



House of Commons
Welsh Affairs Committee

The Proposed Legislative Competence Order relating to School Governance

Seventh Report of Session 2009–10

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

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Contents

Report	<i>Page</i>
Summary	3
1 Introduction	5
2 The purpose of the proposed Order	5
Policy context of the Order	6
Legislative context	7
Grounds for transfer of further powers	7
Scope of the proposed Order in the context of other devolved education powers	7
3 Scope and drafting of the proposed Order	8
Basis for the terminology used in the draft Order	8
Proposed Matter 5.2A: Governance and conduct	8
The issue of staffing and funding	10
School change of status	12
Proposed Matter 5.2 B: Collaboration	13
Proposed Matters 5.2A and 5.2C: Training and training bodies	16
4 Conclusion	19
Annex A	20
Background to the Legislative Competence Order procedure	20
Introduction of this proposed Order	20
Annex B	21
Our inquiry	21
Conclusions and recommendations	22
Formal Minutes	25
Witnesses	26
List of written evidence	26
List of Reports from the Committee during the current Parliament	27

Summary

The proposed Legislative Competence Order relating to School Governance,¹ is the fourteenth Legislative Competence Order on which we have reported.

The proposed Order would confer further powers on the National Assembly of Wales to legislate in the field of education by extending devolved competence into the areas of maintained school governance, legislation to encourage collaboration in the maintained school sector and setting up bodies to support training. A particular policy aim driving the proposal is enhanced provision of training for school governors—a need identified in the 2009 report of the Assembly’s Enterprise and Learning Committee, *The Role of School Governors*. The report considered the link between school performance and the effectiveness of a school’s governing body. The LCO would allow the Assembly to legislate for action in that area.

The proposed Order has received support from most sectors. Some concerns were expressed that federated governing bodies might risk becoming distant from those they serve, that compulsory training might be unappealing to governors whose time is given on a voluntary basis, that local authorities might be excluded from influencing governance, and that the private sector might play too large a part in service provision. These are all matters that the Assembly Government should consider and consult upon fully when Measures are introduced. The evidence we received shows that functions will need to be clearly defined and that changes will need to be explained very carefully if new arrangements are introduced.

Our Report draws attention to some specific issues for review and consideration. In particular, the desire for consistency with the drafting of existing legislative provisions has caused some confusion about the extent to which a natural understanding of “governance” includes matters of staffing and pay. We urge the Assembly Government to reconsider its approach to the relevant language.

More broadly, given the extent of devolution that has already occurred in education, we ask whether it would be best to transfer all remaining legislative powers in the area, with clear exceptions in areas such as teaching pay and conditions, and we invite the Assembly Government to consider that view. We strongly oppose any fragmentation of the arrangements in respect of pay and conditions.

Having made these points, we consider that the Assembly Government has made a convincing case that legislative competence in respect of school governance is important in improving education in Wales. We therefore recommend approval of the proposed Order.

¹ Technically, the proposed draft National Assembly for Wales (Legislative Competence) (Education) Order 2010

1 Introduction

1. This is the fourteenth proposed Legislative Competence Order (LCO) on which the Welsh Affairs Committee has reported. The full background is contained in Annex A to this Report.

2. We considered:

- whether the proposed order fits appropriately into the current scheme of devolution on educational matters;
- the extent to which there is demand for legislation which might follow the adoption of the proposed Order;
- the parameters of and terminology used in the Order; and
- whether the Order is in the spirit and within the scope of the devolution settlement.

We did not consider questions that will be a matter for consultation when Measures are introduced for consideration by the Welsh Assembly. The process undertaken by the Committee is described in Annex B to this report, together with an outline of parallel scrutiny undertaken by Legislation Committee No.4 of the National Assembly for Wales.

2 The purpose of the proposed Order

3. The proposed Order would confer further legislative competence on the National Assembly for Wales in the Field of education—Field 5 in Schedule 5 to the Government of Wales Act 2006—by adding three additional Matters to that Field. These matters are:

- conduct and governance of maintained schools;
- collaboration between bodies associated with maintained schools; and
- establishment of training bodies for the maintained school sector.

The exact language used in the draft Order is:

5.2A Conduct and governance of schools maintained by local education authorities, including the allocation of functions, property, rights and liabilities relating to such schools.

5.2B Securing collaboration between persons or bodies with functions relating to schools maintained by local education authorities.

5.2C The following activities by persons or bodies with functions relating to schools maintained by local education authorities—

(a) establishment of bodies—

(i) to carry out activities relating to education and training, or

- (ii) to exercise functions on behalf of local education authorities;
- (b) involvement with bodies mentioned in paragraph (a).

Policy context of the Order

4. The Explanatory Memorandum sets out the policy context for the Assembly Government’s request for competence to legislate in additional areas with regard to education. It explains that as a way of raising standards of attainment in schools the Assembly Government has been piloting the Schools Effectiveness Framework, which is underpinned by five broad themes:

- systems thinking (meaningful engagement across the three levels of school, local authority and Welsh Assembly Government);
- bilingualism;
- high performance culture;
- equality; and
- supportiveness and interdependence (whereby schools and districts learn from each other).²

The first and last of those themes can be seen as requiring greater collaboration together with novel structural models (including governance models) within which to accomplish enhanced collaboration levels.

5. The Explanatory Memorandum goes on to state that, “as it expands and develops, the framework will need to take increasing account of school governing bodies because governance provides the accountability mechanism within which schools operate, and the means by which outcomes are monitored and evaluated, resource allocation decided, and responsibility lies for taking action to improve outcomes.”³

6. We note that written and oral evidence to the Assembly Committee’s inquiry—as well as from Undeb Cenedlaethol Athrawon Cymru (UCAC, the National Union of Teachers of Wales) to our own Committee—indicated broad support for the proposals, although the NASUWT was opposed. There were concerns from others about lack of clarity which both our inquiry and the Assembly Committee’s inquiry have considered and addressed. The National Association of Head Teachers Cymru cautioned the National Assembly against introducing legislation before full account has been taken of evolving practice, particularly in the area of collaboration. That is an entirely sensible view but, as the Association agreed, it is not of itself a reason for withholding devolution of competence.

7. We consider that the purpose of the proposed Order is clear and that it arises from a developed policy agenda on the part of the Assembly Government.

² Explanatory Memorandum, paragraph 10

³ *Ibid.*

Legislative context

8. The statutory basis for school governance has existed in much the same form since the Locally Managed School Model was implemented in England and Wales by the Education Reform Act 1988. Under that model, maintained schools must each have a governing body to set the school's strategic direction and monitor and evaluate progress. The governing body receives an individual school budget and is responsible for allocating resources in a way that it deems fit to support the strategic direction and to discharge its functions effectively.⁴ The law also requires local authorities, as they see fit, to provide free information and training for governors to enable them to discharge their functions.⁵ However, there is no legislative compulsion to provide training.

9. The proposed Order would permit the National Assembly for Wales to enact Measures requiring such training. It would also allow for changes to the governance model currently prescribed by the 1988 Act to take account of the aims of such policies as the School Effectiveness Framework. Furthermore, it would permit collaboration between a wider range of bodies as well as between schools, as is already permitted under the 1988 Act.

Grounds for transfer of further powers

10. Devolution of education policy in Wales has a long history, and transfer of powers from the UK Government to the Welsh Assembly has provided new policy competence in a number of areas. Examples are the new curriculum for children in the early years and in the later years of primary schooling, the adoption of a reading scheme modelled on a successful Scandinavian approach, and efforts to promote greater pupil engagement. The Curriculum Cymreig, the introduction of the Welsh Bacalaureate, and a strong emphasis on teacher consultation are examples of achievements in a unique Welsh approach to education. Devolution has provided the means for Welsh education to advance a separate and distinct policy agenda and focus.

11. It is clear to us that devolution has enabled Wales to create and develop its own educational policy agenda, and further devolution of education powers is in the spirit and scope of the devolution settlement.

Scope of the proposed Order in the context of other devolved education powers

12. We have already noted the long-standing history of devolution of education matters to Wales, and Field 5—on Education and Training—is one of the most extensive Fields in the 2006 Act, covering some 18 Matters including the school curriculum, admission policies, attendance, inspection and, importantly, schools establishment and change of status.

13. Only Fields 12 (Local Government) and 15 (Social Welfare) of the 2006 Act approach the same level of completeness as Field 5. Given that the Education Field is arguably

⁴ The current law is mainly set out in Part III, Chapter 1 of the Education Act 2002 although there are also relevant provisions in the School Standards and Framework Act 1998 and the Education and Inspections Act 2006. The principal relevant regulations for Wales are the School Government (Terms of Reference) (Wales) Regulations 2000 .

⁵ Section 22 of the Education Act 2002

already approaching a high level of transfer of legislative powers, we questioned whether the opportunity should have been taken to complete the transfer of legislative powers in education. The Parliamentary Under-Secretary observed that there remains a small but significant number of areas that are not yet devolved, including matters such as teachers' pay and conditions, regulation of teaching qualifications and student finance. He indicated that the Assembly Government prefers an incremental approach to the transfer of legislative powers in education, driven by policy requirements.⁶ The Assembly Minister further clarified that although there might be advantages in a codification of education law in Wales, there are no current plans for consolidation.⁷

14. In the case of this LCO, the Assembly is seeking a specific delegation of competence for a particular purpose. Ministers stated that their approach was to request a transfer of legislative powers in education as and when it is needed to implement a policy requirement.

3 Scope and drafting of the proposed Order

Basis for the terminology used in the draft Order

15. Matters 5.12 to 5.14 deal with further education and are relevant to the proposed Order in that they cover similar although not identical subject matter and employ terminology that is likewise similar but not identical. Essentially, Matter 5.12 covers the conduct and functions of further education institutions, their property rights and liabilities, and their governance and staff. Matter 5.13 allows for securing collaboration between them and other bodies with education and training functions, and for the establishment of bodies to support such collaboration. Matter 5.14 is concerned with the provision of financial resources for further education. The terminology used in this proposed Order has been chosen with the aim of achieving consistency with Matters 5.12 to 5.14. However, that does not necessarily make other considerations such as self-consistency and clarity unimportant, and we had those in mind too when we examined the appropriateness of the language used in the draft.

Proposed Matter 5.2A: Governance and conduct

16. As noted in the Explanatory Memorandum (which also sets out the relevant statutory sections),⁸ current primary legislation on governing bodies deals with topics including:

- the constitution, functions and membership of governing bodies;
- the means by which they may collaborate or federate, including collaboration with further education institutions;

⁶ Q 28 and see also Q 3

⁷ Qq 3 and 4

⁸ Explanatory Memorandum, paragraph 19

- the governing body’s responsibility for the conduct of the school and to promote high standards.

