we do not think that in reality it does go further than our proposed Order ... in fact they are very much on a par”.⁶⁹ However, the Minister was against adopting this definition given that the context and structure is fundamentally different in Scotland compared to Wales:

Scotland is legislating for another context and there are many differences in the way that special needs are funded and the way the relationship between local authorities and schools are managed, so it is really quite different. That legislation obviously works in Scotland in its own context. However, it would not necessarily be appropriate to assume that it would work for us.⁷⁰

58. The same points were made by the Wales Office in a subsequent note to the Committee,⁷¹ and by the Parliamentary Under-Secretary of State in evidence to us:

Assembly Ministers are concerned that by expanding this Order to deal with children suffering from ‘emotional difficulties’ as the Scottish model does ... they could lose or dilute the prime purpose for acquiring these powers. ... to simply lift the Scottish model and plonk it down in Wales would actually dilute, or risks skewing away from, the purpose for which these particular powers are being sought.⁷²

59. We accept the evidence we have received that the reference in Scottish legislation to “additional support needs” does not range further than “persons who have a greater difficulty in learning” as contained in the proposed Order. We also acknowledge the significance of the very different contexts which apply in Scotland and in Wales. For both these reasons we agree that the reference to “persons who have a greater difficulty in learning” contained in the proposed Order is appropriate.

Able and talented children

60. As part of our evidence we were keen to establish whether the ability to make provision for education and training for able and talented children would fall within the scope of the proposed Order. The Parliamentary Under-Secretary of State told us:

In terms of the more able and talented, the scope of the proposed Order ... does not cover those children defined as more able or more talented who currently do not fall within the SEN regime.⁷³ The definition of SEN excludes gifted children. However,

⁶⁹ Q 81

⁷⁰ *ibid*

⁷¹ Ev 27

⁷² Q 39

⁷³ Special Educational Needs

able and talented children who currently also fall within the SEN regime do come within the scope of the Order.⁷⁴

61. This repeated the advice given in the Assembly Minister’s written evidence to the Assembly Committee,⁷⁵ and was further confirmed by a supplementary note provided by the Wales Office:

Any Measure made under this Order could make provision for able and talented children but only if those children have a greater difficulty in learning than the majority of those their age and/or they are disabled. Therefore, such a Measure could make provision for able and talented children who currently fall under the SEN regime.⁷⁶

62. We understand that under the terms of the proposed Order as drafted, provision for the education and training of able and talented children could only be made if they also came within the Special Educational Needs regime.

Education in a different language from that used at home

63. Another issue that arose during our evidence was whether the definition in the proposed Order of “persons who have a greater difficulty in learning than the majority of persons of the same age” would include those being educated in a different language from that used at home – for instance, the children of migrant workers. The Parliamentary Under-Secretary of State said:

Clearly for many of them their “additional learning” is acquiring competence in the English or indeed the Welsh language. It would be these types of groups in a flexible way that could be embraced within this Order in Council.

64. The Wales Office confirmed in a subsequent note that persons being taught in a different language from that being used at home would come within the scope of the proposed Order if they had additional learning needs, i.e. greater difficulty in learning,⁷⁷ although under the terms of the Education Act 1996:⁷⁸

... a child is not to be taken as having special educational needs if his learning difficulty is solely because the language ... in which he is or will be taught is different from the language ... which has been spoken in his home.

The exclusion ... consequently applies to persons identified in the Order who have ‘special educational needs’.⁷⁹

⁷⁴ Q 20

⁷⁵ *Clarification of issues relating to the scope of the LCO on additional learning needs*, supplementary written paper to the Assembly Committee, 6 October 2007 para 1.4.1

⁷⁶ Ev 28

⁷⁷ *ibid*

⁷⁸ Education Act 1996, Section 312

⁷⁹ Ev 28

65. We accept that persons being taught in a different language from that being used at home would come within the scope of this proposed Order, but only in cases where those persons also have a greater difficulty in learning.

Travel arrangements

66. The ability for the Assembly to make provision for travel arrangements for those in education or training to and from the places they receive it is specifically excluded from the proposed Order. This is because, as the explanatory note⁸⁰ to the proposed Order states, such provision falls under the scope of another matter, Matter 5.10.⁸¹ Travel arrangements are specifically excluded here, so as:

... to ensure that the legislative competence of the Assembly to make provision about education-related travel arrangements does not extend beyond the terms of Matter 5.10⁸²

Matter 5.10 allows 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.⁸³

67. As confirmed by the Assembly Minister in evidence to us and in a letter of 23 October, those in higher education are excluded from the scope of Matter 5.10.⁸⁴

We do not consider at this point in time that [Matter 5.10] extends to higher education because that is not in the Education Act 1996. This is something which ... came up in the Assembly Committee and we are looking at that in terms of higher education.⁸⁵

68. We note that Jane Hutt AM, in evidence to the Assembly Committee, said, “If we can do anything to amend Matter 5.10, I will explore that”.⁸⁶

69. We recommend that Matter 5.10 be amended so as to include provision for travel arrangements for those in higher education. If this point were to be accepted by the Welsh Assembly Government, it could be addressed by incorporating an amendment to Matter 5.10 in the draft Order when it is published.

⁸⁰ Ev 22

⁸¹ GOWA 2006, Schedule 5, Field 5: Education and training

⁸² Ev 22

⁸³ GOWA 2006, Schedule 5, Field 5: Education and training

⁸⁴ Q 79; Letter from Jane Hutt AM to the Chair of the Assembly Committee, 23 October 2007

⁸⁵ Q 79

⁸⁶ Evidence to the Assembly Committee, 18 September 2007, para 112

Conclusion

70. **We agree that the proposed Order should be proceeded with, substituting reference to the WHO definition of disability for the definition contained in the proposed Order as drafted.**

Conclusions and recommendations

1. We regret that the Assembly Committee appointed to conduct pre-legislative scrutiny on the proposed Order on environmental protection and waste management has completed its inquiry and published its report before the proposed Order has been referred to Parliament by the Secretary of State. We further regret that the publication of the proposed Order on affordable housing and its referral for pre-legislative scrutiny before its clearance in Whitehall is another example of how this process is not working as anticipated. (Paragraph 13)
2. We regret that due to timetabling considerations it was not practicable to explore the possibility of working jointly with the Assembly Committee on the proposed Order relating to people with additional learning needs. However, we are grateful to the Assembly Committee for keeping us informed of the course of its inquiry at every stage, and appreciate the opportunity for members of the Welsh Affairs Committee to attend its meetings in an observer capacity. Future timetabling arrangements should allow greater opportunities for the Assembly and Westminster committees to work together. (Paragraph 14)
3. We regret that this opportunity appears to have been ruled out in the case of some proposed Orders by their publication and examination prior to completion of the process of engagement with Whitehall departments. The Welsh Affairs Committee would wish to explore the possibility of working more closely with Assembly committees in the pre-legislative scrutiny of proposals for draft Legislative Competence Orders. We would wish to consider experimenting with some degree of joint scrutiny where practicable. (Paragraph 15)
4. We are satisfied the explanatory memorandum produced by the Welsh Assembly Government to accompany this proposed Order addresses a widespread consensus that there is an identifiable need for such an Order, but the evidence provided did not do so effectively or convincingly. We will look for such clarity in the future. (Paragraph 28)
5. While not asking for “every detail” of future Assembly Measures, nevertheless we believe that it would have been helpful for this Committee to have been given a clearer indication of the most immediate legislative proposals for which the additional competence being sought is considered necessary. This would then enable the Committee to judge the appropriateness of the proposed Order. (Paragraph 29)
6. We agree that a Legislative Competence Order is the most appropriate way forward for this proposal, given that it does not fit within the scope and purpose of existing bills. (Paragraph 30)
7. While we accept that it is the Welsh Assembly Government’s intention to refer to the WHO definition of disability, we are not convinced that the courts will inevitably do so. (Paragraph 39)

8. From the evidence we have received, it is clear that those with a sensory or a communication impairment who are also engaged in education or training would fall within the scope of the proposed Order. We therefore do not believe it is necessary to qualify the term “physical or mental impairment” by adding reference to sensory or communication impairment in order to ensure that these are included in the terms of the proposed Order as drafted. We also believe that to do so would restrict the scope of the proposed legislative competence, as it would imply that anything not included was excluded from its scope. (Paragraph 42)
9. We believe it is appropriate – indeed, necessary – for a parliamentary committee conducting pre-legislative scrutiny of a proposed Order in Council to include as part of its scrutiny an examination of the terms used and, in this particular case, to explore the extent to which courts would rely on the WHO definition of disability. (Paragraph 48)
10. We believe it is right that the proposed Order does include a definition of its use of the term “disability”. We recommend that for reasons of clarity, certainty and appropriateness the proposed Order be amended to refer to the World Health Organisation’s definition of disability from time to time. The proposed Order could therefore include the power for the Assembly Government to substitute some other definition by statutory instrument, should circumstances make that desirable. (Paragraph 51)
11. We accept the advice of the Assembly Minister and of the Wales Office, and agree that the reference to “greater difficulty in learning” as contained in the proposed Order would allow the Assembly to introduce Measures for persons with additional learning needs in such a way that reference to “significantly greater difficulty in learning” would not. We believe this is an appropriate degree of competence to devolve. (Paragraph 53)
12. We accept the evidence we have received that the reference in Scottish legislation to “additional support needs” does not range further than “persons who have a greater difficulty in learning” as contained in the proposed Order. We also acknowledge the significance of the very different contexts which apply in Scotland and in Wales. For both these reasons we agree that the reference to “persons who have a greater difficulty in learning” contained in the proposed Order is appropriate. (Paragraph 59)
13. We understand that under the terms of the proposed Order as drafted, provision for the education and training of able and talented children could only be made if they also came within the Special Educational Needs regime. (Paragraph 62)
14. We accept that persons being taught in a different language from that being used at home would come within the scope of this proposed Order, but only in cases where those persons also have a greater difficulty in learning. (Paragraph 65)
15. We recommend that Matter 5.10 be amended so as to include provision for travel arrangements for those in higher education. If this point were to be accepted by the Welsh Assembly Government, it could be addressed by incorporating an amendment to Matter 5.10 in the draft Order when it is published. (Paragraph 69)

16. We agree that the proposed Order should be proceeded with, substituting reference to the WHO definition of disability for the definition contained in the proposed Order as drafted. (Paragraph 70)

Formal Minutes

Monday 17 December 2007

Members present:

Dr Hywel Francis, in the Chair

David T C Davies

Nia Griffith

Siân James

Mr David Jones

Alun Michael

Hywel Williams

1. Draft Report: The proposed Legislative Competence Order in Council on additional learning needs

A draft Report (The proposed Legislative Competence Order in Council on additional learning needs), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 70 read and agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

[Adjourned till Tuesday 8 January at 10.00 a.m.]

Witnesses

Wednesday 7 November 2007

Page

Mr Huw Irranca-Davies MP, Parliamentary Under-Secretary of State, **Mr John Williams**, Deputy Director, Wales Office and **Mr Nigel Fulton**, Team Leader, SEN Framework Team, Department for Children, Schools and Families

Ev 1

Wednesday 21 November 2007

Ms Jane Hutt AM, Minister for Children, Education, Lifelong Learning & Skills, **Mr Alan Lansdown**, Head of Additional Needs and Inclusion Division and **Mr Huw Davies**, Senior Welsh Legislative Counsel, Department for Children, Education, Lifelong Learning and Skills, Welsh Assembly Government.

Ev 10

List of written evidence

1	Letter from Rt Hon Peter Hain, Secretary of State, Wales Office, to the Chairman	Ev 19
2	Letter from the Chairman to Rt Hon Peter Hain, Secretary of State, Wales Office	Ev 19
3	Welsh Affairs Committee Press Notice announcing its inquiry into the proposed Legislative Competence Order in Council on additional learning needs	Ev 19
4	National Assembly for Wales (Legislative Competence) Order 2007	Ev 21
5	Memorandum from the Minister for Education, Culture and Welsh Language	Ev 23
6	Supplementary memorandum from the Wales Office	Ev 25
7	Memorandum submitted by RNID Cymru	Ev 32
8	Memorandum submitted by the Royal College of Speech and Language Therapists	Ev 35
9	Memorandum submitted by the National Deaf Children's Society	Ev 37

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2006-07

First Report	Work of the Committee in 2005-06	HC 291
Second Report	Legislative Competence Orders in Council	HC 175
Third Report	Welsh Prisoners in the Prison Estate	HC 74(Cm 7195)
First Special Report	Government Response to the Committee's Second Report of Session 2006-07, Legislative Competence Orders in Council	HC 986

Session 2007-08

First Report	Energy in Wales: follow-up inquiry	HC 177
Second Report	The proposed Legislative Competence Order in Council on additional learning needs	HC 44

Oral evidence

Taken before the Welsh Affairs Committee

on Wednesday 7 November 2007

Members present

Dr Hywel Francis, in the Chair

Mr Stephen Crabb
Mrs Sian C James
Mr Martyn Jones

Mr David Jones
Mark Williams

Witnesses: **Huw Irranca-Davies MP**, Parliamentary Under-Secretary of State, **Mr John Williams**, Deputy Director, Wales Office, and **Mr Nigel Fulton**, Team Leader, SEN Framework Team, Department for Children, Schools and Families, gave evidence.

Q1 Chairman: Minister, welcome to your first meeting of the Welsh Affairs Committee. Could you introduce yourself and your colleagues for the record?

Huw Irranca-Davies: Indeed. Thank you. I am very pleased to be here today in front of the Welsh Affairs Select Committee. As you rightly said, it is my first appearance. To my right is John Williams from the Wales Office and to my left is Nigel Fulton from DCSF. There is a full range of colleagues behind me as well. John and Nigel, if we do enter into some detailed points, might well enter into the fray as well.

Q2 Chairman: Could I begin by placing on record our appreciation to the Assembly Committee dealing with the Additional Learning Needs LCO which is chaired by Eleanor Burnham. They have been very hard at work. We are impressed with the volume and the rigour of their work. Minister, could I begin by asking you to give us a picture of the situation at present. Could you outline to us any unexpected difficulties? What are the early lessons that we can draw from the early days of this process?