17. The Explanatory Memorandum refers to studies recently commissioned by the National Assembly Government on school governance. Those studies found that the effectiveness of governing bodies is variable and that availability and take-up of training is uneven.⁹ The report by the Assembly’s Enterprise and Learning Committee in July 2009, entitled *The Role of School Governors*, highlighted the need for improvements in governance and in training of governors. The recommendations of that report were almost all accepted or accepted in principle in September 2009 by the then Minister for Children, Education, Lifelong Learning and Skills, Jane Hutt AM. Specific recommendations included:

- governor participation in shared training sessions with school staff;
- provision of guidance to governing bodies on how to engage more effectively with local communities;
- improved communication on what governors should be doing; and
- consideration of compulsory training, particularly where governing bodies are not meeting statutory obligations.

18. Improving governance is important if we are to achieve advances in education. Recent research has linked certain models of governing body—from the merely deliberative to those with a more executive function—to performance outcomes. It appears that the more “involved” governing bodies, and those that hold their staff to account, are more likely to be associated with better school performance.¹⁰

19. The proposed Order would allow the Assembly to legislate on the constitution and membership of governing bodies; in other words for the decision-making structures of schools and the quality of their decision making.¹¹ The Explanatory Memorandum states that “[t]he Assembly could pass legislation in relation to the creation (or abolition) of, and the allocation of functions amongst, bodies responsible for school governance.”¹² This was elaborated on in the 20 October 2009 plenary statement by the then Minister when she observed that the Welsh Assembly Government already has executive powers in some aspects of school governance, but that they are limited and rigid because they are circumscribed by the existing legal framework on governance as set out in Part 3 of the Education Act 2002. She explained that the Locally Managed School Model does not provide sufficient flexibility to allow for governance arrangements to support policy intentions and initiatives.

⁹ Explanatory Memorandum, paragraph 15

¹⁰ See Farrell, C.M., ‘Governance in the Public Sector – the Involvement of the Board’, *Public Administration*, 2005, Vol. 83, No. 1, pp. 89-110 and Ranson, S., C. Farrell, N. Peim and P. Smith, ‘Does Governance Matter for School Improvement?’, *School Effectiveness and School Improvement*, 2005, Vol. 16, No. 3, pp. 305-325

¹¹ See Explanatory Memorandum, paragraph 26

¹² *Ibid.*

20. In its first evidence session, with the then Assembly Minister, the Assembly Committee asked why legislative competence is needed. They asked what cannot currently be done that the proposed Order would permit. The Minister responded as follows:

The Education Act 2002 restricts us to a particular model of governance, and the regulation-making powers that it provides are limited to that model. Competence would allow the National Assembly for Wales to make substantial changes to how school governance works. For example, it could put more emphasis in the law on particular aspects of governance or how governing bodies go about their work, or put in place other models of governance.

21. A number of witnesses who appeared before the Assembly Committee supported the case for using legislation to support improvements in the area. However, in written evidence to the Assembly Committee, both the NASUWT and the educational charity SNAP Cymru were concerned about possible removal of responsibility from local authorities. Estyn articulated a further concern, held by some others, by saying that “in any...legislative changes being considered, it will be important that the changes do not dilute the important link governors have between schools and their local communities.”¹³

22. When we asked the Assembly Minister whether there were plans to transfer powers to or from local authorities, he explained that this was not the underlying purpose behind transfer of competence, but that the aim is to facilitate the creation of frameworks of governance that permit collaboration. He emphasised that there are no proposals, at least at this stage, that would contradict the notion of keeping close accountability links between governing bodies and those who rely on them.¹⁴

23. Having considered the evidence, we are convinced that legislative Measures in the area of school governance will enable policy objectives to be pursued more effectively and robustly. We are satisfied that it is right to grant legislative powers in relation to school governance. We note the concerns of a number of parties that certain new governance models might diminish accountability and create distance between governing bodies and their parents and/or students. The National Assembly will need to design Measures in ways that avoid such pitfalls.

The issue of staffing and funding

24. The Explanatory Memorandum states rather elliptically that “substantive changes to school finance and school staffing are not within the competence that would be created by this LCO. If new governance arrangements were created under the LCO, some linked changes to the persons or bodies with functions relating to staffing and finance would be required and so, to that extent, staffing and finance matters are within competence.”¹⁵ Not surprisingly, this opaque language caused confusion as to whether the proposed Order does or does not cover only peripheral staffing and funding areas.

¹³ See Estyn evidence to Legislation Committee No. 4, paragraph 11

¹⁴ Q 7. See also Q 20.

¹⁵ Explanatory Memorandum, paragraph 26

25. Equally important was the point made in evidence to the Assembly Committee that governance inevitably involves an element of decision making in relation to staffing and funding, for example in the appointment and dismissal of individual staff members and in the setting of school budgets. Indeed a natural reading of “governance” would include those areas, and that would be in conflict with what is said in the Explanatory Memorandum. The Head of the School Governance and School Revenue Branch of the Welsh Assembly Government agreed in the 12 November Assembly Committee evidence session that “[I]t is a very complicated area, and it is quite natural to think that staffing and funding would be part of governance, because governing bodies have functions in respect of those, and it is an important part of their work.”

26. In her plenary statement to the Assembly on 20 October 2009, the then Welsh Assembly Minister, Jane Hutt AM, explained that certain staffing functions such as teachers’ pay and conditions are not devolved to Wales. It was these, rather than the more on the ground governors’ decisions on staffing and funding, that were intended to be outside the scope of the Order, she said. Following the evidence session on 12 November, her letter of 25 November to the Chair of the Assembly Committee reiterated that position.¹⁶ The letter pointed out that “governing bodies do have some flexibility and discretion to determine specific pay ranges for their school and head teacher within the agreed framework, but they cannot amend or alter the framework or work outside it.”

27. The pay “framework” referred to here is:

- Pay and allowances for Head Teachers, Leadership Groups, teachers and classroom assistants;
- Conditions of Employment for all heads, deputies, assistant heads and teaching staff; and
- Framework of professional standards.¹⁷

28. The difficulty around the scope of “governance” has arisen because of a conflict between perceptions of what governors do and attempts to build the language and intention of 5.2A around that used in the Field of education at the present time. Matter 5.12, which covers governance in further education, includes references to “staff”, while Matter 5.14 expressly deals with funding of further education institutions. The argument is that proposed Matter 5.2A successfully excludes teachers’ pay and conditions because of the absence of certain language that is employed elsewhere in the Field. The problem is that “governance” might still be argued to include staffing and funding notwithstanding that absence. We consider that the proposed Matter can be made much clearer while staying within the constraints of existing language.

29. In our oral evidence session we asked why the proposed Order could not be made clearer on the question of staffing and funding by setting out the precise exclusions and the precise matters within scope. Our point was that, otherwise, the Order would risk having to be construed by reference to extrinsic statements such as the 25 November 2009 letter. The

¹⁶ A copy of the letter is reproduced at Ev 15

¹⁷ *Ibid.*

Parliamentary Under-Secretary agreed that the language could be clearer. The Welsh Assembly Minister agreed that the Explanatory Memorandum could be amended to include the explanation set out in the 25 November letter. We consider that the letter is clear, and that its incorporation into the Explanatory Memorandum might achieve some *de facto* clarification of what is intended. However, we believe it would be far more satisfactory for Matter 5.2A to be amended so that its intended inclusions and exclusions are apparent without a need for interpretation or exegesis.

30. We recommend that Matter 5.2A be amended so that it is clear on its own terms as to the exclusion of teachers’ pay and conditions and the inclusion of those staffing and funding matters that are a normal function of governors. An absence of language to cover appropriate “staffing” as well as school budgeting matters would leave the proposed Order defective. It would be a second-best solution for the Explanatory Memorandum to include the explanation given in the letter dated 25 November from Jane Hutt AM to the Chair of Assembly Legislation Committee No. 4.

31. We recommend that future drafting of Matters should be self-standing, and clear in its own terms as well as taking account of the constraints of terminology used elsewhere in the Field or in other legislation.

32. The Assembly Committee heard arguments both for and against the inclusion of teachers’ pay and conditions as a devolved matter. The Association of School and College Leaders Cymru observed that the existence of a cross-boundary labour market in teachers—particularly in the eastern parts of Wales—can present a risk to recruitment of best-quality staff. This can be a two-way process, but in general it is safe to assume that the removal of a threshold—essentially a minimum standard—would be bad for Wales. Union bodies expressed similar reservations, and Governors Wales also favoured leaving pay and conditions out of the equation. Undeb Cenedlaethol Athrawon Cymru (UCAC, the National Union of Teachers for Wales), favoured a wholesale transfer of powers including in relation to pay and conditions but this appeared to be argued on the basis of principle rather than for specific benefits.

School change of status

33. Matters 5.1 and 5.2 already grant the Assembly legislative competence with respect to provision about categories of maintained schools, the establishment and discontinuance of schools maintained by local authorities, and their change from one category to another. Nevertheless, the Assembly Committee heard fears that Measures made under the proposed Order might in some way inhibit the ability of a school to apply for change of status. In her statement to the Assembly on 20 October 2009, the then Minister Jane Hutt AM confirmed that the Matters in the proposed Order do not extend to granting competence to repeal the existing statutory provisions that allow governing bodies to apply for foundation status, and that was followed on 25 November 2009 by a letter from her to the Chair of Assembly Legislation Committee No. 4¹⁸ which sought to clarify that there is already competence in the area of establishment and discontinuance of schools or their change from one category to another.

¹⁸ Already referred to in paragraph 26; see Ev 15

34. We asked both the Assembly Minister and the Parliamentary Under-Secretary of State whether the draft Order could allow for changes in relation to a school's right to alter its status, for instance, by diminishing the powers of governors. We also asked about concerns raised before the Assembly—in the light of the Explanatory Memorandum's mention of surplus capacity¹⁹—about whether existing powers under Matter 5.2 or new powers under the proposed Order could be used to close schools with overcapacity. Both Ministers confirmed that the National Assembly for Wales already has power to legislate in relation to changes of status. They told us that the draft Order does not add to or alter those powers. We are content with that explanation. In addition, the Assembly Minister referred us to a statement concerning procedure on school closures which is reproduced with the evidence from our inquiry.

35. Given that the Assembly already has powers over school establishment, change of status and closure we are satisfied that the proposed Order does not raise additional concerns in these areas.

Proposed Matter 5.2 B: Collaboration

36. The Explanatory Memorandum sets out the Assembly Government's commitment to 14-19 Learning Pathways as a Wales-wide initiative in which all learners aged 14 to 19 will take part, the intention being to provide parity between vocational and academic learning.²⁰ It explains that the success of 14-19 Learning Pathways very much depends on schools, further education institutions and other learning providers working together, with learners sometimes attending several establishments, and refers to the need for collaboration stressed by the Webb Review on the mission and purpose of further education in Wales²¹ for delivery of post-14 learning. We note that the Webb Review also highlighted the value of potential new governance arrangements between schools and further education institutions.

37. The Assembly Government's *Skills that Work for Wales* strategy has likewise identified the need to change patterns of collaboration among education providers in the post-11-year-old age group.²² In her plenary statement of 20 October 2009, Jane Hutt AM cited the example of collaboration between Coleg Menai and all secondary schools in Ynys Môn in delivering a BTEC engineering certificate. She also referred to the exemplary best practice of collaboration between a cluster of primary schools: Dewi Sant, Croesatti, Llanfairpwll, Penybryn and Cae Top. Nevertheless, in the 12 November Assembly evidence session she pointed to the need for a "legal stimulus to ensure that collaborative working takes place".