Huw Irranca-Davies: Perhaps it might be helpful, as this is the very first of the Orders in Council coming through, if I made some introductory remarks which set the scene. I have already expressed my thanks to the Committee for inviting me here today. I think Committee members will agree with me that this is indeed a milestone in the devolution process. This is the very first proposed draft Order in Council that the Government has presented to this Committee for pre-legislative scrutiny under Section 95 of the Government of Wales Act 2006. If you will indulge me, Chairman, I would pay tribute to my predecessor, the honourable Member for Carmarthen West and South Pembrokeshire who took through the Government of Wales Act and provided a sterling service. The Government's commitment to devolution in Wales is unquestionable. This Government brought forward devolution in 1998 and it was this Government that again delivered for Wales last year with the Government of Wales Act. In this Act we created

the Order in Council process, a better mechanism to enable the Assembly to achieve its legislative priorities. No longer must the Assembly fight for space in future Queen's Speeches for Westminster Bills. The Assembly is now able to make use of a simpler and quicker process, through which it will be able to bid for the legislative tools to get on with the job of implementing a new policy or modifying an existing law. This means that there will now be more legislation that is truly "made in Wales". This Committee will have a vital role to play in this devolution of legislative competence that will allow the Assembly to produce its own legislation. The detail of the actual measures the Assembly Government wishes to pass, the Welsh equivalent of an Act of Parliament, is not a matter for the Government or for Parliament to consider. These will be wholly for the National Assembly for Wales to scrutinise. It is, however, for Parliament to decide on a case-by-case basis whether legislative competence in a certain area should be devolved. There will be many questions that must be asked to make this determination. Is it appropriate for the Assembly to have legislative competence in this area or would it be better remaining at the UK level? Is the Assembly's description of the purpose for which these powers are being sought in the immediate future clear? Are these powers for a purpose? Is the scope of the Orders too narrow to allow the Assembly to effectively legislate in this area? Or is it too wide? These Orders will be subject to the affirmative resolution procedure. Once they are introduced into the Houses of Parliament for approval they will be unamendable. The pre-legislative scrutiny carried out by this Committee is therefore vital in ensuring that Parliament plays an active and constructive role in ensuring these Orders are fit for purpose. This process is not just a Westminster-based exercise. The National Assembly will be asking many of the same questions that you are. You have indicated your desire to work with Assembly Members in scrutinising these proposed draft Orders. Although the details of this process and how it will work are for yourselves and Assembly Members, I welcome this co-operation and the obvious spirit you have

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demonstrated to making devolution work. Let me turn, Chairman, to this particular draft Order. The Welsh Assembly Government First Minister, Rhodri Morgan, set out proposals for six Orders in Council, including this one, in his address to the National Assembly on 6 June. As the Committee will know, education and training has been a devolved subject area for many years. The Assembly already has wide-ranging powers across the spectrum, including in relation to special educational needs. In the policy document from the Welsh Assembly Government *The Learning Country—Vision into Action* the Assembly Government has set out their intention to promote “inclusion in education and training”. Following this, the National Assembly’s Education, Lifelong Learning and Skills Committee concluded a special review of special educational needs in Wales in March this year. The review examined many of the fundamental elements of the existing system, especially early identification and intervention, statutory assessment, statementing and transition. Because of this, expectations have been raised among stakeholders that the law in Wales would be changed in this area. This gives a clear purpose for why these powers are being sought. As set out in this Order’s accompanying Explanatory Memorandum, there are several limitations to the Assembly’s current powers that are seen as restricting the Assembly Government from fully tackling Welsh priorities and issues. I will not repeat them all, but they include the statutory provisions that set out the duties and the guidance relating to local education authorities and the extent to which the Assembly can affect the statementing system for those requiring additional learning needs in Wales. This Order in Council is designed to grant legislative competence to the Assembly to fully implement their special educational needs/additional learning needs policy in Wales. The UK Government has taken the view that, given the Assembly already has substantial executive functions in this area, it is more than appropriate that they also be given legislative competence. This will bring about in this area the kind of truly “made in Wales” legislation I mentioned earlier. I should point out to the Committee that the House of Lords Select Committee on the Constitution which has agreed to scrutinise these Orders for a 12-month trial period has written to me regarding this Order. They have reached the conclusion that no matters of constitutional principle arise from this Order and I have written back thanking them for the time they have taken in carrying out this work. This Committee’s task in terms of both scrutinising this proposed draft Order and making this new process work will be challenging. I am sure that the talent and the expertise within this Committee means that you will succeed now and in the future. I look forward to working with you to play my part in making sure we deliver for the people of Wales. I hope those introductory comments are helpful both to set the context and in relation to this particular Order.

Q3 Chairman: Thank you, Minister. There is plenty of food for thought there. You make reference to the work of this Committee in terms of pre-legislative scrutiny. We are already conscious of the fact that we need to be better co-ordinated. There is an issue to do with a more reasonable timetabling of our work with the work of the Assembly Committee. Do you have any view on that and how you could assist that process?

Huw Irranca-Davies: The exact procedures you establish for conducting joint pre-legislative scrutiny, which we welcome, with the National Assembly for Wales is obviously a matter for yourselves, but if there were any assistance that we could give in that --- I would not dare to intervene in the arrangements of the Welsh Affairs Select Committee. As I have said earlier, we are delighted that there is an intention, where possible, to meet jointly with the National Assembly for Wales in the scrutiny process. I have to say that wherever and whenever invited my intention would be, from a Wales Office perspective, to appear in front of this Committee, whether it is in a separate sitting or whether it is in a joint sitting with the National Assembly for Wales.

Q4 Chairman: You will be aware of the fact that we cannot start until the Secretary of State writes to us.

Huw Irranca-Davies: Yes, indeed. The point is taken.

Q5 Mark Williams: I want to ask you a couple of things on the proposed LCO as it affects existing legislation. You gave us a little guidance in terms of what measures one might expect to come forward from this Order. I have to say, having read the discussions in the National Assembly that have taken place, I am still a little in the dark as to what measures might follow. What work has been done to assess how existing legislation is going to be either extended or disapplied from this Order?

Huw Irranca-Davies: It is an important point. I think this would entirely depend on the contents of subsequent measures coming forward. As you know, under Section 94(1) of the Government of Wales Act an Assembly measure may make “any provision that could be made by an Act of Parliament”. We hope that the scope of the legislative competence is clear on the face of the Order. If technical drafting issues mean that this is not completely the case then the Explanatory Memorandum has to be absolutely clear, especially on the precise scope of the proposed Order. The purpose of these Orders in Council is to devolve legislative competence to the Assembly. Framework powers can be used to do the same thing when there is a UK Government Bill that could be used as a legislative vehicle. This Order does not fit within the scope of any forthcoming UK Bill. Neither is it our intention to widen the scope of any Bill so that framework powers could be added. In terms of measures, I think there is a distinction between the role of both the Wales Office and the Welsh Affairs Committee in

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scrutinising this, which is scrutinising the scope, the appropriateness and various other issues within this. As to whether we should be speculating on the exact measures coming forward, I think that is something I would be loathe to do because that is, in the spirit and the letter of the Government of Wales Act, something that is within the gift of the Assembly.

Q6 Mark Williams: I certainly would not demur from you on that last point. For the purposes of this Committee and in terms of the deliberations we are having now, you would therefore welcome the inclusion in a memorandum of likely legislation—perhaps we can go that far—that is to be repealed or added to by measures under this Order by way of information for this Committee. I am a committed devolutionist. In terms of information for this Committee, some feel that it is a little lacking.

Huw Irranca-Davies: If it is of help, perhaps I can refer members of the Committee, without breaching the principle I have just talked about in terms of speculating on measures, it is not for me as a Wales Office Minister to do that, to the Explanatory Memorandum where it does give an indication of the scope of what this is including, that is what has been identified by the Welsh Assembly Government in terms of Welsh priorities and issues, such as the lack of a power to alter the statutory threshold or activating a Welsh local education authority's formal SEN duties. Similarly, the formal system of statementing is highly prescriptive. The Explanatory Memorandum alludes to the point that whilst there are Assembly powers to make regulations about the operation of statementing, these do not permit the Assembly to make fundamental changes to the process itself. Those half a dozen or more points provide quite a good basis, based on the reviews that the Assembly has carried out where it has identified these needs already, for guessing, if you wanted to, what measures would be brought forward under this particular Order in Council.

Q7 Mark Williams: And you are satisfied that that is sufficient?

Huw Irranca-Davies: Yes, indeed. There has been a great deal of discussion on this and other Orders in Council that will soon be with us, particularly on defining them in terms of the scope and on the appropriateness of the width. Is there a purpose to the power that is shown through identifiable need? I can say to you that, in terms of this Order in Council, we are confident that that has been established.

Q8 Mr David Jones: Minister, you refer to paragraph 15 which apparently sets out the Welsh priorities and issues which are to be addressed by this LCO. Those set out a number of constraints which would in fact continue to prevail in England, would they not, after this LCO, if it is granted, has been granted? That is right, is it not?

Huw Irranca-Davies: Yes, indeed.

Q9 Mr David Jones: Can you tell the Committee why dispensing with those constraints is a singularly Welsh priority as opposed to an English and Welsh priority?

Huw Irranca-Davies: It would not be the role of a Wales Office Minister in respect of this Order in Council or any others to second-guess a Welsh Assembly Government Minister. The Welsh Assembly Government, which has put a lot of thought into what it requires out of this Order, is satisfied that they have the balance right between what it will enable them to do, what it excludes and the narrowness of scope. If the Welsh Assembly Government Minister is content with that then certainly I would echo those feelings.

Q10 Mr David Jones: You are telling us that it is not up to this Committee to enquire as to the priorities that are guiding Welsh Ministers, is that right?

Huw Irranca-Davies: No, not at all. In fact, the Explanatory Memorandum, for example, refers to the policy document “The Learning Country—Vision into Action” in which the Assembly Government sets out their intention to promote inclusion in education and training. Also, the reviews that have taken place into special educational needs, looking at the fundamentals of the existing system in Wales, identify early intervention, statutory assessments and statementing. The role of this Committee and the role of Wales Office Ministers is to ensure that there has been an established identifiable need for bringing this Order forward and that the powers are being sought for a particular purpose.

Q11 Mr David Jones: The difficulty that I have is distinguishing between a distinctive Welsh need and a UK-wide need. Frankly, this memorandum does not leave me any the wiser.

Huw Irranca-Davies: We may come on at some point to the issue of cross-border issues as well and how we reconcile those. We are wholly comfortable with the idea of devolution and that devolution will produce different Welsh solutions to Welsh priorities based on identifying needs and aspirations within Wales. That does flag up the classic conundrum of devolution, but it is something that we are perfectly content with.

Q12 Mr Martyn Jones: Do you agree that the use of a Legislative Competence Order is the most appropriate way forward for this measure rather than framework powers in a Westminster Bill?

Huw Irranca-Davies: As I have alluded to before, one of the parameters that Welsh Assembly Government Ministers would look at is whether a suitable framework power could be put within a Bill coming forward. I know that the Welsh Affairs Select Committee themselves looked at this issue in quite some detail, as to what would be the appropriate way forward. In this case certainly there is not a suitable Bill that this could be put into. It does not fit the scope and the intentions of existing

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Bills. It may be worth mentioning to the Committee—it is the first opportunity I have had to put it on record—that as with Orders in Council, the Government is committed to ensuring the proper scrutiny of framework powers in UK Bills. As a result of a request from Parliament we have already developed this process surrounding framework powers and have started providing Explanatory Memoranda to accompany any framework power in a Bill. From the beginning of the session the Secretary of State gave a commitment by way of a written ministerial statement to Parliament to highlight any Welsh elements in the legislative programme, including framework powers, which has already been done. In addition to this, briefing sessions by myself and the relevant Welsh Assembly Government Minister to discuss the proposals in detail will be offered to both Houses of Parliament separately following the introduction in the Bill. For example, the Local Transport Bill is being introduced in the House of Lords. I have written to members and peers today inviting them to attend an informal briefing meeting given by the Welsh Assembly Government Deputy First Minister and by me on the proposed clauses. Mr Jones, Parliament will continue to scrutinise framework powers in Bills during the passage of the Bill, but it is about what is the most appropriate vehicle for a particular one being brought forward.

Q13 Mrs James: I would like to turn to the scope of the proposed Orders, how they are going to work *et cetera*. The Orders refer to “education and training” in a very broad way, especially when compared to the detailed and restrictively designed framework powers contained in Westminster Bills. It is also more wide ranging than those issues set out in the Assembly’s own accompanying memorandum. Is this breadth of scope appropriate and in your view does it provide greater clarity?

Huw Irranca-Davies: Yes, because education and training both have been devolved subject areas for many years. The Assembly already has wide-ranging powers across the spectrum of education and training. Certainly when I was looking at this issue it was helpful to refer to Section 5 of the Explanatory Memorandum. This Order will enable changes to be made by way of Assembly measures in relation to any aspect of the organisation and delivery of special educational need in Wales. The legislative competence would also enable an extension to the existing definition of special educational needs to include additional learning needs and thereby impose obligations upon public bodies in relation to that extended category of learner. In short, the Assembly Government is happy that the scope of the Field is sufficient to allow them to carry out the policies they feel are necessary and appropriate to the structuring of education and training within Wales.

Q14 Mrs James: And that clarity will be there?

Huw Irranca-Davies: Yes.

Q15 Mrs James: Educational policies have been moving away from “special provision” and more towards developing the capacity of mainstream

settings. The proposed Order would give the Assembly powers in respect of additional needs, without overall control of mainstream provision. Do you think this would create an incentive for the proliferation of “special” provisions or procedures in Wales?

Huw Irranca-Davies: No, not necessarily, on the contrary. This broader definition subsumes within it the traditional understanding of special educational needs as set out in the Education Act 1996 and in the SEN Code of Practice for Wales. Rather than it being restrictive or proscriptive or indeed in any way a backward step, it is actually a significant step forward because it embraces those who at any point may require greater support than the majority of their peers. For instance, an issue that is currently receiving greater prominence in Wales and the UK is the influx of children of migrant workers. Clearly for many of them their “additional learning” is acquiring competence in the English or indeed the Welsh language. It would be these types of groups that could be embraced within this Order in Council. That is why the way it is defined is the appropriate way for the Welsh Assembly Government.

Q16 Mrs James: An Order needs to define its scope in terms of categories that are well-established in existing legislation and also needs to make sure that they do not clash with existing Westminster legislation. Are there any implications in the Assembly having competences in relation to categories defined differently from those used by Westminster? I am talking about how we define them and how the Assembly would define them.

Huw Irranca-Davies: I accept what you are saying, Mrs James. This definition has been adopted by the Assembly to capture a wider range of individuals than those who would be captured under the definitions used by the Disability Discrimination Act 1995 and by the World Health Organisation. Based on future Assembly measures, different categorisation could result in different policies and services in England and Wales and this is part of devolution. Before UK Cabinet clearance was sought the Department for Children, Schools and Families’ officials were involved in detailed discussions of this Order and they are content with the legislative competence being devolved. I look to my left and there is a head nodding! In addition, in many areas the Assembly Government and relevant Whitehall departments meet regularly to discuss cross-border issues and this Order in Council will be no different. So, yes, there might well be differences through the definition but that is a part of devolution. It is not necessarily something to be afraid of because of the good, very close working relationships between officials in Whitehall and officials in the Welsh Assembly.

Q17 Mr Crabb: The definition in the Order refers to target populations of learners, rather than to education and training institutions or settings. Can you see any point at which the measures introduced

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under the Order might have implications for those institutions or settings where the Assembly does not have competence?

Huw Irranca-Davies: Once again, Mr Crabb, I would not want to speculate on measures being brought forward. I do not see that as the role of the Wales Office. We want to be satisfied that there is proper scope, proper intention, proper values within this and it is appropriate, but not necessarily to bring forward measures or to speculate on them. However, it may be helpful to say that this Order in Council is focussed on the person and then the bodies or organisations that interface with that individual. So this competence covers both individuals with additional learning needs and organisations that provide education and training for them. As I remarked earlier, the Assembly consider that this scope is sufficient to carry out all the necessary reforms of additional learning needs provisions for Wales. However, sections 9, 10 and 11 of the Explanatory Memorandum make clear the existing collaborative approach—and this is crucial—between the Assembly and stakeholders to policy making in this area and we see no reason at all why this will not continue after this Order in Council has been made. What sort of organisations? Well, anyone involved in providing support to those with additional learning needs and education and training could be subject to the regime established by the measure, but the Order itself does not give legislative competence *per se* over charities themselves. Any of those organisations interfacing with the individual with additional learning needs would potentially be covered by this. Do not take me down the road of speculating on measures.

Q18 Mr Crabb: You mentioned charities there. Something like a Young Offenders Institution could be affected by a measure introduced in this Order. Why do you say you are not speculating on specific measures that might arise? Somebody must be doing some thinking about what the implication is going to be.

Huw Irranca-Davies: Whilst I hesitate to speculate on the exact measure, I think it is right to focus again on what it is this Order in Council is about. It is very specifically on the individual that would benefit from additional provision in terms of additional learning needs. If that individual were in one setting or another they could come within the scope of this depending on what organisation there was providing the service, but it is all focused on education.

Q19 Mr Crabb: Would the Order enable the Assembly to pass legislation in respect of others working in educational settings or delivering support which facilitates learning, eg youth workers, social workers and probation workers?