38. The Explanatory Memorandum points out that proposed Matter 5.2B would complement existing Matter 5.13 on collaboration at the further education level, which similarly employs the term "securing collaboration" (rather than other more permissive language such as "facilitating", "procuring" or "enabling" collaboration). Evidence to us from Undeb Cenedlaethol Athrawon Cymru expressed some concern about the directive

¹⁹ See Explanatory Memorandum, paragraph 12

²⁰ Explanatory Memorandum, paragraph 11

²¹ <http://www.lluk.org/documents/promise-performance-rev2-e.pdf>

²² Explanatory Memorandum, paragraph 13

tone of the word “securing”, and the UCAC witness to the Assembly Committee explained that UCAC objected to mechanisms requiring specific collaboration arrangements. The NASUWT was likewise concerned about the potentially coercive nature of the term “securing”, although among other parties this particular issue did not appear to be high on their agenda.

39. The main issue with respect to Matter 5.2B is whether voluntary collaboration would be more effective. There are also greater difficulties in securing collaboration in Wales compared with England, for reasons of geography and language. These concerns were expressed in evidence to the Assembly Committee from Cymdeithas Ysgolion Dros Addysg Gymraeg (CYDAG, the Association of Schools for Welsh-medium Education).

40. As with changes to governance models, redefining and redistribution of functions have a potential to cause confusion. Issues that will need to be resolved are the identity of the employer, how to allocate resources and whether collaborative arrangements change the link between school and community.

41. In evidence to the Assembly Committee, the National Association of Head Teachers Cymru expressed concern that transfers of responsibility could divert those concerned into complex new sets of rules (demarcating functions) that nobody fully understands. This was a point elaborated on by the National Association of Head Teachers Cymru in oral evidence to the Assembly Committee, whose witness, the Chair of the Secondary School Committee said:

There are stringent divisions of responsibilities between governing bodies and headteachers, as some can act alone while others can be devolved to committees and so on. We would have to be most careful to ensure that that is written into legislation in precise terms so that we are not diverted into a complex new set of rules that nobody fully understands and which will have unforeseen consequences.²³

42. In her second evidence session with the Assembly Committee, on 10 December 2009, the then Minister was sanguine about these difficulties, preferring to focus instead on the opportunities that collaboration could present, despite any potential obstacles. We asked the present Assembly Minister and the Parliamentary Under-Secretary to give their perspective. The Assembly Minister said that, while a voluntary approach would be ideal, schools have not yet taken advantage of the existing provisions permitting collaboration, and that the purpose behind the proposal was to allow for a legislative backstop while maintaining the preference for voluntary co-operation. He also indicated that there would be wide consultation on any proposed Measures. The Parliamentary Under-Secretary reiterated this perspective, expressing the intention as one of “not insistence, but [a] kind of firm direction.”²⁴

43. We note the confirmation given by the Parliamentary Under-Secretary to the effect that Matter 5.2B is deliberately intended to be of wide scope in the classes of institutions it covers and that it could cover collaboration between education authorities. We consider

²³ See 26 November Assembly Committee evidence session at paragraph 14

²⁴ Q 37

that to be appropriate, given the proviso that collaborating persons and bodies should have functions relating to maintained schools.

44. In light of the policy intention of legislating to achieve greater collaboration than is occurring voluntarily, and to connect a wider set of bodies than merely schools, as currently permitted in legislation, we are satisfied that there is justification for the broad scope of proposed Matter 5.2B.

45. We note the Assembly Minister's confirmation that the proposed Order will give competence in relation to federation, as well as collaboration. The Education Act 2002 treats federation and collaboration under different sections (24 and 25, and 26 respectively). Collaboration enables the governing bodies of two or more maintained schools to arrange for their affairs to be discharged jointly or by a joint committee. Federation, on the other hand, results in the governance of two or more maintained schools being placed in the hands of a single governing body.

46. There are currently proposals to make regulations for Wales (using existing powers under section 24 of the Education Act 2002) to permit federation of maintained school governing bodies. These are due to be made and come into force in early Spring 2010. The regulations will enable schools to work together closely by permitting them to federate under a single governing body. The constitution and membership of such single governing bodies would apparently be based on the current model set out in existing legislation.

47. We asked whether there is sufficient clarity about what is intended, particularly given that draft regulations on federation are currently being promulgated under existing powers. We had noted comments in the Assembly Enterprise and Learning Committee's report *The Role of School Governors* to the effect that:

We feel that there are all sorts of governance issues associated with consortia working that have yet to be teased out and the specific role of governors in the process of federating both governing bodies and schools is not clear. We recommend that the Welsh Government clarify the role of school governing bodies in the federation process and ensure that governors are supported in using their powers positively within the new regulatory framework.²⁵

The Assembly Government indicated that clarification would be premature at that point, perhaps because the new regulations were still at the formative stage.

48. The Assembly Minister agreed that there are issues to be teased out but, referring to the guidance provided to teachers and governors, took the view that the position is reasonably clear. However, providing guidance is a different matter from providing an adequate explanation of change. While the existing guidance provides an indication of who does what under the current position, we question whether there is sufficient transparency around the interaction between currently proposed changes and those that are likely to emerge from the LCO. In particular, it is not clear how any future Measures relating to federation will build on or alter the regulations currently proposed under existing powers.

²⁵ See recommendation 17

49. We are satisfied that the Welsh Assembly Government has made a valid and strong case for having the power through legislation to require collaboration. We note that Ministers stressed a preference for voluntary arrangements and we endorse that approach. However, as Measures and regulations are proposed and taken forward, their direction, purpose and interrelation will need to be clearly explained to those who will be affected. The pace of change in this area could leave those involved in a position of uncertainty unless there is such a high degree of clarity.

Proposed Matters 5.2A and 5.2C: Training and training bodies

50. The Education Act 2002 includes a requirement for local authorities to provide information and training for governors “as they see fit” in order to enable them to discharge their functions. Proposed Matter 5.2A would allow the Assembly to legislate to require higher standards of training of governors and thereby improve the quality of decision making.²⁶

51. Subject to questions of resource, we consider that improving the availability of training to governors is a useful and important step forward. But that is not the whole story. Care needs to be taken—particularly in respect of existing governors—because the contribution of governors as volunteers is not necessarily recognised in “status” terms. Governors already feel they have huge responsibilities and take on a substantial time commitment. Compulsory training is attractive and it appears to be a good idea, but it might reduce the attractiveness of the governor role and lead to a reduction in volunteer numbers.²⁷ Careful consideration and research on possible impacts will therefore be needed before proceeding with compulsory training.

52. This view was supported by the witness appearing for Cymdeithas Ysgolion Dros Addysg Gymraeg (CYDAG, the Association of Schools for Welsh-medium Education) before the Assembly Committee in the oral evidence session of 3 December 2009. He said:

A great deal of work needs to be undertaken if our governing bodies...in Wales are to understand what is being proposed. They need to understand the need for this, and not be blindly compelled to do it. They need to be led by explaining the importance of their role and therefore how important it is that they take advantage of the training. There should be no mention of compelling them to attend training because that has a different psychological impact. That must be discussed in an exceptionally sensitive, education way over a significant period. It will not develop overnight because they are not used to it.

53. On the other hand, a witness from Governors Wales made the case in oral evidence to the Assembly Committee for a greater element of compulsory training given the rapidity with which change is taking place in schools. He said: “The school effectiveness framework is on our doorstep, yet the number of times that I have talked to governors who know little about it is scary. Anything that gives them a push by saying, ‘This is important, and you must do it’, will be useful.” Similarly, a witness from Neath Port Talbot County Borough

²⁶ See Explanatory Memorandum, paragraph 26

²⁷ Ranson et al., *op. cit.*

Council took the view that a Measure flowing from the draft Order would allow the development of a much more consistent approach to training of governors across Wales.

54. The Welsh Assembly Government has made a strong case for using legislation to improve the provision of training to governors. Given that the training processes inevitably make time demands on those being trained, any Measure that would make training compulsory will need to be sensitive to the voluntary nature of governorship. Ideally, enhanced training would be made sufficiently attractive that compulsion would not be an issue. This will be a matter for the Assembly to consider.

55. The purpose of Matter 5.2C is principally to enable the creation of bodies to support enhanced training efforts. However, “bodies” are not defined. In evidence to the Assembly Committee on 10 December on the question of what “bodies” would be covered, the then Minister said:

It is difficult to be specific, because that detail will emerge with any future Measure, which would, of course, be subject to scrutiny. I have been thinking about how to clarify this, and when we are talking about types of bodies, that could be a not-for-profit body, or a charitable body; it would have a legal entity, but let us think about these bodies in terms of collaboration and sharing services...The major point to get over...is that this is only in order to facilitate and improve the governance arrangements for a school and give schools and governing bodies more opportunities in terms of perhaps creating a body that can serve their needs.

56. We note that clarification from the then Minister in light of the fears, strongly expressed by some union bodies, that the proposed Order is about removing power from local authorities and opening up services to greater competition and private-sector input “under a smokescreen of collaboration”. The precise nature of any new body will be a matter for consultation at the time that proposals for a Measure are brought to the Assembly. We draw these concerns to the attention of the Welsh Assembly Government and urge that they be addressed specifically when a Measure is proposed.

57. Turning to the substantive issue of whether new bodies should be created, in evidence to the Assembly Committee, the Secretary of the Association of School and College Leaders Cymru said:

We have lost a lot of the specialist knowledge about educational law and the procedures that apply to schools. If this matter enables local education authorities to delegate certain functions to a regional body, which allows the re-establishment of a more cost-effective but high-quality support service, there will be some benefit in it.

He added:

We would have concerns if this is about creating yet another tier of governance. When you pour the funding in at the top, each layer of management or governance that it goes through takes out its stake for administration, which means that less and less gets to the bottom—that is, to the schools. That is where our concern would be.

58. In written evidence to the inquiry by the Assembly Committee, Governors Wales pointed to the need to address resource and capacity issues at national and local level if the

recommendations in the Enterprise and Learning Committee's *The Role of School Governors* report are to implemented under the draft Order. Furthermore, in its oral evidence session with the Assembly Committee, the Welsh Local Government Association said that it would not want to see any additional bureaucracy or the creation of needless administrative burdens.

59. There is evidence in favour of enhancing support for those engaged in education through creating bodies to provide services to them. We consider that the Assembly Government has made a valid and strong case for the transfer of legislative powers in this area, although we note the need for Ministers to address the concerns of a number of parties to be assured that such bodies do not result in additional bureaucracy. We note the assurance given by Ministers that any implementing Measures will be subjected to impact assessment to examine potential costs and we underline the view previously expressed by this Committee that such assessments need to be robust and of high and challenging quality in order to establish a sound reputation for “Welsh legislation”.²⁸

60. A number of other drafting issues arise in relation to proposed Matter 5.2C. Although part of the provision is limited to maintained schools, there is no limitation to sub-paragraph (i) to education and training in maintained schools. As a result it could include, for instance, provision of services to further education institutions. It seems that this is the intention, which appears to us to be sensible, but that intention should be spelled out clearly and explicitly in the Explanatory Memorandum.²⁹

61. We note that proposed Matter 5.2C sub-paragraph (i) is not restricted to education and training in maintained schools. We are content that this will permit provision of services to other institutions provided this is made clear and explicit in the Explanatory Memorandum and in any final Order.