Huw Irranca-Davies: No, not directly, because it is focussed particularly upon education and the individual who is being supported in some way through additional learning needs, that is where the focus is, as opposed to saying *carte blanche* all these organisations come within a prescribed list. That is a very important difference. So it does not extend the

remit to say you will effectively take on board responsibility through this Order in Council for every single organisation out there that interfaces. If we come back to the focus of this Order in Council, it has to be the individual with the additional learning needs and then what organisations do to interface and that could be in different settings.

Q20 Mr Crabb: In her supplementary memorandum the Assembly Minister confirmed that able and talented children who currently fall under the SEN regime would come within the scope of the LCO, but those who currently do not fall under the SEN regime would be excluded. Is that your understanding as well?

Huw Irranca-Davies: Our understanding is that those who fall within the SEN regime would be included within this, but it gives wider breadth as well to satisfy the identified requirements of the Welsh Assembly Government. In terms of the more able and talented, the scope of the proposed Order as it is drafted does not cover those children defined as more able or more talented who currently do not fall within the SEN regime. The definition of SEN excludes gifted children. However, able and talented children who currently also fall within the SEN regime do come within the scope of the Order.

Q21 Mr Crabb: Do you think gifted and talented should be within the SEN regime?

Huw Irranca-Davies: It is not for me to speculate on this.

Q22 Mr Crabb: You must have a view.

Huw Irranca-Davies: It falls some way outside the scope of this Order for me to speculate on it. You are tempting me, I know, but I would hold back.

Q23 Mr David Jones: Let us turn to the definition of the expression “disability” contained in the draft Order. According to the draft Order a person has a disability for the purpose of this matter if that person has a “physical or mental impairment”. That is as wide a definition as you could possibly imagine, is it not?

Huw Irranca-Davies: Yes.

Q24 Mr David Jones: Let us say for the sake of argument that a child, unfortunately, has an accident which results in his losing the little finger of his left hand. That would amount to a disability for the purposes of this definition, is that not right?

Huw Irranca-Davies: The Order as it stands defines, as you rightly say, a person with a disability as a person who has a physical or a mental impairment. This is a broader definition than that set out in the Disability Discrimination Act 1995. That definition in the DDA provides that in order to be disabled a person must have a physical or mental impairment and that that impairment must have a particular consequence, namely a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities. The Assembly believe that if this definition was adopted it would not capture all those persons that they would wish to

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capture within this Order in Council. By leaving the term physical or mental impairment unqualified there is a belief that the courts will look to the World Health Organisation's definition of disability for assistance in interpreting the term. That WHO definition is "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". This definition has been a feature of case law under the DDA 1995. It was decided that it was not appropriate to simply replicate this WHO definition within the Order as understanding and definitions of disability are constantly evolving. Thereby, by leaving the definition open—and I do take your point that it is wider—it can operate in the future by reference to developments in the understanding of disability. So there is a clear intention behind the reasons why it is left.

Q25 Mr David Jones: It can also result, can it not, Minister, in a proliferation of litigation?

Huw Irranca-Davies: Certainly not, not only the Welsh Assembly Government officials but DCSF, also, have been involved in the discussions around this, and they are content that with reference to existing WHO definitions and, also, the evolving definitions of disability, that this is the appropriate way to go forward.

Q26 Mr David Jones: It seems odd that a devolved body should operate by reference to a wider definition than, if you like, the mother Parliament.

Huw Irranca-Davies: I would disagree because in the earlier comments that I made, Mr Jones, I made reference to the detailed, if you like, needs analysis that the Welsh Assembly Government has already made—the extensive consultation and the identified priorities they have—and this wider definition would suit those priorities more than the existing more restrictive definition. However, it, also, as I say, has the singular advantage that it will allow changes over time as well, as the definitions of what is a disability will evolve.

Q27 Mr David Jones: It is effectively, therefore, in legislative terms, a blank cheque.

Huw Irranca-Davies: No, I would disagree. Certainly, as I have already mentioned, you would refer to existing definitions, including that of the WHO, but, also, to evolving definitions from other organisations to establish what is meant by disability. You may be right, Mr Jones, in that that would have to be tested and proved, but certainly the Welsh Assembly Government and Whitehall are content that this allows the flexibility that Welsh Assembly Government Ministers are looking for.

Q28 Mr David Jones: It gives them total flexibility.

Huw Irranca-Davies: Not total flexibility because they would have to have reference to existing, whether it is WHO or other, definitions that are currently turned to for reference on the definition of disability. So it is not a complete blank cheque, as you said.

Q29 Mr David Jones: That is not right, is it? They do not have to have reference to the WHO definition because that is not the definition that is applied in this LCO.

Huw Irranca-Davies: No, the definition within this, as a person who has a physical or mental impairment, is wider.

Q30 Mr David Jones: Someone with a squint? Someone with a limp?

Huw Irranca-Davies: Well, if I refer back to the WHO definition: "Any restriction or lack resulting from impairment of ability to perform an activity in a manner or within the range considered normal for a human being".

Q31 Mr David Jones: You keep referring to the WHO definition but that is not the definition that is actually contained in the draft LCO, is it?

Huw Irranca-Davies: Tempted as I am to go further and discuss this in detail here in this Committee (and it is an interesting discussion, I will give you that) I would offer the comment that I think it is appropriate in the nature both of the spirit and the letter of devolution but, also, this Order in Council, that this is an appropriate discussion for the Welsh Assembly Government Ministers and the National Assembly of Wales to have when they bring forward measures as opposed to us trying to make that decision for them.

Q32 Mr David Jones: Again, forgive me for taking issue with you, but it is this Parliament that is devolving the powers; it is, therefore, this Parliament that has to be convinced that it is an appropriate level of devolution. Is that not right?

Huw Irranca-Davies: Entirely.

Q33 Mr David Jones: However, at the moment, what is being proposed is a devolution of powers by reference to the widest possible definition that you could imagine, even wider than the WHO definition. Is that not right?

Huw Irranca-Davies: The definition is wider than would normally be used, but it is there for a purpose, and the purpose includes that ability to develop over time to suit the changing definitions that there have been over many years in terms of disability, but, also, to suit the clearly identified priorities and issues within Wales. As such, that would certainly necessitate the elaboration of these definitions being made at the National Assembly for Wales, rather than here, but we are certainly content, and Whitehall departments are content, that this is an appropriate scope to be passed down to the Welsh Assembly.

Chairman: I will allow one more supplementary. It is not coming?

Q34 Mr David Jones: It is coming, actually, yes. There would be nothing to prevent the Welsh Assembly, would there, if in fact a more restrictive definition were applied, from coming back to Parliament at a later date to seek to amend that definition, if it thought appropriate?

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Huw Irranca-Davies: That they would bring back a measure to actually amend this?

Q35 Mr David Jones: If, in fact, a more restrictive definition of disability were applied, there would be nothing to prevent the Assembly, at a later date, were it to consider it appropriate, from coming back to Parliament to seek to have a wider definition.

Huw Irranca-Davies: Yes. There is nothing to preclude that happening, without a doubt, although you would have to take into account the legislative timescale. It may be worth just adding one, final comment on this. As I said at the outset, the Lords Constitution Committee, who have looked at this, are content also with the scope of this, including what is on the face of the Bill.

Q36 Mr Martyn Jones: Staying with definitions, Minister, can you give a precise definition of what is meant by “persons who have a greater difficulty in learning” as used in the Order? In particular, would the definition cover people who do not have a learning difficulty but only because they have support in terms of, say, cochlear implants, or something of that nature, and (I think you have already touched on this) extremely bright children? If they are defined as being SEN then they would, but perhaps you could define it.

Huw Irranca-Davies: Mr Jones, I may be able to be of some help to you and give some indication, although, again, I would not want to give an exclusive A-Z list. The scope of the proposed Order is intended to cover, for example, persons in Wales of any age, provided that they are in receipt of education and training and have either a greater difficulty in learning than the majority of persons the same age as those persons and/or somebody with a disability. This does exclude, I have to say, securing or facilitating employment, so older people could well fall within the parameters I have just said within that scope. The Order is also broadly drafted to encompass all persons with a disability. So, for example, for the purpose of Matter 5.17 a person has a disability if that person has a physical or mental impairment. Now, a sensory impairment is a physical disability. Such persons would come within the scope of this Order in Council providing that they receive education or training. So there are a couple of examples of the breadth of the type of individuals who might be covered within this Order in Council.

Q37 Mr Martyn Jones: There is still a question over the definition. You did not actually touch on people—and, again, not just children, I suppose—who do not have a learning difficulty but only because they are receiving support in some other way. Would they be covered by that definition? I think that is the question.

Huw Irranca-Davies: This is where the scope of the additional learning needs, which subsumes within it the SEN regime, does come into play. The person must have a greater difficulty in learning than the majority, and in addition that greater difficulty must

be of a particular character in that it must be significantly greater than the difficulties of the majority of people. So that does allow for that—

Q38 Mr Martyn Jones: It is subsumed in the other definition?

Huw Irranca-Davies: Yes, indeed.

Q39 Mr Crabb: Minister, you are probably aware of the 2004 Scottish Education Act, which used the phrase “additional support needs” as a particular definition in addressing similar issues. Does the Scottish definition of “additional support needs” catch individuals who would not be caught under this Order? If so, should the Order here be broadened to cover all those with “additional support needs”?

Huw Irranca-Davies: The Scottish model, as you quite rightly point out, is different. This particular Order is based on Welsh objectives, as I have stated, and seeks to devolve the competences that the Assembly feels is appropriate and asked for. I know that colleagues in the Assembly feel that given the different ways special needs is funded and organised in Scotland, their model was not necessarily appropriate in Wales. We have always said that all of these legislative competences should be conferred for a purpose. I know that Assembly Ministers are concerned that by expanding this Order to deal with children suffering from “emotional difficulties” as the Scottish model does, for example, they could lose or dilute the prime purpose for acquiring these powers. So the very idea of powers for a purpose, an identifiable purpose which has been well justified within the explanatory memorandum, to simply lift the Scottish model and plonk it down in Wales would, actually, dilute, or risks skewing away from, the purpose for which these particular powers are being sought.

Q40 Mr Crabb: A definition which would facilitate support for—I do not know—children who are the victims of bullying or suffered a bereavement—trauma of that kind—you feel would be a dilution in the Welsh context?

Huw Irranca-Davies: It is a different approach, and whilst Welsh Assembly Government Ministers did look at the Scottish model in quite some depth (they were content that the very specific purposes for which they were seeking this, the areas to be covered of extending it to the additional learning needs—that was the purpose behind seeking this legislative competence that they have gone for), there was a concern that they did not want to add to it, broaden it or take simply in block the Scottish model, because that did not suit what they were intending to do with this particular Order in Council.

Q41 Mr Crabb: You do not feel this is a case of exceptionalism for exceptionalism’s sake?

Huw Irranca-Davies: Not necessarily. It is worth saying, Mr Crabb, that both from this Committee and from all the players involved—the Welsh Assembly Government Ministers, the NAW, ourselves in the Wales Office and Whitehall—this is

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very much a learning process, but one of the things that we are rapidly coming to grips with is, as each Order in Council comes through, recognising that it is within an appropriate degree of narrowness for a specific purpose, and that the justification is there for seeking this particular power. Certainly, in this particular Order in Council, we are very content that there has been a very good dialogue on that, and whilst you could always go further—you could always go wider—would you go wider for a particular reason or simply because you could do it? I think this is the right way of doing it, saying: “Here is what we are seeking; these are the competences we need.”

Q42 Mr David Jones: Just briefly, Minister, you refer to “narrowness” and operating for a specific purpose, but this is not a narrow LCO; this is a very wide LCO, and is not operating for a very specific purpose that has yet been identified because you are unable to assist the Committee as to for what purpose it is to be used.

Huw Irranca-Davies: I would disagree. Maybe I was not sufficiently clear before, but certainly the assessment that has been done of the deficiencies currently within “additional learning needs” and within the SEN regime are quite explicit within the explanatory memorandum. As such, as I have said before, whilst it is not for me to suggest the individual measures, there is a fairly clear indication of what this will be used for, and that is different from the point that your colleague, Mr Crabb, made, which is: “Why not take a wider approach to it?” That is the very reason why this is not overly wide; it is for a very specific, identifiable need: Wales priorities and Wales issues.

Q43 Mr Martyn Jones: How would measures brought forward under this LCO take account of Welsh-domiciled learners educated in England and English domiciled learners educated in Wales? This does happen in areas like mine, as you are probably aware.

Huw Irranca-Davies: Yes, indeed; cross-border issues. The 2006 Act specifically imposes a prohibition upon Assembly measures having effect other than in relation to Wales. The implication of any proposed cross-border cases caught by any measure brought forward will, therefore, have to be carefully considered on a case-by-case basis by Welsh Assembly Government policy officials who will consult their respective policy counterparts in England at the time the measures are drafted. So the process that we are going through here today is not the end of it, in that when measures are brought forward there will also have to be close consultation with Whitehall colleagues and the Welsh Assembly Government colleagues to make sure it is effective for those individuals who might be caught by those cross-border issues.

Q44 Mr Martyn Jones: I think you would have to have a crystal ball to answer this one, Minister, but if legislation and policy in England and Wales diverge, as they have already (and under this

legislation likely to diverge even more), what issues would arise in relation to the equality of provision between the two countries?

Huw Irranca-Davies: In some ways you are right, Mr Jones, in saying that we are tempted into speculation with a crystal ball. What I can say quite clearly is that in the whole process up to this point, and beyond as we go forward, DCSF are not only currently content with the scope and the ideas behind this Order in Council but, also, will continue to be fully engaged. Whilst we have had cross-border issues in other areas, and we have this Whitehall/Welsh Assembly dialogue going on, that will continue to happen. There is no worry from this end that there will not continue to be that sort of constructive engagement to make sure that cross-border issues can be ironed out.

Mr Martyn Jones: I hope that is the case. Thank you.

Q45 Chairman: Mr Fulton, could I ask you a question concerning a statement made by the Minister, Jane Hutt, in her evidence before the Assembly Committee, in which she refers to child carers as being treated as having a learning difficulty because of their circumstances rather than their specific ability. You have obviously looked at that evidence and what she is stating seems to be very laudable and enabling. Do you think that there could be cross-border issues there? Have you consulted with other colleagues in other departments about this?

Mr Fulton: Certainly in England child carers would not be considered to have Special Educational Needs or a learning difficulty just because of their position as child carers. There could be differences in interpretation there but, as the Minister has just said, as new measures come forward then there would be discussions between officials in England and Wales about how those different interpretations might affect practice.

Q46 Chairman: Though it is in the nature of devolution that it is a two-way process; it is not just that we will be learning from you but you could well be learning from us.

Mr Fulton: Certainly, certainly, yes, indeed.

Q47 Mr David Jones: Minister, what budgetary implications might result from the proposed LCO?

Huw Irranca-Davies: I am pleased to say that there are no budgetary implications arising as a result of this Order. Any budgetary implications will be a result of subsequent Assembly measures, and these would have to be met fully from the Assembly budget in the same way as any existing policies in the area of “additional learning needs” must be. So directly out of this Order in Council there are no budgetary implications.

Q48 Mr David Jones: You are satisfied that the Assembly has control of all the budgets necessary to support any measures it might make pursuant to the LCO?

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Huw Irranca-Davies: Indeed. I have no reason to express any concerns on that. It will be for the Welsh Assembly Government Ministers to fund any implications from this, and they are decisions that they must reach.

Q49 Mr Crabb: I have a supplementary, Chairman. If, as many members of the Assembly, I think, wish, the budgetary process for Wales moves towards a more needs-based formula, away from Barnett, and we are applying a very broad definition of learning support needs in this, do you foresee that leading to greater calls for increased expenditure in Wales?

Huw Irranca-Davies: Tempting as it is, once again, we are into the realms of some speculation here, which falls beyond this Order in Council. As you are, no doubt, aware, Chairman, and Mr Crabb, the

Welsh Assembly Government is currently carrying out a review in Wales of the Barnett formula, and I am content that they are carrying on with that.

Q50 Chairman: Could I thank you, Minister, for the thorough and comprehensive way in which you have answered all our questions, and thank your colleagues alongside you and behind you for their assistance as well. We will be writing to you with a series of questions, in the light of our discussions today, very soon, and we look forward to meeting you again before this Committee.

Huw Irranca-Davies: Thank you, Chairman. Could I thank the officials who have worked so very hard on this, and thank you, as a Committee, as well. I do look forward to this being the first of many appearances in front of you. Thank you very much.

Taken before the Welsh Affairs Committee

on Wednesday 21 November 2007

Members present

Dr Hywel Francis, in the Chair

Mr Stephen Crabb
Nia Griffith
Mr David Jones

Rt Hon Alun Michael
Albert Owen
Mark Williams

Witnesses: **Ms Jane Hutt AM**, Minister for Children, Education, Lifelong Learning and Skills, **Mr Alan Lansdown**, Head of Additional Needs and Inclusion Division, and **Mr Huw Davies**, Senior Welsh Legislative Counsel, Department for Children, Education, Lifelong Learning and Skills, Welsh Assembly Government, gave evidence.

Q51 Chairman: Good afternoon and welcome to the Welsh Affairs Committee. For the record could you, Minister, introduce yourself and your colleagues, please?

Ms Hutt: Thank you very much, Chairman. I am Jane Hutt. I am the Minister for Children, Education, Lifelong Learning and Skills in the Welsh Assembly Government. Alan Lansdown is the Head of Additional Needs and Inclusion Division in my Department for Children, Education, Lifelong Learning and Skills, and from our Senior Welsh Legislative Counsel, Huw Davies.

Q52 Chairman: Thank you very much. Could I at the outset thank you, Minister, for coming to see us, particularly at such short notice. It is an indication, I believe, of the way in which we wish to work as closely as possible. The first questions I have relate very much to process. Personally, as Chairman of this Committee, I am very keen, as I am sure you will appreciate my colleagues are, that we do the very best we can and get things right. We are in very much a learning situation at the moment, appropriately, given what we are studying. Could I first of all ask you, why did the Welsh Assembly Government publish proposed LCOs before the clearance process with Whitehall was actually complete?

Ms Hutt: Thank you very much, Chairman. I wonder if I could just say in response to your welcome that I am also very pleased to be here this afternoon. I think I am the first minister to come before the Welsh Affairs Committee in relation to one of our new Legislative Competence Orders, and I am very delighted to be here to discuss the proposed draft Additional Learning Needs Order. I do hope we will have the opportunity to talk a bit more about the process, but in response to your direct question, as you recall, we did come into government following an election in May and it was very clear—and you will know the history since May—that the person who had been the First Minister since May, Rhodri Morgan, sought to present a draft legislative programme to the Assembly as a result of the election and as a result of the fact that the new powers were coming into being under the Government of Wales Act 2006. So indeed in June he did then present to the Assembly—and

indeed it was something which was requested across-party, but the Government wished to give it—a list of six draft Legislative Competence Orders. Then, of course, in terms of the timescale, ensuring that before we then brought them forward further to introduce them for pre-legislative scrutiny we then sought the approval of Whitehall. I think this is because this is the start of a new process with the new powers, which you will appreciate meant that we were anxious to not waste time in terms of being able to start the process. Also, of course, in terms of this particular Legislative Competence Order we knew there was a lot of knowledge and understanding. We had already ensured that our colleagues in Whitehall at official level had had sight of the proposals which would lie in the draft Legislative Competence Order and we sought to in fact move ahead with the one LCO which we thought would get the smoothest passage to take us forward. I hope that does respond to your question fully, but of course I cannot see that this will happen again in terms of timetabling because through our legislative programme we have been able to go to Whitehall and get that support, recognition and approval timetabled as we present the LCOs.

Q53 Chairman: You will recall from our report that we expressed a strong desire as a Committee to work as closely as possible with Assembly committees, but following on this issue of process do you actually share our concerns (which I suppose is the right word to use) that the first two scrutiny committees of the Assembly have completed their actual evidence-taking before we can actually begin ours and that this did not, perhaps, make for good joint working at the outset?

Ms Hutt: I recall, and in fact it was very good to see you, Chairman, at the first meeting which was held of the scrutiny committee in the Assembly. I had a former role as Minister for Assembly business and we had discussions about how we could ensure that we did work together and that we did, where possible, jointly scrutinise. I have to say that I am very pleased that you and the Committee seek to jointly scrutinise future Orders with Assembly Members. At the moment it is in parallel, but I do believe in terms of the process that the fact that the

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Assembly committee got on with the job—which is what we were expected to do—as soon as we had the opportunity in setting up that committee was appropriate. But I think there is a real commitment from us to work with you in terms of scrutinising future Orders jointly. I do not think the parallel process and the fact that perhaps the Assembly committee was ahead of your Committee in starting the work has been a disadvantage to you. I would not imagine so, because I think many of the stakeholders and the evidence given has been shared not only with our committee but with your Committee as well. There are pragmatic issues of timetabling. You have priorities as well in terms of your inquiries, but of course with our new powers we can set up a committee, and that committee has got on with the work. I hope now that they are coming together in terms of parallel thinking and scrutiny.

Q54 Chairman: So you think these early stages are more exceptional and an aberration rather than a developing pattern?

Ms Hutt: I hope that in the future there will be—and before May we had some good examples with the Transport Bill—joint scrutiny with your Committee and I cannot see any reason why we cannot move forward on that basis. Just going back to the issue about our timetabling and in terms of how we are taking forward this first Order, we did feel we wanted to move as quickly as possible. We had genuine cross-party support for this Legislative Competence Order and also we had very good cooperation between Cardiff and Whitehall. It has gone very smoothly as far as official work is concerned and it has been very encouraging in a sense not just with DCSF but with the Ministry of Justice as well. It has been very positive. As far as we are concerned, I hope today I can give you a very strong indication from the Welsh Assembly Government that we want to be supportive. We want good working relationships to develop and we want this process to work for you as well as for ourselves in terms of ensuring that we can seek appropriate legislative competence in these areas, and of course a very important policy area today is additional learning needs.

Q55 Mr Crabb: Good afternoon, Minister. When the Parliamentary Under-Secretary of State appeared before this Committee on 7 November he described this Committee's role as being "to ensure that there has been an established identifiable need for bringing this Order forward and that the powers are being sought for a particular purpose." Can you please assist the Committee on both those two points, because it was not clear, I think, to a number of us on the Committee really why the Welsh Assembly Government was asking for additional powers after the Parliamentary Under-Secretary had given his presentation?

Ms Hutt: Thank you very much, Mr Crabb. I have obviously read that transcript with great interest and it is entirely consistent with the new powers available under s.95 of the Government of Wales Act. It does take us, obviously, on the next step on the road to

devolution, but as to why the additional learning needs should be the first draft Order to be considered there is a number of reasons, but the principal one is that it was the key recommendation of the committee, the National Assembly former Education Lifelong Learning and Skills Committee, which undertook a policy review of special education needs and they strongly recommended that the Assembly Government should seek the necessary powers to have full legal competence for statutory assessment for special and additional learning needs. That was the view which was unanimously endorsed by the National Assembly in plenary. The fact is, if we look then at how we could seek those powers, the Order in Council process introduced by the 2006 Act has provided us with that opportunity to seek powers. There was not an appropriate UK Bill, for example, forthcoming—and I know the Parliamentary Under-Secretary of State commented on this—including educational skills where you could have used a framework approach as a route, which of course we are using in relation to seeking legal competence in other areas. I think the approach we have adopted is entirely appropriate under the new powers of the Government of Wales Act, and also we feel we need to respond as timeously as possible to that very important policy review, but we do need, as the explanatory memorandum shows, primary legislation in order to respond to those recommendations in that very important committee policy review. That is what we will be seeking in terms of the legal competence.

Q56 Mr Crabb: I thank the Minister for that reply, but there is a lot of description of the process there, the recommendation of the committee, the endorsement of the plenary, looking around for the appropriate legislative vehicle for seeking these powers, but just in a nutshell could the Minister just tell the Committee what she believes is the specific Welsh need for these additional powers? What needs will these powers help the Welsh Assembly Government meet in Wales, just very briefly?

Ms Hutt: I think it is important, again, to look at what the National Assembly for Wales would want to achieve in terms of this legislative competence and I do go back to the committee review because this gives us the clearest indications. Just to give you a couple, I think one of the important areas in terms of the legislative needs is that we want to ensure that we have got opportunities to strengthen the current statutory assessment and statementing regime in Wales. I am sure many of you in your roles as elected Members will know that this is an issue which is of great concern to constituents and that policy review on statementing recommended that serious consideration should be given to the way the current statutory assessment and statementing regime operates. This actually does link to a review undertaken by the National Audit Office and looked at the opportunity, but it would require changes in legislation. Also, I would say that the SEN Code of Practice in Wales (this is the Welsh Code of Practice) has very weak legal force, since LEAs only have to

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have regard to it, and if you compare that, for example, with the Social Services equivalent guidance under s.7 of the Local Authority Social Services Act 1970, where Social Services Departments have to comply with the guidance, we feel and the committee felt that we needed to strengthen this in terms of legal force. That is another area where we need primary legislation. I would also draw attention to the fact that the late Children's Commissioner, Peter Clarke, recommended, in terms of the SEN Tribunal for Wales, that children should be given a right of appeal to it. At the moment, as you will know, the right of appeal is only to parents and/or carers. We would consult on all of these, clearly, if they were to move forward into Measures, but I think those are three examples which came directly as a result of policy considerations by that committee where we identified we needed primary legislation and where we saw that it would be fit to then introduce a Legislative Competence Order in order to get that competence to move forward with Measures.

Chairman: David Jones wanted to ask a brief supplementary.

Q57 Mr David Jones: Where I am finding difficulty in understanding, however, is why these are specifically Welsh concerns and Welsh issues. Surely these are concerns which prevail across a UK-wide context? Is that not right?

Ms Hutt: We are here today because we have new powers to enable us to deliver for the people of Wales as a result of the Government of Wales Act, and of course I think it is totally appropriate that we should be learning from experience rather than as elected representatives. I am sure you also have views on some of the particular issues I have mentioned in terms of special educational needs. Let us also remember that we have had education and training powers devolved to Wales for many years in many aspects and that the breadth of this Order is appropriate as education and training, as I said, has been devolved. We already have wide-ranging powers and it is totally consistent with the scope of the Field in the Government of Wales Act 2006. This would give us competence over areas in education and training, but it only, of course, covers those two areas in terms of this Legislative Competence Order and we are seeking powers for a purpose, as Huw Irranca-Davies said, powers for a purpose to produce and deliver better services for those learners in Wales who have additional learning needs.

Chairman: We will come back to the issue of cross-border matters later.

Q58 Mark Williams: Minister, Mr Crabb's question has slightly pre-empted mine in that I was going to ask if you could give us a more precise indication of what the Order was going to be used for. You have answered that to some extent. Is there anything you want to add to that, firstly? One of the problems I think this Committee has had is that in our deliberations in assessing the appropriateness of the Order, up until now at least, we had at best a very vague idea of what the Assembly sought to achieve,

and I have to say that even looking at some of the Scrutiny Committee papers actually in Cardiff at some times, with respect to that committee, it was quite hard to identify what the objective of the LCO was going to be. Can you give us a more precise indication over and above what you have said, perhaps prioritising some of those issues you have mentioned, of what you would envisage being included in the LCO? Last week, when the Parliamentary Under-Secretary of State came here, he said that the memorandum which had been provided by WAG provided quite a good basis for guessing what Measures would be brought forward. Such a statement did not really help us in our deliberations and, to be frank, has not really inspired confidence in the system. Like you, I am a devolutionist and I support the goal behind this, but in terms of process it has not been particularly helpful.

Ms Hutt: In terms of what we are seeking, we are seeking legislative competence in relation to additional learning needs, where we see the need for primary legislation, and I recognise that for the Committee to fulfil its scrutiny role you do need to have some idea—more of an idea than perhaps we have given you so far—of what the Assembly might wish to pursue if the new power is approved, but I do turn to paragraph 14 of the explanatory memorandum, which does seek to identify the areas where it is possible. I have to say again that these are only possibilities because it will be up to the National Assembly for Wales and the Welsh Assembly Government to consider whether or not these need to be worked up into Measures. If you look back to the explanatory memorandum, I have said very clearly the proposal for these powers was made in the context of the limitations to the current settlement, which restricts the Welsh Assembly Government from tackling Welsh priorities and issues, and we have identified them. I have already mentioned three, but that is where the committee, the Assembly Members, came to us—and the whole Assembly backed this—that we needed for Welsh needs and Welsh circumstances to strengthen the competence. I think there are some very important other areas, for example when you look at the issue of advocacy—this is something we have been consulting about recently—it is very important that we do allow, for example, local dispute resolution mechanisms to be concluded before proceeding to appeal to the Tribunal. There is no statutory requirement for LEAs to provide advocacy services for children of SEN. I have already mentioned the marked contrast with Social Services. Also, there is little scope for the Assembly by regulation to confer additional specific duties upon LEAs or anyone else in relation to special educational needs. There have been many independent reports, not just through the Assembly but also I have mentioned the National Audit Office, as well as from other organisations and stakeholders. One of the things I was going to say in fact, Mr Williams, to the Chairman is that we have had a very positive response from stakeholders—I am sure you have as well—engaged in special needs in Wales, educational, medical, the voluntary sector

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and people at the sharp end delivering services, local authorities, very strong support for what we are trying to do in terms of enabling them to deliver better services for additional learning needs, but clearly this Order is to acquire the legislative competence in order for us to be able to deliver on those aspirations for better services for those learners with additional needs.

Q59 Mark Williams: Notwithstanding what you have said about the breadth of the problem—I am a former teacher myself and I can relate to many of the issues you have identified—can you give us any more guidance as to the specific Measures, over and above the generality of the document “*The Learning Country—Vision into Action*” and the Education Committee, and again the representations which have been made to you, you would envisage being included in terms of Measures?

Ms Hutt: I was very struck when reading the contributions from Huw Irranca-Davies when he came before you because I think perhaps he was stronger than I was in saying that this is not for this at this point in time. The Measures are what will emanate from the legislative competence which the Assembly is seeking, and I do believe I have only given you an indication of what Measures could emanate from this competence. Once, of course, you have secured that legislative competence, and perhaps when we move on to questions about the scope and breadth in terms of the actual Matter which is before us, you have to remember this is about additional learning needs and training and education. It is confined to training and education, but there are huge opportunities, which I am sure you can think of, Mark, having been in education, to clarify responsibilities, to clarify criteria and purpose in terms of service, to clarify the opportunities I have already mentioned in relation to advocacy and support and rights and entitlement and to clarify the statutory duty in terms of additional learning needs. Indeed, I think there are opportunities as a result of this Legislative Competence Order which I could not possibly speculate on today.

Q60 Alun Michael: If you look at what has been said in the past, you said to the Assembly Committee that you wanted the proposed Order to be as flexible and as broad as possible and there is potentially little conflict with the assurance which was given to this Committee in an earlier inquiry that the LCOs would be focused and specific. Could you perhaps explain to us why the degree of flexibility is needed? Personally, I am pleased that you are placing such a priority on this area. It is certainly one which comes up from constituents very frequently. In relation to your last answer, for instance, will part of the role be to clarify and be more specific about the responsibilities of schools, colleges and local authorities in making sure they deliver on their responsibilities? I think my colleagues might agree that that is something which comes up quite

frequently in relation to individual case work, and if there is a focus on that I suspect you will get a round of applause!