62. Secondly, 5.2C(a)(ii) is not confined to functions in support of education and training. When asked about this, both the Assembly Minister and the Parliamentary Under-Secretary said that, because the provision speaks of exercising functions on behalf of local education authorities, those functions must be education and training functions. We are not convinced. Local education authorities exercise a number of other executive functions that are ancillary to their main educational function, and the provision could therefore cover bodies performing such ancillary activities.

63. We urge the Assembly Government to review the scope of Matter 5.2C in relation to non-education and non-training functions by considering whether other functions might unintentionally fall within it and whether additional limiting words should be added.

64. Finally, the word “involvement” is not defined and is an unusual term to use in legislation. The word “participation” is more commonplace. This was raised by the Association of Teachers and Lecturers Cymru in written evidence to the Assembly Committee. The union expressed concern that lack of clarity in Matter 5.2C could permit

²⁸ Q 44

²⁹ Qq 22 and 41, and see also Explanatory Memorandum paragraph 28

the introduction of Measures that give excessively wide powers to the Executive. While we are satisfied that the intention is to cover *bona fide* involvement, we suggest that the more usual word “participation” could be used. Indeed, when questioned on the point, both Ministers explained involvement in terms of participation.

65. We recommend that the Assembly Government reconsider the language used in 5.2C(b) to ensure that it does not unintentionally cover activities outside the intended scope of the Matter.

4 Conclusion

66. We agree that the National Assembly for Wales should have the ability to legislate in relation to school governance, collaboration between education bodies, and the facilitation of training. Evidence to the Assembly Legislation Committee No. 4 and to ourselves indicated a clear majority in favour of devolution in this area provided that due consultation occurs with respect to implementing Measures. The use of the Legislative Competence Order procedure is appropriate and acceptable in this instance.

67. We recommend that the Welsh Assembly Government take into account our comments and the observations of Assembly Legislation Committee No. 4 when finalising the Order and the accompanying Explanatory Memorandum, and in relation to the drafting of future proposed Orders.

Annex A

Background to the Legislative Competence Order procedure

The Government of Wales Act 2006 introduced a procedure whereby the National Assembly for Wales can bring forward proposals which would extend the Assembly's lawmaking 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 'Measures' to change 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 to the Government of Wales Act 2006.

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

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) arising from pre-legislative scrutiny. The draft Order may 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 can then make laws in the form of Assembly Measures, which need to be passed by the National Assembly but which require no further approval by either Whitehall or Parliament.

Introduction of this proposed Order

The National Assembly for Wales (Legislative Competence) (Education) Order 2010 was laid before the National Assembly by the then Minister for Children, Education, Lifelong Learning and Skills, Jane Hutt AM, on 19 October 2009. The proposed Order was referred to the Assembly's Legislation Committee No. 4, which formally agreed to undertake pre-legislative scrutiny of the proposed Order on 22 October 2009. The Committee issued a call for written evidence and subsequently held five evidence sessions, including with the then Minister. Others giving evidence included Estyn, the Welsh Local Government Association, representatives of local authorities, Governors Wales, the National Association of Head Teachers Cymru, the Association of School and College Leaders, the NASUWT, Cymdeithas Ysgolion Dros Addysg Gymraeg (CYDAG, the Association of Schools for Welsh-medium Education) and Undeb Cenedlaethol Athrawon Cymru (UCAC, the National Union of Teachers of Wales). The Welsh Assembly Committee published its report on 27 January 2009.

Annex B

Our inquiry

We announced our inquiry and issued a call for evidence on 28 October 2009. On 14 January 2010 we took oral evidence from the Welsh Assembly Government Minister for Children, Education, Lifelong Learning and Skills, Leighton Andrews, the Parliamentary Under-Secretary of State at the Wales Office, Mr Wayne David MP, and officials. We also benefited from an informal meeting with the Mike German AM, the Chair of National Assembly for Wales Legislation Committee No. 4 to discuss the issues raised by our respective inquiries, which was highly productive. We received written evidence directly from Undeb Cenedlaethol Athrawon Cymru (UCAC, the National Union of Teachers for Wales), and we also considered the evidence submitted to the Assembly Committee. We are grateful for the assistance of our specialist advisers, Professor Catherine Farrell, Department of Social Sciences, University of Glamorgan,³⁰ and Professor Keith Patchett, Emeritus Professor of Law, University of Wales.³¹

³⁰ See Formal Minutes for the Committee for 24 November 2009 at http://www.parliament.uk/parliamentary_committees/welsh_affairs_committee/wac_formal_minutes_09_10.cfm

³¹ See Formal Minutes for the Committee for 28 November 2006 at <http://www.parliament.uk/documents/upload/final%20FORMAL%20MINUTES%2006%2007.pdf>

Conclusions and recommendations

Policy context of the Order

1. We consider that the purpose of the proposed Order is clear and that it arises from a developed policy agenda on the part of the Assembly Government. (Paragraph 7)

Grounds for transfer of further powers

2. It is clear to us that devolution has enabled Wales to create and develop its own educational policy agenda, and further devolution of education powers is in the spirit and scope of the devolution settlement. (Paragraph 11)

Scope of the proposed Order in the context of other devolved education powers

3. In the case of this LCO, the Assembly is seeking a specific delegation of competence for a particular purpose. Ministers stated that their approach was to request a transfer of legislative powers in education as and when it is needed to implement a policy requirement. (Paragraph 14)

Proposed Matter 5.2A: Governance and conduct

4. Having considered the evidence, we are convinced that legislative Measures in the area of school governance will enable policy objectives to be pursued more effectively and robustly. We are satisfied that it is right to grant legislative powers in relation to school governance. We note the concerns of a number of parties that certain new governance models might diminish accountability and create distance between governing bodies and their parents and/or students. The National Assembly will need to design Measures in ways that avoid such pitfalls. (Paragraph 23)
5. We recommend that Matter 5.2A be amended so that it is clear on its own terms as to the exclusion of teachers' pay and conditions and the inclusion of those staffing and funding matters that are a normal function of governors. An absence of language to cover appropriate "staffing" as well as school budgeting matters would leave the proposed Order defective. It would be a second-best solution for the Explanatory Memorandum to include the explanation given in the letter dated 25 November from Jane Hutt AM to the Chair of Assembly Legislation Committee No. 4. (Paragraph 30)
6. We recommend that future drafting of Matters should be self-standing, and clear in its own terms as well as taking account of the constraints of terminology used elsewhere in the Field or in other legislation. (Paragraph 31)

School change of status

7. Given that the Assembly already has powers over school establishment, change of status and closure we are satisfied that the proposed Order does not raise additional concerns in these areas. (Paragraph 35)

Proposed Matter 5.2 B: Collaboration

8. In light of the policy intention of legislating to achieve greater collaboration than is occurring voluntarily, and to connect a wider set of bodies than merely schools, as currently permitted in legislation, we are satisfied that there is justification for the broad scope of proposed Matter 5.2B. (Paragraph 44)
9. We are satisfied that the Welsh Assembly Government has made a valid and strong case for having the power through legislation to require collaboration. We note that Ministers stressed a preference for voluntary arrangements and we endorse that approach. However, as Measures and regulations are proposed and taken forward, their direction, purpose and interrelation will need to be clearly explained to those who will be affected. The pace of change in this area could leave those involved in a position of uncertainty unless there is such a high degree of clarity. (Paragraph 49)

Proposed Matters 5.2A and 5.2C: Training and training bodies

10. The Welsh Assembly Government has made a strong case for using legislation to improve the provision of training to governors. Given that the training processes inevitably make time demands on those being trained, any Measure that would make training compulsory will need to be sensitive to the voluntary nature of governorship. Ideally, enhanced training would be made sufficiently attractive that compulsion would not be an issue. This will be a matter for the Assembly to consider. (Paragraph 54)
11. There is evidence in favour of enhancing support for those engaged in education through creating bodies to provide services to them. We consider that the Assembly Government has made a valid and strong case for the transfer of legislative powers in this area, although we note the need for Ministers to address the concerns of a number of parties to be assured that such bodies do not result in additional bureaucracy. We note the assurance given by Ministers that any implementing Measures will be subjected to impact assessment to examine potential costs and we underline the view previously expressed by this Committee that such assessments need to be robust and of high and challenging quality in order to establish a sound reputation for “Welsh legislation”. (Paragraph 59)
12. We note that proposed Matter 5.2C sub-paragraph (i) is not restricted to education and training in maintained schools. We are content that this will permit provision of services to other institutions provided this is made clear and explicit in the Explanatory Memorandum and in any final Order. (Paragraph 61)
13. We urge the Assembly Government to review the scope of Matter 5.2C in relation to non-education and non-training functions by considering whether other functions

might unintentionally fall within it and whether additional limiting words should be added. (Paragraph 63)

14. We recommend that the Assembly Government reconsider the language used in 5.2C(b) to ensure that it does not unintentionally cover activities outside the intended scope of the Matter. (Paragraph 65)

Conclusion

15. We agree that the National Assembly for Wales should have the ability to legislate in relation to school governance, collaboration between education bodies, and the facilitation of training. Evidence to the Assembly Legislation Committee No. 4 and to ourselves indicated a clear majority in favour of devolution in this area provided that due consultation occurs with respect to implementing Measures. The use of the Legislative Competence Order procedure is appropriate and acceptable in this instance. (Paragraph 66)
16. We recommend that the Welsh Assembly Government take into account our comments and the observations of Assembly Legislation Committee No. 4 when finalising the Order and the accompanying Explanatory Memorandum, and in relation to the drafting of future proposed Orders. (Paragraph 67)

Formal Minutes

Tuesday 2 February 2010

Members present:

Dr Hywel Francis, in the Chair

Nia Griffith

Mrs Siân James

Mr David Jones

Alun Michael

Hywel Williams

Mark Williams

Draft Report (*Proposed Legislative Competence Order relating to School Governance*) proposed by the Chairman, brought up and read.

Ordered, That the Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 67 read and agreed to.

Annexes and Summary agreed to.

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

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

Written evidence ordered to be published on 15 December under the title of *Proposed National Assembly for Wales (Legislative Competence) (Education) Order 2010* was ordered to be reported to the House for printing with the Report.

[Adjourned until Thursday 2 February at 9.45 a.m.]