Ms Hutt: I think that does go back to the explanatory memorandum and the fact that I have clearly identified the recognition from quite an extensive policy review of the lack of statute in relation to safeguarding and providing entitlement, and I do go back to Welsh policy development and issues where there has been a development, and indeed even pre-devolution there has been development in terms of our agenda and our needs in Wales. I think clarity is what people need, what your constituents need in terms of their entitlement when it is the statutory duties, the obligations, in relation to additional learning needs, but also there are perhaps new opportunities which we cannot speculate on today in terms of additional learning needs which may go beyond the classroom but indeed take us into those areas, for example, such as work-based learning, out of school hours learning and also the additional learning needs which many people and many young people have. I did note that there were questions, for example, about issues such as young carers in schools who are trying to manage both their educational learning and perhaps caring for a sick parent. We all know of those young carers in our constituencies. They have additional learning needs. So this is pioneering in terms of the opportunities for us to recognise the additional learning needs across that range of educational and social, and indeed I have given the example of work-based learning. I have given you a very specific range from that policy review in terms of statementing, in terms of statute for the Code of Practice for SEN and in terms of opportunities for advocacy entitlements, but of course this Legislative Competence Order I hope you will welcome as a real opportunity to test out what we can do with the statute for some of the most vulnerable people in Wales and in our constituencies.

Q61 Alun Michael: I think certainly if the clarity is then reflected in delivery, as I say, that will make the case for the whole system. Could you just help us on one thing? Do you think there are any Measures which can be brought forward in this Order which could affect circumstances which are beyond the Assembly’s sphere of competence?

Ms Hutt: I think the only one we have identified in terms of the explanatory memorandum relates to the Special Education Needs Tribunal—I am looking to my Legislative Counsel here—if we were so minded to look at that in relation to a Measure, but we would have to be very clear about the Matter we had before us in terms of the Legislative Competence Orders. I do not know whether Huw wants to clarify that point.

Mr Davies: I think the first thing to say is that we are certainly not going to be able to do anything beyond the terms of the Matter itself, and of course you have got the built-in restrictions in the Government of Wales Act. For example, the Assembly would not be able to remove or modify existing functions of Ministers of the Crown without consent of the

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Ministers of the Crown, and there are a few functions of the Ministers of the Crown which continue to operate in relation to Wales in this area. For example, the Lord Chancellor appoints the President and Panel Members of the Welsh Tribunal. So if we wanted to re-make that law and remove that function we would need the consent of the Secretary of State. Similarly, we could re-cast that law just in relation to that and replicate that function. So the points of cross-over are dealt with in the overarching structure of the 2006 Act.

Q62 Mr Crabb: Just to clarify your answer to my colleague about testing out the Orders in terms of what it can achieve in terms of devolution, do you not agree it is actually much more important for the proposed legislation to be meeting specific needs of the people of Wales than merely just testing this out as a devolutionary vehicle? That surely is not the objective of this exercise?

Ms Hutt: Those were not words which I used. What I am saying is that the opportunities which can come forth, I believe, as a result of this Legislative Competence Order will be to the benefit of the people of Wales. This is not about testing out, this is about ensuring that we can maximise the opportunities in order to benefit the people of Wales in relation to evidence. This is again going back to powers for the purpose and what Huw Irranca-Davies said in his evidence. This is about us seeking to improve our services as far as additional learning needs. We also seek to also use our Government of Wales Act.

Chairman: I apologise for interrupting you, but a vote has just been called, so I propose to suspend this sitting for ten minutes to allow Members to vote.

The Committee suspended from 4.00 pm to 4.08 pm for a division in the House.

Q63 Chairman: Apologies for that interruption. Minister, you were in mid-sentence.

Ms Hutt: I was going to go on to say that clearly we have the Government of Wales Act 2006 now and we do have new powers which were supported here. We then obviously want to ensure that we use those powers effectively and that they are powers for a purpose. I think the point also needs to be made, of course, that there are different policy routes developing in Wales, and different policy routes across the United Kingdom. Those different policy routes relate to policy areas where we can learn from each other, and indeed before the 2006 Government of Wales Act, on previous occasions where I have sat before this Committee, the very first one was in relation to the Children's Commissioner Bill, which of course was the first in the UK. Wales took the lead and now we have a Children's Commissioner in every part of the UK and also coming before this Committee in relation to the Health (Wales) Bill as well, where there were differences developing already in terms of policy prior to the 2006 Act, and we had to come to Westminster to seek those powers and join the queue for the Queen's Speech. But we have moved on from there, and that is why we are

here today with this Legislative Competence Order for additional learning needs, which we think will help meet the needs, as I said, of learners in Wales.

Q64 Mr David Jones: Can any of the policy objectives which you have just outlined be met by administrative Measures such as ministerial guidelines rather than primary legislation?

Ms Hutt: I think the point back to the explanatory memorandum is important here. I have identified areas where we needed primary powers. We already have guidance in terms of the SEN Code of Practice, but they are not in statute, whereas the Social Services equivalent guidance is. There is not enough teeth, not enough clout in terms of the Code of Practice in relation to SEN. We needed primary powers. So we have brought forward here those policy areas where we have identified that we need primary powers.

Q65 Mr David Jones: One of the concerns I have got, and I think it is fair to say other colleagues have got, is the lack of specificity in the definitions contained in the draft LCO. In fact, to be fair, your memorandum indicates that they have been deliberately drawn as widely as possible. Can you explain why you are resisting closely defined definitions so as to make the scope of the LCO absolutely clear?

Ms Hutt: We have sought to be as broad as possible in terms of definitions and I think it might be helpful if I did explain in detail our thinking on this Matter. I know that Huw Irranca-Davies also addressed this issue when he gave evidence. I will go back to s.1 of the Discrimination Act 1995, which provides that a person has a disability if he has a physical or mental impairment, and secondly 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 that illness is a clinically well-recognised illness. We have looked this up, and you will know this was brought up in a previous evidence session. The courts tend to look at the World Health Organisation's definition of "disability" in interpreting the term "physical or mental impairment". Again, I can go through what the WHO definition is, but what we wanted to ensure was that we had the widest possible scope. In terms of the definition, again we need to be conscious that the WHO does cover a much wider range of individuals in the WHO definition than the DDA definition, but we want to make sure that we open this up to ensure that anybody with additional learning difficulties in relation to education and training could be included as a result of this Legislative Competence Order. I think it is a matter for the Assembly to decide on detailed definitions when it comes to Measures, but the fact is that the LCO gives us the scope to decide and they are powers of the legislature. They are not powers for

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ministers, so it is giving us the broadest scope and I have already given some examples of who that would include.

Q66 Mr David Jones: You have mentioned the WHO definition, but with respect the proposal here is not the WHO definition. What you seem to be suggesting to the Committee is that you should rely upon the courts in case of an emergency. Surely it is better, is it not, simply to have a properly defined expression (defined in this case, I would suggest, by reference to the WHO definition) rather than leaving the matter open?

Ms Hutt: If I can go back to what we are talking about in terms of the Matter, it is about greater difficulty in learning, and I think again if we look at Matter 5.17, education and training for persons who have a greater difficulty in learning than the majority of persons of the same age as those persons and persons who have a disability, and a person who has a disability for the purposes of this Matter if that person has a physical or mental impairment. I think it is important that we recognise this is about ensuring that this Competence Order does enable people who have greater difficulties in learning than the majority to come under the scope of this LCO. Yes, we are going beyond the Learning and Skills Act 2000, we are going beyond the Disability Discrimination Act, we are going beyond the WHO definition, but it should be then for the Measures to enable—for example, would you agree that possibly a Measure may come forward relating to people with sensory impairments or autistic spectrum disorder? That could be a very specific Measure which would be within the scope of this Legislative Competence Order. If we narrow things down, then we are narrowing down the opportunity for Measures to meet some of the specific needs people have in terms of additional learning difficulties. In terms of the courts, *et cetera*, yes, there has been a lot of court cases in terms of testing definitions and we could go on to look at some of those court cases, but what we want to do is ensure that this Legislative Competence Order catches people with additional learning needs whatever the reason for that additional learning need.

Q67 Mr David Jones: The expression “physical or mental impairment” is not qualified as it is in other pieces of legislation. You have probably seen that I put it to the Minister when he gave evidence that you could, for the sake of argument, have a child who had lost the little finger of his left hand, which could not possibly have any adverse effect upon his ability to learn. Nevertheless, that child would be caught by this particular provision, is that not right? Why do you not qualify the term “physical or mental impairment”?

Ms Hutt: We do not wish to qualify it because we think then it will be restrictive, because this is about enabling us to have legislative competence and once we have got that competence then obviously Measures as appropriate, and if necessary, will be drafted and brought forward for consultation. No, we have not qualified it and it is actually recognising

that there is also a developing definition of disability. I am sure you recognise that. That is something which has come through from some of the evidence-giving we have had and a recognition that developing an understanding of disability is very important. If you look at the Matter, we are talking only about education and training. We are only talking about education and training and we are talking about people who have a greater difficulty in learning than the majority of people in the same position as themselves. That does narrow the scope.

Q68 Mr David Jones: But that is not what the draft LCO says, is it? That is not what it says.

Ms Hutt: I have just read from the Matter. Basically, no, but we are talking about education and training for persons who have a greater difficulty in learning than the majority of persons of the same age as those persons, persons who have a disability. For the purposes of this Matter it is a person who has a physical or mental impairment. I think, again, it is going to be a question of the Assembly deciding on detailed definitions in the Measures. I have given you the example of autistic spectrum disorder. I am sure there are others and in fact I recall at one of the evidence-giving sessions, scrutiny sessions, one of the Members of the Committee put it to me, “Does this mean that a young carer would have additional learning needs because of the inability to be able to attend school and be able to concentrate and be supported? Has that child got an additional learning need?” and I said, “Yes, that child does have an additional learning need in accordance with the wide definitions we are giving here in this LCO,” but it is the Measure which will test that out. It is the Measure coming forward that actually will look at the detail in terms of that definition.

Q69 Mr David Jones: Indeed, but we are talking about competence here, not the Measure. You have just mentioned the question of the definition of “disability” constantly evolving, and in fact I think I am right in saying that the WHO definition is constantly evolving. Why not simply therefore attach a definition to the expression “disability” which is that of the WHO from time to time?

Ms Hutt: We think that would be too restrictive. If I could perhaps go back to the issues about the WHO? I did not give you a full description of the issues. If we look at interpreting the term “physical and mental impairment” the courts tend to look, as I have said, at the WHO’s definition and it defines “disability” as “any restriction or lack resulting in 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 of normal day to day activities, as required by the 1995 Act, of course the WHO definition does capture a wider range of individuals, but it is important to stress that we have not adopted the WHO definition, because if we 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

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category of disabled people. So you can see that we do not want to be trapped by a WHO definition which might change, because once we put a definition down that is it.

Q70 Mr David Jones: Forgive me interrupting you, but what I put to you was that you might possibly adopt the WHO definition from time to time, so that as the WHO definition evolves so would the competence evolve.

Mr Davies: Could I just intervene? If we did that, what would happen then is that the WHO would be deciding what the competence of the Assembly is and not Parliament.

Q71 Mr David Jones: But at the moment it is completely opaque.

Mr Davies: No, it is not opaque, it is broad and quite deliberately broad, so Parliament decides.

Ms Hutt: And the Assembly decides.

Q72 Mr David Jones: It is as wide as you could imagine?

Mr Davies: Yes, but it is for Parliament and the Assembly to decide whether or not that is appropriate.

Mr David Jones: That is right.

Q73 Mr Crabb: Minister, you told the Assembly Committee, “You might ask why we do not use the WHO definition, but we would be constraining ourselves.” Do you not think the greater clarity and certainty which that would bring would be a worthwhile trade-off? There are benefits from having a greater specificity in the legislation, is there not?

Ms Hutt: Not if it then actually reduces our competence. I think it does go back to the answer which David agreed with, that this is for Parliament and the Assembly, not for the WHO, in terms of definitions to decide whether we have the competence. So we are looking for as broad a definition as we can. In fact, if you have read the transcripts, we have had quite robust discussions about this because there is an issue emerging as to whether we have gone broad enough, and we might come on to this in terms of issues around, for example, emotional difficulties. We think that would take us too broad. If you have emotional difficulties and you have additional learning needs, yes, but if you just have emotional difficulties and you put that into the face of the Matter, then you are really broadening this out beyond the purpose of the LCO, so there does need to be that scrutiny in terms of have we got it right. You obviously recognise it is very broad. Some might say that it should be broader in terms of bringing in other categories. We do not think, in terms of emotional difficulties, that would be appropriate, but it does go back to the fact that the detail will come in the Measures which come forward. We are looking way ahead in terms of what Measures may emerge. We have brought forward a Legislative Competence Order, an Order which

gives us the powers to deliver what was in that committee policy report in terms of special educational needs—and that is what your starting point was—to make sure that we had the competence to be able to then come forward with Measures where we know we need primary powers.

Chairman: We will come back then to cross-border issues.

Q74 Nia Griffith: If we could perhaps broaden out the discussion a little bit on the cross-border issues, and if I could just perhaps put this into context. You have quoted some very good examples of where Wales has led the way, and obviously people therefore praise the Welsh Assembly Government for doing so. Conversely, people can become very upset if they perceive that something is happening over the border which they feel offers a better deal than what they have, and I think the Welsh Assembly Government needs to be very careful about being different for the sake of being different. It has to be absolutely certain that being different is worthwhile. What I would really like to ask you about is, I have had a number of constituents coming to see me very concerned because they think that children may be losing the statements which they currently hold and I know that their next agenda is to compare it with what the situation would be in England. I just wonder what sort of preparation you have got in terms of how you will cope with that whole issue.

Ms Hutt: This is very important because it is not having Welsh policies or Welsh laws for the sake of it. Clearly, in terms of cross-border issues it is critical that we do get this right. There is a prohibition in the Government of Wales Act of Assembly Measures having effect other than in relation to Wales, so this would relate to children and learners in Wales, and of course we would have to look at any Measure on a case by case basis in terms of proposed cross-border issues. That is where we would have to ensure that Welsh Assembly Government policy officials are consulting with respective policy counterparts in England if this should arise. I think this is how we do it already.

Mr Davies: We do it already, yes.

Ms Hutt: We do it in relation to not just education but health issues, where there is a divergence of policy. I hope that reassures you. It is not just a point of principle, this is about responding to Welsh policy development and Welsh needs, but it is also to safeguard that the Government of Wales Act provides that prohibition in terms of having an effect on anyone outside of Wales and then having this agreement about cross-border on a case by case issue.

Q75 Nia Griffith: Perhaps we could just take it a little bit further then. In the Education Act 1996 we have the phrase “significantly greater difficulty in learning” so how exactly does the term “greater difficulty in learning” differ from this?

Ms Hutt: This goes back to the fact that we have drafted this broadly to give us flexibility in terms of

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Measures, in terms of additional learning needs, but it is additional learning needs which do not necessarily amount to SEN, as you say, for the purposes of the Education Act 1996. The Learning Skills Act 2000 talks about “significant learning difficulties” so we want to have that flexibility to benefit those people who do not fit in the SEN or the Learning and Skills Act’s, “significant learning difficulty”. That is again about flexibility. What do we mean about the greater difficulty in learning? It is about the greater difficulty of learning in the majority, and also we are saying that that greater difficulty must be of a particular character in that it must be significantly greater than the difficulties of the majority. We would not have that flexibility under the Learning and Skills Act, and indeed that is why we do not have the word “significantly” in the LCO, and we would not have it, of course, in terms of the Education Act, which would restrict us to just “special educational needs”.

Q76 Nia Griffith: You feel that “greater difficulty in learning” is more precise than just having the term “difficulty in learning”?

Mr Davies: Can I just come in there? I think the two things do not quite fit, because they are doing two very different things. The definition in the 1996 Act is imposing a regime which has direct application throughout England and Wales and the thresholds and definitions have been set at that particular level. What we are looking at in the Matter itself is something which describes the outer edges of power for the Assembly to decide exactly how it might frame the sorts of definitions and thresholds set out in the 1996 Act. The two pieces of legislation are doing quite different things. The 1996 Act is setting out the regime; the Matter is just simply describing the outer edges of the Assembly’s power. So when the Assembly does come to make the Measure, then its detailed provisions will set out precisely what that regime is in Wales and where the thresholds, limits and definitions are set of the kind you mentioned from the 1996 Act.

Q77 Nia Griffith: You mentioned the Order covers those whose difficulties in learning arise from their circumstances. Are there ways in which we would understand what the limits to those circumstances are?

Ms Hutt: I know a number of questions came forward from this Committee about particular circumstances. We are talking about education and training, so that is the parameter of the policy area, and we are talking about greater difficulty in learning and explained why this is broader. I think in terms of the circumstances I have said that the Order would not only cover persons whose learning difficulties arise from their ability to learn but also persons whose need for support arises from their circumstances. I have used the young carer quite a lot as an example of that. I think basically it does go back to confirming that we are talking about the greater difficulty in learning which can be for any reason whatsoever.

Q78 Nia Griffith: So would you actually see that the reference to “persons who have a greater difficulty in learning” would actually supersede the 1996 Education Act definition of “special educational needs” for the purpose of the Assembly Measures?

Ms Hutt: Yes, it would, would it not?

Mr Davies: It will be for the Assembly to decide precisely what sorts of definitions it wants to impose. The Assembly could, if it wanted to, re-cast the system so that it looked something like the Scottish system or something quite different within the boundary set within Matter 5.17.

Q79 Alun Michael: Could I ask about travel arrangements specifically, Jane? I think you probably agree with me that travel arrangements can make a tremendous difference in terms particularly of getting access to appropriate education and appropriate training, and therefore can have a particular significance in this field. It is one of the reasons why some of the more flexible travel arrangements like Wheels to Work, and things like that, can make an enormous difference in particular circumstances. What I wanted to be clear about is whether the arrangements are flexible enough. The Order specifically excludes travel arrangements because it is deemed that these are dealt with under another Matter, 5.10, but 5.10 specifically excludes those in higher education. I am not quite sure about the training aspect of that as well. Are the current arrangements and the arrangements under 5.10 sufficiently broad to allow the Assembly to be specific in terms of the provision of meeting individual needs? You did say to the Assembly that 5.10 could be extended in order to include travel arrangements for those receiving higher education. Is that something you are considering? Is that something you might well pursue in future?

Ms Hutt: We must be clear again that we are not precluding any Measure which makes provision about additional learning needs but also makes provision about travel arrangements. Then we would obviously use both 5.10 and 5.17 as enabling powers in relation to any Measure which might be forthcoming. But as you rightly say, at the moment this does relate to primary, secondary or further educational training in relation to Matter 5.10. We do not consider at this point in time that it extends to higher education because that is not in the Education Act 1996. This is something which, as you said, came up in the Assembly Committee and we are looking at that in terms of higher education.

Q80 Alun Michael: It would be interesting if you could let us have more information as a result of that consideration because, as I say, the danger that there could be boundaries in relation to some parts of training or of higher education would be a concern. But the fact that you are engaging with it and considering it is an encouragement.

Ms Hutt: Thank you very much. If I could perhaps say, we do identify work-based learning and work placements and extra-curricular activities as appropriate in terms of education and training.

21 November 2007 Ms Jane Hutt AM, Mr Alan Lansdown and Mr Huw Davies

Q81 Mr David Jones: Could I ask you about the Scottish model, please? The relevant legislation in Scotland defines children as having “additional support needs” for whatever reason, if they need support to benefit from education. To what extent does the Scottish model go further, or not as far as, the proposed Welsh LCO?

Ms Hutt: The Scottish approach, as you say, is additional support for learning. We have looked at that and there has been quite a lot of discussion in the committee in the Assembly about it, but actually we do not think in reality it does go further than our proposed Order. We have come to the view that in relation to those who come within the definition of having a greater difficulty in learning invariably the majority of those would also require additional support, additional support for learning. So we think the Scottish model could actually be replicated by an Assembly Measure and that in fact they are very much on a par in terms of additional support for learning and having a greater difficulty in learning. In fact, the Scottish model, as I said, could

be replicated by Assembly Measures. There are differences again in the way the Scottish Government approaches special education needs and this is something which has come up in evidence, for example the evidence which came to the committee from Estyn. One of the contributors said that Scotland is legislating for another context and there are many differences in the way that special needs are funded and in the way the relationship between local authorities and schools are managed, so it is really quite different. That legislation obviously works in Scotland in its own context. However, it would not necessarily be appropriate to assume that it would work for us, but we believe that they are very much on a par.

Chairman: Minister, I think we have completed all our questions. Can I once again thank you for coming to see us, particularly at such short notice, and also thanks to your colleagues. We look forward to working with you in the future. In the meantime, we look forward also to receiving that additional information which you promised to give us about transport arrangements.

Written evidence

Letter from Rt Hon Peter Hain, Secretary of State, Wales Office, to the Chairman

PRE-LEGISLATIVE SCRUTINY OF THE ADDITIONAL LEARNING NEEDS PROPOSED DRAFT ORDER IN COUNCIL

I am writing to invite you and your Committee to undertake pre-legislative scrutiny of the Additional Learning Needs proposed draft Order in Council. As you will be aware the Order was originally published in draft by the Welsh Assembly Government on 11 June. During the intervening period my officials have been working with colleagues in the Welsh Assembly Government to seek the agreement of Whitehall Departments to this Order. I am pleased to say that the UK Government has given its consent to this Order being presented to Parliament for pre-legislative scrutiny and I would be grateful if you could make the necessary arrangements for this to happen. I enclose a copy of the Order along with an accompanying Explanatory Memorandum prepared by the Welsh Assembly Government.

May I take this opportunity to thank you once again for agreeing to take on this demanding but important role and I look forward to working with you.

26 July 2007

Letter from the Chairman to Rt Hon Peter Hain, Secretary of State, Wales Office

PRE-LEGISLATIVE SCRUTINY OF THE ADDITIONAL LEARNING NEEDS PROPOSED ORDER IN COUNCIL

Thank you for your letter 26 July inviting the Welsh Affairs Committee to conduct pre-legislative scrutiny of the Additional Learning Needs proposed Order in Council, which I saw from your written answer was laid before the House yesterday.

The Welsh Affairs Committee has agreed to conduct pre-legislative scrutiny of the proposed Order, and will shortly issue a press notice calling for evidence and outlining the broad areas on which it expects to focus.

27 July 2007

Welsh Affairs Committee Press Notice

PROPOSED LEGISLATIVE COMPETENCE ORDER IN COUNCIL: ADDITIONAL LEARNING NEEDS

The Government of Wales Act 2006 introduced a process enabling the National Assembly for Wales further to enhance its law-making powers by a new procedure known as Legislative Competence Orders in Council (LCO).

The first proposed LCO, introduced by the Welsh Assembly Government and published on 11 June, concerns Additional Learning Needs. The Secretary of State has written to the Chairman inviting the Welsh Affairs Committee to conduct pre-legislative scrutiny of this proposed Order.

The proposed Order, together with an Explanatory Memorandum, is on the National Assembly's website, www.assemblywales.org/bus-home/buslegislation.htm

The Welsh Affairs Committee invites written submissions on the proposed Order on Additional Learning Needs, which should be received by 1 October. If you wish to submit written evidence, please send it to the following address:

by email:

welshcom@parliament.uk

or by mail:

Welsh Affairs Select Committee, House of Commons, No 7 Millbank, London SW1P 3JA.

Please head your submission "Additional Learning Needs proposed LCO".

In conducting pre-legislative scrutiny the Committee expects to focus on the proposed Order itself rather than examine the underlying policy issues or possible Measures which could subsequently be introduced under the Order. In particular, the Committee will consider the following aspects of the proposed Order:

1. To what extent might the transfer of functions proposed have wider implications for the UK budget?
2. To what extent might the transfer of functions impact on reserved functions; for example, would the transfer of functions increase regulatory burdens on business?
3. Are there any cross-border issues relating to the LCO? (Would legislation subsequently be required in England?)
4. Would the proposed LCO necessitate the formation or abolition of Welsh institutions and structures? If so, where does the legislative competence to exercise such changes lie?
5. Is the LCO request in the spirit and scope of the devolution settlement?
6. Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?
7. Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill?
8. The extent to which there is a demand for legislation on the matter(s) in question?

Concurrent to the work of the Welsh Affairs Select Committee, a detailed legal examination of the proposed Order will be conducted by the Constitution Committee, House of Lords.

The Welsh Affairs Select Committee will consider the evidence it has received at its next meeting on 9 October, and will then issue a further press notice announcing how it intends to proceed.

Dr Hywel Francis MP
Chair, Welsh Affairs Select Committee

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.

STATUTORY INSTRUMENTS

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(a) 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.

(a) (c.32).

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 to 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).

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

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

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

15. The main issues, which have been identified are:

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

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

SCOPE

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

18. 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.

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 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

Supplementary memorandum from the Wales Office

PROPOSED DRAFT ADDITIONAL LEARNING NEEDS ORDER IN COUNCIL

DISCRIMINATION BY ASSOCIATION

1. *The Assembly Minister has stated that those discriminated against by association (for example, a person with a sensory-impaired parent) fall outside the scope of the proposed Order. Is this also the Wales Office's assessment?*

The Order is 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 Order provided that they receive education or training.

"Associated" persons fall outside the scope of the proposed Order. The Order is intended to give the Assembly legislative competence to make measures in relation to Matter 5.17 which concern direct participants in education or training.

OUT OF HOURS SCHOOL PROVISION

2. *Would the proposed Order enable policy-making in respect of out-of-hours school provision?*

The Welsh Assembly Government is fully committed to out of school learning and believes that it should be an integral part of child's education. The aim of the provision as endorsed in by *The Learning Country—Vision into Action* is to tackle poverty of educational opportunities and raise standards in schools, enrich informal learning and help raise standards in basic and key skills as well as in the curriculum areas of personal, social and emotional development.

This Order would provide the Assembly with the power to make Measures specifically aimed at supporting children who fall within Matter 5.17 during out of school hours. The scope of the Order does not extend to childcare provision outside those hours.

“PHYSICAL AND MENTAL IMPAIRMENT”

3. *There has been considerable debate in the Assembly Committee about the scope of “physical and mental impairment” as a definition of disability. Would this definition cover each of the following:*

(a) *Persons who have a sensory impairment, including blindness?*

I would first like to confirm that by leaving the term “physical or mental impairment” unqualified, the Welsh Assembly Government would refer to the World Health Organisation's definition of disability. For the purposes of that definition a disability is “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”.

If a person with impairment falls within the scope of that definition and is also in receipt of education and training then that person is within the scope of the proposed Order. The same principle would also apply in determining whether other possible disabilities would fall within the scope of the Order.

Sensory impairment is a physical impairment that falls within the WHO definition.

(b) *Persons who have a broader communication impairment?*

Communication impairment is a physical impairment that falls within the WHO definition.

(c) *Past disabilities?*

The scope of the Order does not encompass persons who used to be disabled. The Order does however cover persons who whilst no longer disabled, have greater difficulty in learning than the majority of persons of his age as a direct consequence of their former disability. For example a child who has cochlear implants may no longer have a hearing disability but as a consequence of that disability continues to have impaired speech which causes that child difficulty in learning.

(d) *Cancer and HIV?*

Progressive conditions will fall within the scope of the Order.

(e) *Other long-term and degenerative conditions?*

This really depends on the actual nature of the condition. If the condition does not fall within the WHO definition of disability the condition may still satisfy the second criteria of the Order. For example, the condition may mean that the person has greater difficulty in learning than the majority of persons of his age in which case the person would come within the scope of the Order.

(f) *Hyperactivity, emotional or social difficulties and general poor health?*

Hyperactivity

Whether hyperactivity falls within the WHO definition of disability depends on the underlying cause of the condition. For example, a child unable to concentrate on a specific matter for a period of time, may have an underlying physical impairment such as a hearing or vision difficulty so reacts with adverse impulsive behaviour. Alternatively, the child may have a mental impairment.

As confirmed previously, if the condition does not fall within the WHO definition the person may still come within the scope of the Order if that person has greater difficulty in learning than the majority of persons of his age.

Emotional Difficulties

Committee members will be aware that the Scottish model of additional support for learning includes emotional difficulties, however evidence provided to the Assembly Committee by Estyn, stresses that the context in Scotland is fundamentally different in relation to structure and funding and this is an important consideration. The Government of Wales Act has provided the opportunity to tailor Welsh legislation to Welsh needs and that is the prime focus.

We consider that the specific inclusion of emotional difficulties would in effect broaden the Order to such an extent that there is the potential of losing the prime purpose for acquiring these powers—and the possible danger of diluting future provision. Emotional difficulties that result in a greater difficulty in learning, for whatever reason, will be captured within the proposed definition.

Social Difficulties

Whether a social difficulty falls within the WHO definition of disability again depends on the underlying cause of the condition. However, social difficulties that result in a greater difficulty in learning, for whatever reason, will be captured within the proposed definition.

Poor Health

A person may well have poor health due to a physical or mental impairment. Whether their health condition falls within the WHO definition of disability consequently depends on the underlying cause of the condition. Although health conditions that result in a greater difficulty in learning, for whatever reason, will be captured within the proposed definition.

(g) Disabilities that do not give rise to additional education and training needs, or to any problems with day-to-day functioning?

The purpose of the Order is to enable changes to be made by way of Assembly Measure in relation to any aspect of the organisation and delivery of special educational needs in Wales. 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 is currently focussed.

The Order will give the Assembly legislative competence to make Measures in relation to Matter 5.17 which concern direct participants of Education or Training who have special educational needs or additional learning needs. For instance, this definition encompasses able and talented provided that they also fall within the SEN regime. Persons who do not have special educational needs or additional learning needs as defined by the Order will not be covered.

4. If an additional category of sensory and communication impairment was added to the definition of disability, might that imply that “physical and mental impairment” is not an all-embracing term and suggest that other categories should also be included?

Yes. If the definition were extended the Assembly believe it would cast doubt on and imply a limitation to, the generality of the description currently used in the Order. An unintended consequence of this would be to cast doubt as to whether Assembly Measures made under the Order could make provision for other impairments or perhaps in relation to other descriptions of physical or mental impairments that may arise in the future. That would undermine the whole purpose of this Order.

“PERSONS WHO HAVE A GREATER DIFFICULTY IN LEARNING”

5. Can you give a precise definition of what is meant by “persons who have a greater difficulty in learning”, as used in the proposed Order?

In particular, would the definition cover:

(a) people who do not have a learning difficulty—but only because they are receiving, or have received, additional support or treatment—for instance, a person who has cochlear implants?

The Assembly’s aim is to permit Measures to be made that will give special educational treatment to an extended category of persons, namely those with additional learning needs. The concept of additional learning needs is to be identified by reference to a need for additional learning support which is required or is reasonably required in order for a person to be able to fully benefit from education and is additional to, or otherwise different from, that comprised in the educational provision made available generally for

persons of the same age. The term additional learning needs therefore relates to persons who have a greater difficulty in learning because their learning support needs differ from those of the majority of learners, the comparator being those in mainstream education provision.