Witnesses

Thursday 14 January

Mr Leighton Andrews, Assembly Member, Minister for Children, Education, Lifelong Learning and Skills, **Dr David Lloyd-Thomas**, Head of Branch Revenue Funding and School Governance, and **Mr Simon Morea**, Legal Services, Welsh Assembly Government Ev 1

Mr Wayne David MP, Parliamentary Under-Secretary of State, **Mr Geth Williams**, Head of Legislation Policy, and **Ms Susan Olley**, Legal Adviser Wales Office Ev 5

List of written evidence

1	Letter from Rt Hon Peter Hain MP, Secretary of State, Wales Office	Ev 8
2	Welsh Affairs Committee Press Notice	Ev 8
3	Proposed Order for Pre-Legislative Scrutiny	Ev 9
4	Welsh Assembly Government Explanatory Memorandum	Ev 11
5	Written evidence from Undeb Cenedlaethol Athrawon Cymru	Ev 14
6	Supplementary written evidence from Jane Hutt AM, Minister for Children Education, Lifelong Learning and Skills	Ev 15
7	Statement by Leighton Andrews, Minister for Children, Education and Lifelong Learning, Welsh Assembly Government	Ev 16

List of Reports from the Committee during the current Parliament

Session 2009-10

First Report	The Proposed National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009	HC 40
Second Report	Proposed National Assembly for Wales (Legislative Competence) (Housing) Order 2009 relating to Domestic Fire Safety	HC 142
Third Report	Work of the Committee 2008-09	HC 154
Fourth Report	The Proposed National Assembly for Wales (Legislative Competence) (Local Government) Order 2009	HC 36
Fifth Report	Review of the LCO Process	HC 155
Sixth Report	Proposed National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010, relating to Sustainable Housing	HC 186
Seventh Report	The Proposed Legislative Competence Order relating to School Governance	HC 274
First Special Report	Proposed National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2009: Government Response to the Committee's Fourteenth Report of Session 2008-09	HC 198
Second Special Report	The National Assembly for Wales (Legislative Competence) (Environment) Order 2009: Government Response to the Committee's Twelfth Report of Session 2008-09	HC 243
Third Special Report	Ports in Wales: Government Response to the Committee's Fifteenth Report of Session 2008-09	HC 308

Session 2008-09

First Report	Cross-border provision of public services for Wales: Further and higher education	HC 57
Second Report	Globalisation and its impact on Wales	HC 184 –I, II
Third Report	Proposed National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2008	HC 5
Fourth Report	Work of the Committee 2007-08	HC 252
Fifth Report	The provision of cross-border health services for Wales	HC 56
Sixth Report	Proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009	HC 306
Seventh Report	Legal Services Commission Cardiff Office	HC 374
Eighth Report	Potential Benefits of the 2012 Olympics and	HC 162

	Paralympics for Wales	
Ninth Report	The proposed National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009	HC 348
Tenth Report	Cross-border provision of public services for Wales: Transport	HC 58
Eleventh Report	English Language Television Broadcasting in Wales	HC 502
Twelfth Report	Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009	HC 678
Thirteenth Report	Digital Inclusion in Wales	HC 305
Fourteenth Report	Proposed National Assembly for Wales (Legislative Competence) (Health And Health Services And Social Welfare) Order 2009	HC 778
Fifteenth Report	Ports in Wales	HC 601
First Special Report	The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008: Government Response to the Committee's Seventh Report of Session 2007–08	HC 200
Second Special Report	Cross-border provision of public services for Wales: further and higher education: Government Response to the Committee's First Report of Session 2008-09	HC 378
Third Special Report	Proposed National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2008: Government Response to the Committee's Third Report of Session 2008-09	HC 410
Fourth Special Report	Globalisation and its impact on Wales: Government Response to the Committee's Second Report of Session 2008-09	HC 538
Fifth Special Report	The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009: Government Response to the Committee's Sixth Report of Session 2008-09	HC 605
Sixth Special Report	Legal Services Commission Cardiff Office: Government Response to the Committee's Seventh Report of Session 2008-09	HC 825
Seventh Special Report	Proposed National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009: Government Response to the Committee's Ninth Report of Session 2008-09	HC 1024
Eighth Special Report	Digital Inclusion in Wales: Government Response to the Committee's Thirteenth Report of Session 2008-09	HC 1050
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
Third Report	Work of the Committee in 2007	HC 325

Fourth Report	The proposed National Assembly for Wales (Legislative Competence) Order in the field of social welfare 2008	HC 257
Fifth Report	The proposed draft National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008	HC 576
Sixth Report	The provision of cross-border health services for Wales: Interim Report	HC 870
Seventh Report	The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008	HC 812
First Special Report	The proposed Legislative Competence Order in Council on additional learning needs: Government response to the Committee's Second Report of Session 2007-08	HC 377
Second Special Report	Energy in Wales – follow-up inquiry: Government Response to the Committee's First Report of Session 2007-08	HC 435
Third Special Report	The proposed National Assembly for Wales (Legislative Competence) Order in the field of social welfare 2008: Government Response to the Committee's Fourth Report of Session 2007-08	HC 715
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
First Special Report	Government Response to the Committee's Second Report of Session 2006-07, Legislative Competence Orders in Council	HC 986
Session 2005-06		
First Report	Government White Paper: Better Governance for Wales	HC 551
Second Report	Proposed Restructuring of the Police Forces in Wales	HC 751
Third Report	Energy in Wales	HC 876-I
Oral and written Evidence	Energy in Wales	HC 876-II
Fourth Report	Future of RAF St Athan	HC 1129
Fifth Report	Current Restructuring of the Police Forces in Wales	HC 1418
Oral and written Evidence	NHS Dentistry in Wales	HC 771-i
First Special Report	Government Response to the Committee's Second and Third Reports of Session 2004-05, Manufacturing and Trade in Wales and Public Services Ombudsman (Wales) Bill	HC 433
Second Special Report	Government Response to the Committee's Fourth Report of Session 2004-05, Police Service, Crime and	HC 514

Anti-Social Behaviour in Wales		
Third Special Report	Government Response to the Committee's First Report of Session 2005-06, Government White Paper: Better Governance for Wales	HC 839
Fourth Special Report	Government Response to the Committee's Second Report of Session 2005-06, Proposed Restructuring of the Police Forces in Wales	HC 1431
Fifth Special Report	Government Response to the Committee's Third Report of Session 2005-06, Energy in Wales	HC 1656
Sixth Special Report	Government Response to the Committee's Fourth Report of Session 2005-06, Future of RAF St Athan	HC 1657
Seventh Special Report	Government Response to the Committee's Fifth Report of Session 2005-06, Current Restructuring of the Police Forces in Wales	HC 1695

Oral evidence

Taken before the Welsh Affairs Committee on Thursday 14 January 2010

Members present:

Mark Williams, in the Chair

Dr Hywel Francis

Alun Michael

Witnesses: **Mr Leighton Andrews**, Assembly Member, Minister for Children, Education, Lifelong Learning and Skills, **Dr David Lloyd-Thomas**, Head of Branch Revenue Funding and School Governance, and **Mr Simon Morea**, Legal Services, Welsh Assembly Government, gave evidence.

Q1 Chairman: Good morning and welcome to this evidence session of the Welsh Affairs Select Committee. First, would you identify yourselves to the Committee, please.

Mr Andrews: I am Leighton Andrews. I am the Minister for Children, Education and Lifelong Learning in the Welsh Assembly Government. I am accompanied by Dr David Lloyd-Thomas, who heads our School Governance Branch, and Simon Morea from Legal Services.

Q2 Chairman: Thank you very much. First I should declare an interest. I am a member of the NASUWT, the Teaching Council for Wales, and my wife is a governor of a school in Ceredigion. I turn to the first question. If the LCO proceeds, how complete do you believe that the devolved settlement will then be in relation to education, and what further plans are there for competence requests on the education portfolio?

Mr Andrews: Clearly we have had devolved powers on education in Wales for many years. Even preceding the National Assembly for Wales there was administrative devolution, and education was one of the fields, of course, transferred from the Secretary of State's responsibilities to the National Assembly's responsibilities following the 1998 Government of Wales Act, so we have been accustomed to dealing with education issues for some time. As far as we are concerned, we are seeking the competence on education on an incremental basis. On governance, for our purposes, it makes sense for us to come to you now with this request for an LCO. It has received wide support in the National Assembly for Wales, it has been scrutinised there, and I think it is precisely the kind of example that the LCO process was designed to facilitate.

Q3 Chairman: Given the extent of devolution in this field already, there was not a debate or consideration of wrapping up, if you like, the proposals in a final order which would complete the transfer; you still very much see it in a step-by-step approach.

Mr Andrews: I do, because I think that the request for the transfer of competence in some cases will depend on policy choices that the National Assembly or the Welsh Assembly Government may

choose to exercise. There may be responsibilities that we would not seek to transfer of competence that we would not seek to gain. But in general terms, at this stage, this is a particular power that we are seeking, a particular competence that we are seeking, and I do not have any plans to seek to consolidate the whole of education legislation.

Q4 Chairman: In the evidence session of the Assembly Legislation Committee on 12 November your predecessor spoke of the "potential" consolidation of education law for Wales. Could you elaborate further on what that might mean?

Mr Andrews: That would mean trying to codify all the different powers that we currently have, some of which of course were transferred at the inception of the Assembly, some of which have been accrued through primary legislation. There is another example I can give you on that score. If you look at home education, we are seeking powers under a Bill currently before Parliament and we introduced a Legislative Consent Motion in the Assembly this week to address that Bill. I suppose powers have come to us through a variety of means, and if you were to codify them, bringing them together in the way that my predecessor was talking about, it might look cleaner in one respect and simpler. However, I am not myself in favour of legislation for the sake of it.

Chairman: Thank you.

Q5 Hywel Francis: To look specifically at proposed Matter 5.2A relating to governance and conduct, in the Explanatory Memorandum it states that the LCO would allow the Assembly to abolish bodies responsible for school governance. What plans does the Welsh Assembly Government have in this area?

Mr Andrews: The wording that is used gives us the ability not only to abolish but to create—in fact I think it is create and abolish. At this stage what we are seeking is the competence to produce Measures within the field of school governance. I have not turned my mind to the necessary act of abolition of anything. In the sense in terms of the wording, you will find in the Explanatory Memorandum we do talk about creating or abolishing.

14 January 2010 Mr Leighton Andrews, Dr David Lloyd-Thomas and Mr Simon Morea

Q6 Hywel Francis: What interchange of powers between governing bodies and local authorities is being considered in this context?

Mr Andrews: We are really interested in getting a framework which allows us to drive collaboration, whether that is collaboration between governing bodies of different schools, collaboration between governing bodies of schools and further education institutions, or collaboration at different levels between local authorities. It is not so much, necessarily, that we are seeking the competence in order to transfer responsibility from governors to local authorities or in any other way. If we have the transfer of competence, it makes sense to bring the competence for school governance across the field.

Q7 Hywel Francis: We noted the views of two educational bodies, the Association of School and College Leaders Cymru and the National Association of Headteachers Cymru. Both of them are unconvinced as to the need for or efficacy of new transfers of governance powers. Should not responsibility and accountability stay with a school's own governing body?

Mr Andrews: At this stage we are not proposing anything that would contradict that. We have a model of governance that derives from the original legislative powers relating to local management of schools and it is a particular kind of form of governance. At some stage we may wish to make new proposals. For example, we may wish to improve the training of governors by local authorities. If we are seeking responsibility over school governance, then it seems to me it is sensible to take the competence for the bulk of the conduct and governance of schools rather than to do it in a piecemeal fashion.

Hywel Francis: Thank you.

Q8 Alun Michael: Good morning. The intentions of Ministers and the impact of legislation can often be misunderstood. If you do not mind me using an anecdote from my own experience, when I had responsibility for education in Wales, on one occasion I asked officials to explain what the impact of a particular statutory instrument would be and the explanation was nearly as complicated as the Explanatory Memorandum, which was nearly as complicated as the draft. Eventually, I said, "Look, just explain to me in words of one syllable what would be the impact to a school governor or a headteacher of a school?" and the answer was, "Absolutely none, Minister." "Why is that?" "Because all we are doing is transposing existing arrangements from the old legislation to the new." Everybody was getting very excited about what looked to be very complicated. For that reason I would like to understand one thing which seems to be in the minds of some people but I do not believe the intention to be that complicated. The Explanatory Memorandum states that school finance and staffing are not within competence, but then it is indicated that they are within competence to the extent that changes in staffing or finance are linked to the new governance arrangements.

Furthermore, governors are involved in making decisions on staff recruitment and pay and setting school budgets. Can you clear up for us what the intention and impact will be?

Mr Andrews: Yes. Clearly governors exercising the functions that they do currently will have a role to play in terms of the setting of the finance arrangements for a school budget. They will have a role obviously in looking at the performance of staff and the performance of the school and so on. But their powers, of course, derive from broader legislation, so teachers' pay and conditions would set the framework within which governors would operate within their own school setting. We are not seeking competence over teachers' pay and conditions. That is set on an England and Wales basis by the Secretary of State. Governors can operate within that framework: this LCO would not change that. That is a reasonably clear example. Though there was some initial confusion when it first came to the first of the Assembly Legislation Committee hearings, it was subsequently clarified, I hope, by the letter that was sent by my predecessor.¹

Q9 Alun Michael: I have to say that I think that explanation is extremely helpful. Would it not be a good idea—and there is time to do this before the substantive LCO comes forward—perhaps to make the LCO itself clearer on this point by setting out precise exclusions and exactly what is within scope. Otherwise there is a risk, is there not, that the LCO has to be interpreted against the sort of explanation you have just given to us and stated to Ministers, rather than it being clear in itself.

Mr Andrews: I think it is relatively clear, because we have set that out in my predecessor's letter. I am quite relaxed about this point, and if the Committee so felt, it might be that we should insert some extracts from the letter that my predecessor sent out into the Explanatory Memorandum.

Alun Michael: I think, indeed, that might be helpful.

Q10 Hywel Francis: Turning to school change of status, will the draft Order allow for changes in relation to a school's right to alter its status, for instance, by diminishing the powers of governors?

Mr Andrews: Not in itself, because all the LCO does, of course, is give us the competence over school governance.

Q11 Alun Michael: To what extent does Field 5 Matter 5.2 already give the Assembly power to legislate on such rights?

Mr Andrews: We already have the competence to pass Measures relating to the change of school category. That is given in Matter 5.1, if I remember. The Assembly has had that competence for the last three years. So far, Welsh Ministers have not brought forward any Measures on it, and I do not myself anticipate that being something I would be able to do.

¹ Ev 15

14 January 2010 Mr Leighton Andrews, Dr David Lloyd-Thomas and Mr Simon Morea

Q12 Hywel Francis: Could existing powers under Matter 5.2 or new powers under the LCO be used to close the schools with surplus capacity mentioned in paragraph 12 of the Explanatory Memorandum?

Mr Andrews: Again, the National Assembly already has competence in that field. It is obviously for local authorities to determine through what we used to call “school organisation plans” how they are going to deal with the issue of surplus places. We do not need any further powers under this LCO to do that and this LCO does not transfer any further competence to do that. The competence already exists. In fact earlier this week I published a written statement on the role of Welsh Ministers in relation to school closures, because I did want people to be clear about the process. Indeed, new school closure proposals that are brought forward by local authorities from 1 January this year will be dealt with under new guidance that we have issued. I wanted to draw that to people’s attention. If it is helpful to the Committee, of course we can show that written statement to you.²

Chairman: Thank you. That would be very helpful.

Q13 Alun Michael: You have already referred to the securing of collaboration. I am very sympathetic to that point. Are you sure that the power to secure collaboration by legislation will achieve more than a voluntary basis? What assessment have you made of the advantage of legislation in that respect?

Mr Andrews: It would be ideal if collaboration happened on a voluntary basis. I would obviously myself prefer that. It is always better that school governing bodies have a view to the wider context within which they operate, the overall interests of students in their locality, not just within their own school but more broadly. There have not been any examples really of effective collaboration. Our own governor support officers and local authorities tell us that no school has yet to use the existing regulations that permit formal collaboration. The competence would give us the ability to introduce a Measure which would produce a backstop power if we needed it to ensure that collaboration did occur. As I say, I would prefer it, of course, to happen on a voluntary basis.

Q14 Alun Michael: You see the legislative powers being, if you like, a framework and a background to strengthen your hope of people just getting on with it, rather than a very bureaucratic approach to collaboration.

Mr Andrews: We do want local school governing bodies to consider the wider context. As I say, I would prefer that if there was an opportunity for collaboration, they would take that voluntarily. However, it may be that we would need a power to ensure that that did happen to secure it.

Q15 Alun Michael: There is a rule on legislation that laws rarely prevent what they forbid and rarely quite achieve what they set out to achieve. I am sure that you and the officials with you today will be entirely

benevolent in the use of those powers, but it is possible for a bureaucracy to become very prescriptive in requiring things. I suppose we are looking for a reassurance that the regime would be to ensure that schools cannot, if you like, avoid the necessity of considering the wider context, but as far as possible providing encouragement for them to take those decisions at a local level.

Mr Andrews: Clearly if we were going to exercise the competence to secure collaboration by introducing an Assembly Measure that addressed that, we would be consulting on that widely. There would be the opportunity there for people to make the appropriate representations.

Q16 Alun Michael: The word “securing” is read by some people to imply an element of coercion. I understand the word “securing” was adopted for consistency with other Matters in Field 5, specifically those that relate to further education. What does the experience in further education suggest about the likely meaning, in practice, of “securing collaboration”?

Mr Andrews: It is important that there is consistency in the terms that we are using here. Clearly as we are going through our agenda of driving transformation in post-16 education we are looking more and more for schools and FE institutions to collaborate rather than to compete. One of the things we have currently underway, of course, is a review of FE governance. That will be concluding over the next month or so, and it may well be that as a result of that we will be in a position to make judgments as to how this is operating in FE. But I do think it is important to have consistency of phraseology for both FE and maintained schools.

Q17 Chairman: I want to move on now to the issue of federation. You have elaborated very clearly your thoughts on collaboration as referred to in the LCO. How does that square with the proposed regulations on federation of governing bodies under Section 24 of the Education Act 2002?

Mr Andrews: Collaboration obviously is about bodies working with each other while remaining separate legal entities. Federation is about the merging of separate bodies to create one body that governs two or more education establishments. In a sense, if you like, the fundamental difference is that under collaboration, separate bodies remain, but under federation they do not. Both are means, of course, of getting education providers to work together. The proposed federation regulations that you have referred to are about arrangements to permit governing bodies to propose that they federate as a single governing body for several schools. Again the emphasis there is on the voluntarism aspect, if you like, of the governing bodies deciding to federate.

Q18 Chairman: Will the LCO as it covers federation of governing bodies be used to change the law on federation beyond what the regulations will suggest?

² Ev 16

14 January 2010 Mr Leighton Andrews, Dr David Lloyd-Thomas and Mr Simon Morea

Mr Andrews: If we are given competence under this LCO, we will be in a position to introduce further changes.

Q19 Chairman: Do you think there has been sufficient clarity around what is happening in the debate on federation and collaboration, the timetabling for them and the roles of the professionals, the governors and the local authorities? I would just cite the Enterprise and Learning Committee's report to the Assembly which state: "We feel . . . the process of federating both governing bodies and schools is not clear" and that there are issues to be "teased out". Is that a concern?

Mr Andrews: There are probably issues to be teased out in respect of federating schools. In a sense, some of those will only be tested as federation moves forward. I know it is seen at a local level, by some parents and governors and some others, as a sensible and realistic route as we look at how issues such as surplus places in schools are addressed. Often, if you have a number of schools in a locality, the whole issue of federation looks very sensible to people. I would hope that we would see that agenda and move forward. In respect of the issue of differences between the role of governors and the role of the professionals within the school, the headteacher and teachers, that is reasonably clear. We have published extensive guidance on that, and it is quite clear what the role of the teachers is and what the role of governors is. We also support organisations such as Governors Wales to ensure that there is advice and information available to governors throughout Wales.

Q20 Chairman: I can think of constituency cases where the process towards federation does make sense, but there is still this fear that some federated governing bodies do become more remote and less accountable to parents. Would you accept that there is certainly a concern there?

Mr Andrews: I could understand that concern. You will speak from your own experience, and I would say from the experience of a Valleys constituency that you may very often have a primary school or a couple of primary schools very closely located with a secondary school, and it may be that there are certain things that can be handled in common across those schools and federation might be one route to achieving that.

Q21 Hywel Francis: I would like to turn to training bodies, Matter 5.2C. At the risk of sounding pedantic, I want to explore some of the meanings of words and phrases. Paragraph (ii) of Matter 5.2C appears in the current draft not to be limited to education. Should the words "in support of education and training" be added?

Mr Andrews: I do not think there is a need to do that. If you look at the clause, it is quite clear that it is talking about exercising functions on behalf of local education authorities, so these would, therefore, be education and training functions.

Q22 Hywel Francis: In paragraph (i), should the Matter be confined to education and training in maintained schools?

Mr Andrews: No, I do not think so. We wanted a competence which would allow the Assembly to make a Measure to provide for any kind of body that was established to work with, for example, a further education institution, so we are seeking here a degree more flexibility.

Q23 Hywel Francis: Finally, what does "involvement" mean in paragraph (b). Could this not be more precisely expressed?

Mr Andrews: The term "involvement" is that Matter 5.2C would allow us to create a Measure that would establish a body to carry out activities in relation to education and training or to exercise functions on behalf of local education authorities. Once you have established that body, it obviously follows that those who established it need to be able to be involved with that body (that is, participate in it) by providing staff or investing in the body that is put forward.

Q24 Chairman: Thank you. Perhaps I could turn to some of the terminology used in the LCO. The Assembly Government has chosen not to include school "functions" as such in Matter 5.2A, but only the allocation of functions. What is intended to be excluded by that use of words?

Mr Andrews: What would be excluded would be changes to functions which are not part of school governance—and we discussed finance in answer to Mr Michael's question earlier on—but it would be possible for us to reallocate those functions amongst other bodies, either those that currently exist or bodies that might be created as a result of Matter 5.2C within the Measure. We think competence to allocate functions is important. Changes to school governance or changes to aspects of how schools work could have consequences for who does what in the system, so competence needs to be broad enough to reallocate functions in the relevant governing bodies which are not in themselves part of school governance.