- (a) A person with cochlear implants will fall within the definition if for any reason they have greater difficulty in learning than the majority of persons of the same age as that person. For example a child who has had cochlear implants may still have impaired speech which causes that child difficulty in learning.

(b) *extremely bright children, whom Jane Hutt AM has said will be excluded unless they fall under the current definition of SEN?*

Any Measure made under this Order could make provision for able and talented children but only if those children have a greater difficulty in learning than the majority of those their age and/or they are disabled.

Therefore, such a Measure could make provision for able and talented children who currently fall under the SEN regime.

CIRCUMSTANCES

6. *Jane Hutt AM has stated that the Order would not only cover persons whose learning difficulty arises from their ability to learn, but also persons whose need for support arises from their circumstances. For instance, she suggested that a child-carer could be treated as having a learning difficulty. Do you agree?*

It is acknowledged that many young carers who struggle to look after someone at home whilst attending school experience difficulty in learning and achieving at school. It is consequently proposed that a child in this situation who is identified as having greater difficulty in learning than the majority of children of the same age would fall within the scope of the definition.

If yes:

(a) *Are there limits to the circumstances that could be recognised under the Order as giving rise to a learning difficulty? For instance, would the Order apply to children who have additional learning needs due to being “looked-after”, suffering from bullying, living with parents who have mental health or substance abuse problems, or children who fall behind due to truancy or bad behaviour?*

No. The greater difficulty in learning can be for any reason whatsoever.

(b) *Should the Order be altered to make it clear that a persons circumstances can give rise to a recognised learning difficulty?*

If the Committee should still hold to this view and include it in its final report, then obviously it would become a matter for us to consider.

DIFFERENT LANGUAGES AT HOME AND SCHOOL

7. *Section 312 of the Education Act 1996 excludes from the category of “children with special needs” those whose learning difficulty derives from having education in a different language from that spoken at home. Does this exclusion also apply in relation to the “persons” identified in the Order? If not, can you confirm that Matters could be brought in under this Measure to make provision in such cases?*

Section 312(3) of the 1996 Act provides that a child is not to be taken as having special education needs if his learning difficulty is solely because the language (or form of language) in which he is or will be taught is different from the language (or form of language) which has been spoken in his home.

The exclusion in section 312(3) of the Education Act 1996 consequently applies to persons identified in the Order who have “special educational needs”.

The exclusion does not apply to persons identified in the Order who do not have SEN but have additional learning needs i.e. a greater difficulty in learning.

 OMISSION OF THE WORD “SIGNIFICANTLY”

8. *The 1996 Education Act defines someone with learning difficulty as having “significantly greater difficulty in learning than the majority of persons of his age”. Can you confirm that omitting the word “significantly” from the Order ensures that persons with additional learning needs would be captured by Measures made under the Order?*

The proposed Order has been drafted to give the Assembly flexibility to make Measures that benefit persons who have additional learning needs that do not amount to special educational needs for the purposes of the Education Act 1996 or a “significant learning difficulty” for the purposes of the Learning Skills Act 2000.

The definitions used in primary legislation refer to children/persons who have a “significantly” greater difficulty in learning than the majority of children/persons of the same age of those children/persons in order to benefit from learning difficulty provision. Two steps must be surmounted before a person is captured by this definition: The person must have a greater difficulty in learning than the majority, and in addition that greater difficulty must be of a particular character in that it must be “significantly” greater than the difficulties of the majority. These definitions would not allow the Assembly flexibility to make Measures that benefit persons with additional learning needs—consequently the proposed Order omits the word “significantly” to ensure that any Measure made under this Order could capture those persons with additional learning needs.

“SEN” / “GREATER DIFFICULTY IN LEARNING”

9. *Would the 1996 Education Act’s definition of children with “special educational needs” be superseded by the Order’s reference to “persons who have a greater difficulty in learning”, for the purposes of Assembly Measures?*

The Order itself does not alter or replace the definitions in the Education Act 1996. But the Order will confer powers on the Assembly to adjust the existing law as it sees fit.

It is too early to say at this stage how the existing law will be adjusted. That will be for the Assembly to consider by way of Measure.

DEFINITIONS

10. *At the end of Field 5 it states: “Expressions used in this field and in the Education Act 1996 have the same meaning in this field as in that Act”. How will this arrangement allow for the fact that LCO’s in the education field might want to address the same expressions as are contained in the Act, but may want to include a very different definition—for instance the meaning of “learning difficulty”?*

If a matter is inserted into Field 5 containing an expression defined in the Education Act 1996, but which is intended to have a different meaning to the 1996 Act expression, then the interpretation section of Field 5 would need to be amended accordingly. This would involve (a) inserting a definition of the expression under the interpretation heading in Field 5, and (b) inserting words which make it clear that where an expression is given for the purposes of Field 5 a meaning different from that given to it for the purposes of the Education Act 1996, the meaning given for the purposes of Field 5 is to apply instead of the one given for the purposes of the Education Act 1996.

The expression “learning difficulty” is not used in the Order and so it does not engage the definition of that expression in section 312(2) and (3) of the Education Act 1996 for the purposes of the proposed matter 5.17. But if the drafting of 5.17 had been approached in a different way using the expression “learning difficulty”, then a definition of the term and further clarifying words as described above would have been inserted into Field 5 because the Order is intended to capture a wider group than that provided for in the definition of learning difficulty in the 1996 Act.

TRAVEL ARRANGEMENTS

11. *Travel arrangements are specifically excluded from this Order because, the supplementary memorandum from the Assembly confirms, they are dealt with under another Matter, 5.10. Is it the Wales Office's view that Matter 5.10 provides the Assembly with the legislative competence relating to transport that is necessary to make full use of the competence conferred under the Order? In particular:*

(a) *Matter 5.10 is restricted to travel arrangements for persons receiving primary, secondary or further education as defined in the Education Act 1996. This definition specifically excludes higher education and those aged under two. Can you envisage circumstances where the definition of a person who is "receiving" "primary, secondary or further education" in 5.10 will not cover transport for persons or activities that are covered by the Order—with particular reference to adult learners, the very young, and those in higher education?*

The scope of matter 5.10 would allow the Assembly to make provision for the travel of persons with Special Educational Needs, or Additional Learning Needs (including travel to extra curricular activities) or disability provided that those persons are in receipt of education or training.

(b) *The Education and Learning Committee of the Assembly recently conducted pre-legislative scrutiny of the draft Learner Travel Measure that is due to be introduced under 5.10. That Committee's Report made particular reference to safety matters, which are excluded from 5.10, including seatbelts and escorts on school buses. If there is a need for additional competence on transport for education and training services, would it be desirable to add the necessary competence to the LCO at this stage?*

The Assembly Government is currently considering responses to the consultation on its proposed Learner Travel (Wales) Measure, as well as evidence submitted to and considered by the Assembly's Enterprise and Learning Committee which has been undertaking a scrutiny of the proposed Measure. Many issues have been raised, including some related to safety which are not within the competence of the Assembly. The Deputy First Minister and Minister for the Economy and Transport has said that he will consider, in the context of the proposed Learner Travel Measure, those issues very carefully before coming to a view on whether additional powers for the Assembly should be sought. It is too early to offer a view on this in the context of the Additional Learning Needs Order."

LISTING MATTERS CLEARLY

12. *As the number of Matters grows in particular Fields, problems may occur from their listing in the chronological order of their making. Matters that have some substantive content in common will not necessarily be set out together or close by, making it difficult to ascertain where Matters touch upon related topics. How could this be made more clear?*

Where there are two or more matters within a Field on closely related topics it would be preferable for them to be close together within that Field. Where new matters are inserted this might be achieved by inserting the new Matter between existing Matters. The standard drafting method for doing so would be applied, so if, for example, we wished to insert a new Matter after Matter 5.2 about the governance of maintained schools it would be inserted as matter 5.2A between Matter 5.2 and Matter 5.3; governance of maintained schools being closely related to the surrounding Matters.

13. *In the interests of clarity, should links between different Matters touching on the same or related issues be made explicit?*

The overall shape of the Field will need to be kept under review. At some point it may be sensible for the whole Field to be recast in a future Order if there are multiple cross-overs of competence between existing Matters and Matters intended to be inserted. But we have not yet reached that point with Field 5.

We are not quite sure what is being suggested here, but further words indicating overlap of competence and relevance between Matters would be entirely explanatory and would not serve any legal purpose. The general drafting practice in the UK is to include only words which are intended to have legal effects. It would also be very difficult to frame accurate explanatory words in this case because it would involve hypothesising possible laws that might be made by the Assembly and linking these imagined multiple possibilities to the Matters. This kind of explanatory drafting, accompanied by the speculative exercise necessary to do it accurately, is liable to go wrong. The reason for this is that the courts might give effect to the explanatory words that were not intended, especially if the provisions do not include fully accurate explanatory links.

ADDITIONAL QUESTIONS

14. *The Parliamentary Under Secretary of State said in evidence to the Committee that “By leaving the term physical or mental impairment unqualified there is a belief that the courts will look to the World Health Organisation’s definition of disability for assistance in interpreting the term” (Q 24). On what evidence is this assurance based? The Minister noted that “this definition has been a feature of case law under the DDA 1995” (Q 24)—is this sufficient assurance?*

It is correct that the definition has been a feature of case law and that the courts have looked to the WHO’s definition of disability to interpret the term. For example, in *Goodwin v Patent Office* [1999] ICR 302 the Employment Appeal Tribunal said (308G) that “if there is doubt whether the condition of impairment is fulfilled in a mental illness case, it is advisable to see whether the illness is mentioned in the WHO’s international classification of Disease and if it is, that will very likely determine the issue”.

Subsequent cases have referred to the WHO classification for assistance:

Malcolm v Lewisham London Borough v Council v Disability Rights Commission [2007] EWCA Civ 76 and *Romano v Manchester City Council* [2005] 1 WLR 2775. In this latter case, the Court of Appeal referred to the WHO classification and medical professionals gave evidence confirming that the nature and degree of the appellant’s impairment was based on the WHO’s classification of mental illness.

15. *The Minister mentioned that “you would refer to existing definitions, including that of the WHO, but, also, to evolving definitions from other organisations” (Q 27). Would it not result in greater clarity if the WHO definition were to be replicated in the Order, given that, as the Minister acknowledged (Q 35) the Assembly could later seek to amend the definition?*

I consider it unwise to replicate the WHO definition in the Order 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 flexibility is required here and it would be better to leave it undefined so that, in the future, it could operate by reference to WHO or other definitions and developments in the understanding of disability. I am satisfied that this is the appropriate way forward for Wales.

A number of representatives in evidence sessions to the Assembly Committee have supported a broad definition—as one AM stated there is the danger that “the more specific conditions or problems we include in any definition, the more risk we then end up excluding someone by virtue of not having listed them”.

All Wales People First have also voiced their support for the proposed draft of the Order and said they are “confident the terms of the proposed Order would allow Wales to use Assembly Measures to develop a system of opportunity, personal enhancement and equality in Wales”.

If the Order were to adopt the definition, the scope of the Assembly’s legislative competence would be confined to that definition. This would mean that the Assembly would be unable to make Measures that suit the changing definitions of disability that develop over time and consequently benefit those persons who subsequently fall within the amended WHO definition. Whilst it is acknowledged that the Assembly could extend its legislative competence to adopt any new WHO definition, this is dependent on a relevant Order in Council or suitable Bill being available in a realistic timescale.

16. *If the definition of terms used in the proposed Order are “constantly evolving” (Q 24) and allowed to “develop over time” (Q 33), on what basis can the proposed Order’s scope and appropriateness be considered?*

Section 95 of the Government of Wales Act 2006 together with Schedule 5 set out the extent of the Assembly’s legislative competence by listing devolved Fields and Matters within each Field. The scope of this Order is limited by the description of Field 5 which is entitled “Education and Training” and Matter 5.17 which relates to persons with special educational needs or additional learning needs.

Any change to the definition of a term in the Order will be made by Assembly Measure which will be the subject of consultation, scrutiny by Committee and detailed consideration by the National Assembly for Wales.

17. *Advice given to the Assembly Committee has been that “It is a principle of statutory interpretation that if there are a number of similar specific situations and only some of them are mentioned then the intention must be to exclude the ones which are not”. Is it your view, therefore, that this would be the effect of adding specific further references to the phrase “physical or mental impairment” (for example, if “sensory” or “communication” impairment were to be specified)?*

As I have outlined in responses above, our aim is to ensure we are able to adapt to changing definitions of disability and physical and mental impairment. I would, therefore, contend that specifying categories of impairment would have the effect of potentially excluding any groups not specifically mentioned.

Any subsequent Measures that arise from this Order 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.

20 November 2007

Memorandum submitted by RNID Cymru

RNID Cymru is pleased to have the opportunity to respond to this consultation exercise on the Legislative Competence Order on Additional Educational Needs.

RNID Cymru is the charity working to change the world for the 480,000 deaf and hard of hearing people in Wales. We do this by giving advice, information and providing services to improve the lives of deaf and hard of hearing people. We also conduct research and run campaigns to understand and change people's attitudes to deafness. And we work in partnership with others for the benefit of people who are deaf and hard of hearing.

SOME USEFUL BACKGROUND FACTS

- An estimated one in 1,000 children are born deaf (ie with a level of permanent deafness severe enough to make a difference to the process of spoken language development normally observed in hearing children).
- An additional 50–90% of the population of deaf children develop hearing loss by the age of nine (which raises incidence to 1.65 per 1,000 live births) (Fortum et al, BMJ September 2001).
- Roughly 17,000 children aged 0–16 across the UK have a permanent hearing loss greater than 40dBHL (IHR MRC Study 2001) (UK birth cohorts 1980–95).
- About 35% of deaf children have an additional, compounding learning difficulty or sensory impairment, the incidence of severe, profound and complex difficulties is rising, in part because of the increased survival of premature babies.

Our response to the consultation exercise follows the structure set out in the document. But before moving on to consider the individual questions posed, we would like to state two things:

- RNID Cymru is fully supportive of devolution and believes the prospect of devolving Additional Educational Needs to Wales will be beneficial as decisions taken at a more decentralised level in general are more responsive and appropriate to need.
- RNID Cymru is happy to present oral evidence to the Committee on any aspect of the evidence in this response.

We would like to move now to answering your questions regarding the LCO as set out in the consultation document:

1. *To what extent might the transfer of functions proposed have wider implications for the UK budget?*

At this stage, RNID Cymru cannot foresee any significant implication on the UK budget.

2. *To what extent might the transfer of functions impact on reserved functions; for example, would the transfer of functions increase regulatory burdens on business?*

We do not believe that the transfer of functions will have an impact on reserved functions. This has been reflected in the initial consideration given to the LCO in the National Assembly.

3. *Are there any cross-border issues relating to the LCO? (Would legislation subsequently be required in England?)*

Our anticipation is that the LCO would not necessarily lead to the need for subsequent legislation in England. However, there may of course be a case that the Assembly Measures which arise from the LCO will have a bearing on how services are delivered in England. Perhaps they might lead to a degree of replication. Nevertheless, we do not foresee any immediate cross-border issues.

4. *Would the proposed LCO necessitate the formation or abolition of Welsh institutions and structures? If so, where does the legislative competence to exercise such changes lie?*

RNID Cymru does not foresee that this LCO in itself would lead to the formation or abolition of Welsh institutions and structures. Of course, as with our responses to some of the other questions, there may well of course be Assembly Measures which arise from this LCO which will change structures in time.

If such a change were needed, and could demonstrate support amongst stakeholders and politicians in the National Assembly for Wales, then the LCO would presumably be broad enough to facilitate such change.

5. *Is the LCO request in the spirit and scope of the devolution settlement?*

The LCO request is entirely within both the spirit and scope of the devolution settlement as set out in the Government of Wales Act 2006.