Q25 Chairman: Property rights and liabilities are not covered also.

Mr Andrews: Yes. We have covered the allocation of property rights and liabilities for the same reasons.

Q26 Chairman: Finally, what do you see as the overall consequences of the LCO in terms of potential increased burdens on local government?

Mr Andrews: I do not think there would be any increased burdens on local government as a result of the LCO. All the LCO does, of course, is transfer competence to us to do something. It is certainly not my intention to seek to put additional burdens on local government. It is my intention in the role that I have just taken on to try to ensure that we are securing more resources for the frontline, and to reduce the bureaucratic burden wherever that may fall—whether it is on schools or on local authorities or on FE institutions.

Chairman: Thank you to you Minister and your officials for coming. We have had very clear, concise and speedy questioning and answering this morning. Thank you.

Witnesses: **Mr Wayne David MP**, Parliamentary Under-Secretary of State, **Mr Geth Williams**, Head of Legislation Policy, and **Ms Susan Olley**, Legal Advisor, Wales Office, gave evidence

Q27 Chairman: Good morning. Could the witnesses introduce themselves, please.

Mr David: Thank you, Mr Williams. Obviously you know who I am, but could I introduce Geth Williams, on my right, who is Head of Legislation Policy in the Wales Office, and, on my left, Sue Olley, who is one of our legal experts.

Q28 Chairman: Thank you very much. I will kick off with the question I asked initially. If the LCO proceeds, how complete do you believe that the devolved settlement will then be in relation to education, and what further plans are there for competence requests on the education portfolio?

Mr David: Obviously the Wales Office has been in close co-operation with the Welsh Assembly Government and we are supporting fully what the Welsh Assembly Government has decided to put forward in terms of this Legislative Competence Order. It is a very specific matter that we have before us, relating to school governance and activities associated with school governance, that will be an important complement to the array of powers which the Welsh Assembly Government already has with regard to education. Of course there are other educational matters which are not within the legislative competence of the Welsh Assembly Government. We can refer to the regulation of home education, in fact, which is to be included in the Children Schools and Families Bill, and we are also talking about matters relating to staffing, pay and conditions, regulation of teachers qualifications and student finance. Those are matters which are not part of the Assembly's competence and there has been no request for the Assembly to have those powers of competence.

Q29 Chairman: At this stage that is a step-by-step approach, rather than the wrapping up of proposals, so that education would be in a similar position to local government and social welfare where the devolved settlement is almost complete.

Mr David: Yes. Certainly the Assembly Government has indicated to us that they are essentially driven by their policy priorities and those are reflected in their desire to have legislative competence in specific areas. Obviously there is a case for having greater co-ordination and greater symmetry, but the essential thing that is motivating the Welsh Assembly Government is the policy agenda which they are developing.

Chairman: Thank you.

Q30 Alun Michael: Both this Committee and a House of Lords Committee have urged that simple language is used in the drafting of LCOs to make it much easier and clearer what is intended. You will have heard Mr Andrews giving an explanation of what is intended in relation to school finance and staffing. If it is the intention merely to have an

exclusion of the broad pay and conditions, would it not be simpler to phrase the LCO to make that clear?

Mr David: With all due respect, I think the LCO is clear with regard to staffing and funding. As Mr Andrews has indicated, there was quite an intense discussion in the Welsh Assembly under the first session of the Legislative Scrutiny Committee there and greater clarification was provided by means of a letter to Mr German. But I heard what was said earlier and, on reflection, perhaps there is scope for greater clarification, particularly as far as the Explanatory Memorandum is concerned, so that we are not relying on correspondence but we have it set out in the Explanatory Memorandum in black and white precisely what is intended.

Q31 Alun Michael: With equally large quantities of due respect, Minister, it sounds to me as if you are accepting that it would be a good idea to provide the clarity the Minister gave to this Committee in the drafting of the LCO.

Mr David: In the interests of simplicity, I would say yes.

Q32 Alun Michael: The next question concerns the school's right to alter its status. Will the draft Order affect the current rights or powers of school governors? To what extent does Field 5 Matter 5.2 already give the Assembly the power to legislate on such rights? In other words, what changes in that respect as far as the LCO is concerned?

Mr David: The National Assembly already has competence to pass Measures relating to the change of school category, Matter 5.1, and the Legislative Competence Order would make no difference to the process to change the category of schools which we already have.

Q33 Alun Michael: That is already there.

Mr David: Yes.

Q34 Alun Michael: Could existing powers under Matter 5.2 or new powers under the LCO be used to close schools with the surplus capacity mentioned in Paragraph 12 of the Explanatory Memorandum? That is always a difficult and challenging issue to deal with. I would like to be clear how that changes as a result of the LCO.

Mr David: This is very much a policy matter for the Welsh Assembly Government, and I do not think it has any direct relationship with the LCO which we have before us. The LCO does not provide a basis for Measures to come forward to close schools, because school organisation is a separate issue which is outside of the scope.

Q35 Alun Michael: This LCO does not change the powers of the Assembly in that regard.

Mr David: No, it makes no difference.

14 January 2010 Mr Wayne David MP, Mr Geth Williams and Ms Susan Olley

Q36 Hywel Francis: To move now to the question of collaboration, proposed by Matter 5.2B, what is your view on this? How will a power to secure collaboration by legislation achieve more than an approach based on voluntary co-operation?

Mr David: The Welsh Assembly Government have made it very clear that their preference is for governing bodies to choose to collaborate, that it is far better to have a voluntary approach, but it is also important that the guidance and the parameters are set very clearly by the Welsh Assembly Government that collaboration is extremely important. More collaboration will be required. There have been a number of reviews which have indicated that that is certainly the way forward, so that leadership by the Assembly is extremely important.

Q37 Hywel Francis: Do you know whether there has been any assessment of the advantages of legislation rather than the voluntary approach?

Mr David: For example, if we look at the Adrian Webb report on collaboration between further education institutions and schools. But, obviously, if you have to provide a holistic approach to 14–19 and beyond it is very important that you have collaboration. As the Minister indicated earlier, there are no instances of schools or other bodies refusing to collaborate, but nevertheless collaboration will become more of an important issue. This kind of leadership—not insistence, but this kind of firm direction—will be a catalyst for further collaboration and co-operation to fulfil the objectives really of providing an effective and complete system when you are looking at education in this particular age group.

Q38 Hywel Francis: What is the relationship between collaboration as referred to in the LCO and the proposed regulations on federation of governing bodies under Section 24 of the Education Act 2002?

Mr David: There is a commonsense difference between federation and collaboration. Collaboration is about bodies working with each other whilst nevertheless remaining quite separate and distinct legal entities. Federation is about merging separate bodies to create one legal body that governs two or more educational establishments. There is a quite a distinct separation between the two.

Q39 Hywel Francis: Do you believe that there is adequate clarity around what is happening with federation and collaboration, the timetable for them, and what the roles of governors, headteachers and local authorities will be?

Mr David: Yes, I think there is. In terms of the roles of the governors, the headteachers and the local authorities, they are set out in statute. There is comprehensive published guidance for governors on the law which authorities and heads can also use. Officials also, for example, provide a regular dialogue with local authority officers and with schools, so the message is pushed out very firmly through that channel as well. I think there has been a plethora of advice and guidance which is already in place.

Hywel Francis: Thank you.

Q40 Chairman: Perhaps I can turn now to Matter 5.2C and training bodies. Paragraph (ii) of Matter 5.2C appears in the current draft not to be limited to education. Should the words “in support of education and training” be added?

Mr David: Matter 5.2C(a) would allow for the establishment of bodies to carry out the functions on behalf of local education authorities. This means that it is the LEAs’ function and it is thus limited to educational functions. As a consequence of that, it is our judgment that the wording “in support of education and training” are not needed. They would be superfluous.

Q41 Chairman: In paragraph (i) of Matter 5.2C, should the Matter be specifically confined to education and training in maintained schools? We are looking for some more clarity, I think, in the wording there.

Mr David: With regard to maintained schools, we are talking about the overwhelming majority of schools in Wales. I think the figure is that some 97% will be covered by the Order, so it is very comprehensive in the way it is currently worded.

Q42 Chairman: In paragraph (b) what does “involvement” mean? Could that not be expressed in a more precise manner?

Mr David: Matter 5.2C allows for a Measure to be made that would establish a body to carry out initiatives in relation to education and training or to exercise functions on behalf of local education authorities. Once such a body is established, it follows that those who have established it need to be able to be involved with the body (that is, participate in the body that has been established); for example, by providing staff or investing in the body formed. That is what is meant by “involvement”.

Q43 Chairman: Thank you. In the proposed Matter 5.2B, what is the widest possible scope for collaboration in terms of those who could be involved in collaborating? We have talked about governing bodies. Would education authorities themselves be covered in that definition of collaboration?

Mr David: My understanding is that it is deliberately intended to be very wide. It could, for example, include, as you say, governing bodies, but also education authorities, Welsh Ministers, or Her Majesty’s Chief Inspector of Schools. It is not intended to be restricted in any way, but it is intended to ensure that the definition is as wide as is practicable.

Chairman: Thank you.

Q44 Hywel Francis: To turn now to local government, what are the overall consequences of the LCO in terms of the potential increased burdens on local government?

Mr David: The LCO itself, of course, does not create any kind of burden for local authorities at all. LCOs by their very definition are facilitating instruments for future Measures. It is true to say that, as always, but particularly in this case, the Welsh Assembly Government will be mindful of its need to have

14 January 2010 Mr Wayne David MP, Mr Geth Williams and Ms Susan Olley

maximum co-operation in any Measures that are forthcoming, and of course there will be a proper Regulatory Impact Assessment which will look at any potential—and I emphasise the word “potential”—costs which may arise from any Measure it comes forward with.

Q45 Chairman: Cross-border issues. To what extent have you evaluated the risk that divergent governance models in England and Wales will cause confusion amongst parents, governors and professionals who for whatever reason have to have contact with different models of governance?

Mr David: I do not believe there is any real possibility here of confusion. Already there are different approaches towards education and the matters we are considering this morning on either side of Offa’s Dyke. For example, we can look at differences between England and Wales when we look at the curriculum, quite obviously. Also, with regard to

Wales, in Wales there still is a responsibility for governors to ensure that an annual report is prepared for parents and there is also a stipulation for an annual governors’ meeting, and those measures do not currently exist in England. So there is already a significant difference of emphasis. The feedback that the Welsh Assembly Government has is that, at present, the arrangement does not create any real difficulty, and I do not think that any Measures which stem from this LCO will raise any difficulties whatsoever.

Q46 Chairman: I think I can predict the answer to this, but what are the wider implications of the LCO in UK budgetary terms?

Mr David: There are no budgetary implications for the United Kingdom.

Chairman: My silent prediction was right. Thank you very much. Thank you very much for your evidence this morning.