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”. This LCO is needed to enable the Welsh Assembly Government to go beyond that pledge and to then implement some of the changes arising from consideration of the ELLS Committee report.

This competence will thus 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. As Carwyn Jones AM said when Minister for Education introducing this LCO to the National Assembly for Wales:

“Having additional learning needs as the subject of the first Legislative Competence Order is highly appropriate. Policy in this area of education has been developed on a collaborative, all-party basis for some time.”ⁱ

6. *Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?*

It is our judgement that the LCO is entirely in accordance with the Government of Wales Act 2006. This view is supported by many other charities in the disability field and is clearly reflected in the early deliberations and consideration of the LCO at the National Assembly for Wales at both Committee and plenary level.

This is not the first time that the primary legislative competence of the Welsh Assembly Government has been extended in the field of education. We understand that previous framework powers have already been extended to the National Assembly in the field of Education and Training (field 5 within Schedule 5 to the Government of Wales 2006 Act) through the Education and Inspections Act 2006.

7. *Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill?*

RNID Cymru does not have a fixed view that LCOs are a preferable way to accrue legislative power for the National Assembly when compared to framework powers in a Westminster Bill. Indeed, in some cases framework powers might well be a quicker process to devolve to the Assembly the tools to do the job of reforming Additional Educational Needs provision in Wales. However, there is no obvious Bill in the current UK Legislative programme which could be expanded to include framework powers on Additional Educational Needs. It is thus likely that on this occasion the LCO route is the speedier option.

Further, it is heartening that the Welsh Assembly Government has presented this LCO in the very first phase of the devolution of primary law making powers to the Assembly. The Welsh Assembly Government is attaching a priority to this LCO which, we hope, will lead to its speedy passage through the many legislative and scrutiny stages it must pass.

It is one of the first examples of what will undoubtedly be a gradual accrual of powers to the Assembly within the spirit and wording of the Government of Wales Act 2006.

8. *The extent to which there is a demand for legislation on the matter(s) in question?*

There is clearly a demand for legislation on the matters in question. This LCO proposed by the Welsh Assembly Government is being brought forward in response to the work of the Assembly’s Education, Lifelong Learning and Skills Committee, which concluded that substantial reform was needed to the Special Education Needs system in Wales. In essence, the Welsh Assembly Government has accepted the recommendations of that Committee and taken them on board as its own.

The range of organisations who contributed to that Committee review, and the congruence of their views, demonstrates clearly that there is a demand for legislation on Additional Educational Needs.

For example, the second phase of the ELLS Committee review was on Statementing, and a consultation document was issued which invited response. Over 100 organisations or individuals responded. As well as RNID Cymru, organisational responses were also received from:ⁱⁱ

- ASBAH- Association for Spina Bifida and Hydrocephalus
- BATOD Wales - British Association of Teachers of the Deaf Wales
- Bridgend County Borough Council
- Bro Morgannwg NHS Trust
- Cardiff and the Vale NHS Trust
- Cardiff and the Vale Parents Federation
- Careers Wales
- Ceredigion and Mid Wales NHS Trust
- Disability Rights Commission
- ELWa
- Flintshire Parents Partnership Service
- Gwynedd Council
- Mencap
- Mudiad Ysgolion Meithrin
- NAEAIC - National Association of Education Advisors Inspectors and Consultants
- NAGC - National Association for Gifted Children
- NAHT Cymru - National Association of Head Teachers Cymru
- Neath-Port Talbot County Borough Council
- North East Wales NHS Trust
- NUT Cymru - National Union of Teachers Cymru
- Pembrokeshire and Derwen NHS Trust
- Penybont ar Ogwr NHS Trust
- Pontypridd and Rhondda NHS Trust
- Powys County Council
- RhAG - Rhieni dros Addysg Gymraeg
- Royal College of Speech and Language Therapists
- Swansea NHS Trust
- The National Autistic Society

This snapshot is useful in demonstrating the demand for legislation because these organisations did not respond in order to argue services should be left unchanged—and many of the changes which are suggested in the report need primary powers to put them into effect.

It is also important to note also that there is cross-party agreement in the National Assembly for Wales in support of this LCO. Assembly Members clearly recognise that the many organisations who lobbied during the Committee hearings are keen for the Assembly to have the powers to see through the changes necessary to support some of the most vulnerable people in society.

We believe that the terms of the proposed Order are appropriately broad to facilitate an active policy agenda on additional learning needs. This is what the bodies engaged with the Education, Lifelong Learning and Skills Committee review would expect. The scope of the LCO would allow a range of Measures to be brought forward that could improve radically the lives of many of the most vulnerable young people in our education system.

An Explanatory Memorandum produced by the Welsh Assembly Government to aid the interpretation of this specific LCO indicates a range of issues which could be addressed by Assembly Measures following on from this LCO. This is helpful as a pointer to purpose and application.

RNID Cymru believes that amongst the Assembly Measures that could and should arise from this LCO would be Measures to address Statementing and Specialist Schools.

Statementing: We agree with the Explanatory Memorandum’s reflection that “the formal system of statementing is highly prescriptive” and that the Assembly should accrue powers “to make fundamental changes to the structure of the statementing process.” RNID concurs with the views of the Special Educational Consortium (SEC)ⁱⁱⁱ that tensions and frustrations that continue to exist around the assessment of and provision for pupils with special educational needs. This was also reflected in the recent work of the Education and Lifelong Learning Committee of the National Assembly in its deliberations on Statementing.

Special Schools: RNID Cymru's expectation is that the educational achievements of deaf children should reflect their intellectual ability and match educational outcomes for hearing peers, regardless of school placement. This aim can only be achieved if expectations for deaf children are raised and the quality of education available from the time of neonatal assessment onwards through to further education is radically improved. RNID supports the current practice of including deaf children in mainstream schools, but only where parents want it and only when the process is adequately resourced and supported. RNID Cymru believes that a range of educational provision including special schools must be maintained to provide families with real choice. However, the level and type of support for deaf children in mainstream schools should be driven by the individual needs of children and by the choice of parents—not by the need of LEAs to reduce expenditure. The gap between the best and the worst of what is currently available for deaf children and their families is unacceptably wide and the quality and type of schooling that children receive depends far too much on where a family happens to live.

Any Assembly Measure brought forward to address Statementing or Special Schools and educational location should address these perspectives. We believe there would be broad support for examining these issues once the LCO has been passed.

Thank you again for the opportunity to contribute to this debate and I hope we can be of further assistance.

REFERENCES

- i Record of Proceedings of the National Assembly for Wales, 12 June 2007
<http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=56565&ds=7/2007#rhif6>
- ii National Assembly for Wales Education Lifelong Learning and Skills Committee Policy Review of Special Educational Needs: Part 2: Statutory Assessment Framework (Statementing) (May 2006)
<http://www.assemblywales.org>
- iii The Special Educational Consortium is convened under the auspices of the Council for Disabled Children to protect and promote the interests of children and young people with special educational needs and disabilities. SEC provides a policy forum on issues affecting children and young people with special educational needs and disabilities. SEC is a broad consortium consisting mainly of voluntary organisations but including professional associations and local government organisations as well. SEC defines its policies by identifying areas of consensus that exist among the wide range of groups represented within it.

28 September 2007

Memorandum submitted by the Royal College of Speech and Language Therapists

ADDITIONAL LEARNING NEEDS PROPOSED LCO

Thank you for the opportunity to respond to the consultation on the Proposed Additional Learning Needs LCO.

This is a joint response to the consultation produced by Royal College of Speech and Language Therapists and the All Wales Speech and Language Therapy Managers Committee.

Firstly I would like the opportunity to give you some facts about our two organisations.

The Royal College of Speech and Language Therapists (RCSLT) is the professional body for speech and language therapists and support workers in the UK. The College provides leadership in order that issues concerning the profession are reflected in public policy and people with communication, eating, drinking or swallowing difficulties receive optimum care. The RCSLT leads an inclusive profession whose members deliver quality services to meet diverse needs.

RCSLT represents around 12,000 Speech and Language Therapists, Technical Instructors, Assistant Speech and Language Therapists and students in the UK.

Approximately 400 qualified Speech and Language Therapists practice in Wales.

RCSLT members work primarily in the NHS but also in the independent sector, Education, Research and the Voluntary sector. About 70% of the profession work primarily with children with speech and language and communication difficulties, 30% with adults.

All Wales Speech and Language Therapy Managers Committee is the body that makes representation and gives advice relating to provision of speech and language therapy services in Wales to the National Assembly for Wales both directly and via the Therapies Adviser to Welsh Assembly Government and Wales Therapies Advisory Committee. It promotes best practice and develops all-Wales standards and policies to ensure equity of provision.

Before formally responding to the questions posed in the consultation we would like to state in the strongest terms that we welcome this LCO.

We would like to move now to answering your questions regarding the LCO as set out in the consultation document:

1. *To what extent might the transfer of functions proposed have wider implications for the UK budget?*

We do not feel it is possible at present to determine the wider implications for the UK budget if the LCO were to be passed. As the current settlement stands the Assembly can only expect to receive the monies already allocated by the UK Government. There may, however, be an increase in administrative costs.

2. *To what extent might the transfer of functions impact on reserved functions; for example, would the transfer of functions increase regulatory burdens on business?*

By definition the LCO will have an impact on reserved functions as the Welsh Assembly Government will be in receipt of more power but it would be the Measures under that LCO that could have specific impact and therefore, as Measures are not yet outlined, we believe that it is not yet possible to answer this question in full.

3. *Are there any cross-border issues relating to the LCO? (Would legislation subsequently be required in England?)*

As this falls in part in the Health Sector there may be cross-border issues, especially in the provision of services for residents in Mid and North Wales. Traditionally these areas have bought into English providers. However, we believe that post LCO this can be achieved, in the main, via contractual understanding between commissioner and provider rather than the need for primary legislation.

4. *Would the proposed LCO necessitate the formation or abolition of Welsh institutions and structures? If so, where does the legislative competence to exercise such changes lie?*

This LCO in itself would not necessitate this but further Assembly Measures and Welsh Government policy initiatives may generate structural reform.

As part of our submission to the National Assembly's consultation exercise we have stated that new legislation should be accompanied by adequate resources and that the provision for these resources can be shared by both Education and Health Departments in Wales. We recognise that more seamless funding by separate departments may require reform.

5. *Is the LCO request in the spirit and scope of the devolution settlement?*

The LCO covers both areas of Health and Education, as these are, in the main, devolved issues then we feel that the LCO is within the scope and spirit of the settlement.

The Assembly already has legislative competence in relation to a number of education matters, as a result of powers conferred on the Assembly by the Education and Inspections Act 2006. This LCO would add Additional Educational Needs to those Matters.

The Explanatory Memorandum produced by the Welsh Assembly Government is helpful in answering this question:

“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.”

6. *Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?*

So far as we can tell, yes. 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 Government of Wales 2006 Act). This seems entirely in keeping with the Act.

7. *Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill?*

We understand that the emergence of this LCO is direct consequence of reports and recommendations flowing from the National Assembly. As this institution has different priorities from the Westminster Government we believe that the LCO is the most expedient method.

8. *The extent to which there is a demand for legislation on the matters in question?*

Again, the Explanatory Memorandum produced by the Welsh Assembly Government is helpful in answering this question:

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

... 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.

In introducing the LCO to the National Assembly for Wales in June 2007, the then Minister for Education, Carwyn Jones AM, made the following pertinent observations:

Having additional learning needs as the subject of the first Legislative Competence Order is highly appropriate. Policy in this area of education has been developed on a collaborative, all-party basis for some time. The former Education, Lifelong Learning and Skills Committee undertook a comprehensive review of special educational needs in three parts, first covering early identification and intervention, secondly, statementing and, thirdly, transitions. Each of these reports was followed by an action plan, and the final one on transitions was debated and agreed in Plenary in the previous Assembly on 27 March this year.

If we are to achieve the significant improvements that the committee sought and that we wish to see for those with special educational needs, and, more broadly, for those with additional learning needs, we need to make changes in the existing primary legislation. At present, under the devolution settlement, we have responsibility for special educational needs provision in relation to education and training, without, however, the legislative powers for the Assembly to legislate to change fundamental aspects of provision in this area.

We wholly concur with this sentiment. Our organisation represents 400 Speech and Language Therapists in Wales. It is these professionals, working at the coalface of the service, who support this action. We are also aware that other organisations in Wales are supportive.

Thank you again for the opportunity to contribute to this debate and I hope we can be of further assistance.

Nigel Miller

Chair All Wales Speech and Language Therapy Managers Committee

Rosie Jones

Member of Royal College of Speech and Language Therapists

Dr Alison Stroud

Member of All Wales Speech and Language Therapy Managers Committee and RCSLT

28 September 2007

Memorandum submitted by the National Deaf Children's Society

ADDITIONAL LEARNING NEEDS PROPOSED LCO

NDCS is the national charity dedicated to creating a world without barriers for deaf children and young people. We represent the interests and campaign for the rights of all deaf children and young people from birth until they lead independent lives. Our vision is a world without barriers for every deaf child.

Our starting point with this submission is that governments and legislatures should have the willingness and power to create a better world for deaf children. Given that Wales has some devolved functions in this area, it would be better for them to have all the powers to make a real change in this area, determined by need and the best interests of deaf children and their families, than have the scope and nature of the reform driven by legislative competence restrictions.

We therefore support in principle this LCO with one caveat; that the definition of disability is a narrow one, explicitly only covering those with physical or mental disabilities. We believe that this definition should be expanded to cover those with a sensory impairment as well. This would remove any doubt as to the extent of the Order, and remove anomalies at Measure stage resultant solely from the scope of the LCO.

With that pre-amble, our answers to the questions in your consultation:

1. *To what extent might the transfer of functions proposed have wider implications for the UK budget?*

The LCO is not a transfer of functions, which can have budgetary implications, but a transfer of legislative competence which, given the method of funding the devolved legislatures, won't have any immediate effect on the UK budget.

2. *To what extent might the transfer of functions impact on reserved functions; for example, would the transfer of functions increase regulatory burdens on business?*

We can't see any way in which this LCO would impact on any reserved functions. It only touches on Education issues, 100% devolved already.

3. *Are there any cross-border issues relating to the LCO? (Would legislation subsequently be required in England?)*

This LCO would simply be enhancing the powers of the Assembly in areas it already has competency. The only way in which it would have legislative effects for England would be if the Westminster Government subsequently decided, having seen the decisions taken by the Assembly, that some ideas were worth incorporating into legislation for England. But that would be a policy decision for the Westminster structures and not in any way dependent on this LCO.

4. *Would the proposed LCO necessitate the formation or abolition of Welsh institutions and structures? If so, where does the legislative competence to exercise such changes lie?*

None. Excepting some schools which specialise in delivery of ALN services, and of which the Assembly Government and relevant LEA already have responsibility, there are no public institutions in Wales which specialise in this area (aside from the NHS and no specialist trusts there) and which could therefore be affected.

5. *Is the LCO request in the spirit and scope of the devolution settlement?*

Yes. It is clearly within the mainstream of Education, a devolved area.

6. *Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?*

Yes.

7. *Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill?*

We are agnostic as to whether the legislative competence reaches the Assembly via a LCO or via framework powers. There being no appropriate item of legislation at the moment at Westminster, this LCO is an entirely suitable vehicle.

8. *The extent to which there is a demand for legislation on the matter(s) in question?*

There is widespread public policy interest in Wales on the issues covered by this LCO, including the biggest examination of any subject by an Assembly committee, that on SEN in the previous Assembly. Although we are cautious about the policy direction signalled by the Assembly Government in SEN thus far, that is a distinct issue as to whether the Assembly should have the competence at primary legislation level in this area, which is the subject of this LCO.

I hope our comments on this issue are helpful and look forward to hearing your views in due course.

Susan Daniels OBE
Chief Executive

22 October 2007

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