Written evidence

Letter from Rt Hon Peter Hain MP, Secretary of State, Wales Office

PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (EDUCATION) ORDER 2010

I am writing to invite you and your committee to undertake pre-legislative scrutiny of the proposed Education Order in Council. I am pleased to be able to inform you that the UK Government has given its consent to this Order being submitted to Parliament for pre-legislative scrutiny and I would be grateful if you could make the necessary arrangements for this to happen.

I have today laid the Order along with the accompanying Explanatory Memorandum before Parliament in the form of a Command Paper (Cm 7728) and I have issued a written ministerial statement drawing the Command Paper to the attention of Members. I have also written specifically to Welsh Members and Members who speak regularly on Welsh matters.

I look forward to your Committee's views on this Order.

22 October 2009

Welsh Affairs Committee Press Notice

PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED LEGISLATIVE COMPETENCE ORDER IN COUNCIL ON EDUCATION RELATING TO SCHOOL GOVERNANCE

Call for written submissions

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).

At its meeting on 27 October, the Welsh Affairs Committee decided formally to accept the Secretary of State's invitation to the Committee to conduct pre-legislative scrutiny of the proposed National Assembly for Wales (Legislative Competence) (Education) Order 2010, relating to School Governance. The proposed Order, together with an explanatory memorandum by the Welsh Assembly Government, was published as a Command Paper by the Wales Office on 19 October (Cm 7728) and can be found on the internet at:

<http://www.official-documents.gov.uk/document/cm77/7728/7728.pdf>

The Committee asks for written submissions in accordance with the guidelines stated below by 27 November 2009.

The Committee would particularly welcome comments on the following aspects of the proposed Order:

1. Is the LCO request in the spirit and scope of the devolution settlement?
2. Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?
3. To what extent is there a demand for legislation on the matter(s) in question?
4. Are there any cross-border issues relating to the LCO? (eg financial or policy issues)
5. Are the purpose and scope of the LCO clearly defined, including the terms and definitions used?
6. Does the LCO have the potential to increase the regulatory burden on the private or public sector?
7. 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?
8. Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill to confer competence on the Assembly?
9. Has full use been made of any existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter?

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.

28 October 2009

Proposed order for pre-legislative scrutiny

DRAFT STATUTORY INSTRUMENTS

2010 No.

CONSTITUTIONAL LAW

DEVOLUTION, WALES

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

Made - - - -

Coming into force in accordance with Article 1

At the Court at Buckingham Palace, the day of 2010

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, and approved by resolution of, the National Assembly for Wales 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) (Education) Order 2010 and it shall come into force on the day after the day on which it is made.

Amendments relating to the field of education and training

2.—(1) Field 5 (education and training) of Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended as follows.

(2) After Matter 5.2(b) insert —

(a) 2006 c.32.

(b) Matters 5.1 to 5.10 were inserted in Field 5 by the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007 (S.I. 2007 No. 910); Matter 5.10 was amended by the National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008 (S.I. 2008 No. 1036) and the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (S.I. 2008 No. 3132). Matter 5.4A was inserted by section 149 of the Education and Skills Act 2008 (c. 25). Matters 5.11 to 5.16 were inserted by section 27 of the Further Education and Training Act 2007 (c. 25); Matters 5.15 and 5.16 were amended by section 149 of the Education and Skills Act 2008. Matter 5.17 was inserted by S.I. 2008 No. 1036; Matter 5.17 was amended by S.I. 2008 No. 3132. Matter 5.18 was inserted by S.I. 2008 No. 3132.

“Matter 5.2A

Conduct and governance of schools maintained by local education authorities, including the allocation of functions, property, rights and liabilities relating to such schools.

Matter 5.2B

Securing collaboration between persons or bodies with functions relating to schools maintained by local education authorities.

Matter 5.2C

The following activities by persons or bodies with functions relating to schools maintained by local education authorities—

- (a) establishment of bodies—
 - (i) to carry out activities relating to education and training, or
 - (ii) to exercise functions on behalf of local education authorities;
- (b) involvement with bodies mentioned in paragraph (a).”

Name
Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Government of Wales Act 2006 (“the 2006 Act”). The Order extends the legislative competence of the National Assembly for Wales to make laws known as Measures of the National Assembly for Wales (referred to in the 2006 Act as “Assembly Measures”). It does this by adding new matters to the field of education and training contained within Schedule 5 to the 2006 Act. Subject to general limitations on the legislative competence of the National Assembly for Wales, which apply by virtue of section 94 of, and Schedule 5 to, the 2006 Act, an Assembly Measure may make provision that relates to the matters contained in the fields set out in Schedule 5 to the 2006 Act.

Article 2 inserts matters 5.2A to 5.2C into field 5 (education and training) of Part 1 of Schedule 5 to the 2006 Act.

Matter 5.2A comprises the conduct and governance of schools maintained by local education authorities in Wales. It includes the allocation of functions, property, rights and liabilities that relate to such schools.

Matter 5.2B concerns securing collaboration between persons and bodies responsible for schools maintained by local education authorities in Wales.

Matter 5.2C is about the establishment of bodies, such as companies, by persons responsible for schools maintained by local education authorities in Wales.

A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

Welsh Assembly Government Explanatory Memorandum

PROPOSAL FOR A LEGISLATIVE COMPETENCE ORDER RELATING TO THE CONDUCT AND GOVERNANCE OF SCHOOLS

Introduction

1. This memorandum sets out the background to the provisions in the attached Welsh Assembly Government proposed Legislative Competence Order (LCO) which would confer additional legislative competence upon the National Assembly for Wales (the Assembly).

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

3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the Assembly to legislate by Assembly Measure on specified matters. These matters may be added to fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Parts 2 and 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.

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

5. The proposed LCO would confer further legislative competence on the Assembly, in the field of Education and Training (field 5 within Schedule 5 to the 2006 Act).

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

Background

7. Education in Wales is a long devolved policy area. In Wales, prior to the creation of the Assembly in 1999, the extensive executive powers for education in Wales, were exercised by the Secretary of State for Wales. Education is also one of the fields listed in the Government of Wales Act 1998 within which functions were transferred from the Secretary of State for Wales to the Assembly at its inception. The constitutional changes made by the 2006 Act then vested those executive powers in the Welsh Ministers and in addition extensive legislative competence for education and training has already been added to field 5.¹ School governance is however one of the parts of education law for which the Assembly does not have competence.

8. The statutory basis for school governance has existed in much the same form since the introduction of the Locally Managed School Model brought into being for Wales and England by the Education Reform Act 1988. Other than Pupil Referral Units, every maintained school has to have a governing body. The governing body sets the strategic direction of the school and monitors and evaluates progress. The governing body receives an individual school budget and is responsible for allocating resources in a way that it deems fit to support the strategic direction and to discharge its functions (that is its powers and duties) effectively.

9. In addition to the constitutional context, the policy context for the Assembly Government's request for the conferral of legislative competence on the Assembly has several elements.

10. Foremost, the Assembly Government wishes to raise standards of attainment in all schools. In pursuit of this the Assembly Government has piloted a Schools Effectiveness Framework to stimulate, promote and facilitate more and better collaboration. As it expands and develops, the framework will need to take increasing account of school governing bodies because governance provides the accountability mechanism within which schools operate, and the means by which outcomes are monitored and evaluated, resource allocation decided, and responsibility lies for taking action to improve outcomes.

11. Secondly, the Assembly Government is committed to 14 to 19 Learning Pathways which is a Wales wide initiative in which all learners aged 14 to 19 will take part. The intention is to provide parity between vocational and academic learning. The success of 14 to 19 Learning Pathways very much depends on schools, further education institutions (FEIs) and other learning providers working together, sometimes with learners attending several establishments.

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

12. The Assembly Government encourages local authorities and further education institutions to consider how provision is planned and organised so that it is effective in terms of what is offered and more efficient in how it is delivered. The number of school pupils in Wales continues to decline with a commensurate rise in surplus capacity. The Assembly Government is challenging local authorities to consider how schools are organised and how they, and others, can work together to create an effective network of providers. The Assembly Government is supporting these changes with capital investment under the 21st Century Programme, the aim being to have schools of the right standard in the right places.

13. The Webb Review of the Mission and Purpose of Further Education in Wales (Promise and Performance: December 2007) has emphasised the need for collaboration to be the basis for the delivery of post-14 learning in Wales. The review underlined the importance of providers working collaboratively and it highlighted the value of utilising the potential for new governance arrangements between schools and FEIs (for which the Assembly has competence under Matter 5.13 of Schedule 5 of the 2006 Act). This LCO for school governance would complement Matter 5.13. The Assembly Government's Skills that Work for Wales Strategy has also identified the need to transform the way the post-11 provider network operates and collaborates so as to improve effectiveness and efficiency. It pointed to the need to reshape the learning network to enable and empower providers to work in partnership in order to deliver learning provision tailored for the learner. In line with this theme of needing more and better collaboration, the Deputy Minister for Skills made a written statement to the Assembly on 30 April 2009 stating the Assembly Government's intention to reform governance arrangements for further education institutions. The Minister is establishing a review group to advise him about options for reform.

14. A further theme that has emerged since the creation of the Locally Managed School Model is the growing emphasis placed on children and young people having a voice in their schools. The Assembly Government intends that the United Nations' Convention on the Rights of the Child will continue to underpin its policies. Article 12 of the UNCRC states that a child capable of forming his or her own views has the right to express those views freely in matters affecting the child. Children and young people have an interest in how schools are governed and they need an effective voice. Every school in Wales must by law have a School Council comprising pupils of all ages. In secondary schools, the School Council may nominate pupils from years 11, 12 or 13 to be associate pupil governors who may attend governing body meetings and play a part in policy formulation and decision making.

15. The Assembly Government has commissioned studies of school governance in recent years.² These have considered the quality and capability of school governing bodies and governor training. The evidence is that the effectiveness of governing bodies varies and the training available to governors is uneven, with weaknesses in consistency of approach, availability and take-up by governors.

16. In July 2009 the Assembly's Enterprise and Learning Committee published its report "The Role of School Governors". The report identified some of the issues described above about training and the effectiveness of governing bodies. Taking the Committee report and other evidence together, the Assembly Government wishes to have the means to address these issues.

17. This proposed LCO will provide the Assembly with competence in relation to school governance. The Assembly now has competence for much of the education law. School governance underpins and relates to how schools work and what they do. It is thus a core part of the law for education. Gaining competence for school governance and the other topics dealt with in this draft Order would therefore allow the Assembly to consider legislation including the potential consolidation of education law for Wales.

Current Legislative Framework

18. Current law for the government of maintained schools, mainly set out in Part III, Chapter 1 of the Education Act 2002 (EA 2002), requires every maintained school in Wales to have its own governing body which is responsible for the local management of that school. This places governing bodies in a central and critical position for the successful and efficient delivery of education in a maintained school setting. This also includes the requirement for local authorities to provide information and training for governors as they see fit to enable them to discharge their functions. Such information and training is free of charge to governors.

19. Current primary legislation in respect of governing bodies deals with topics which include the following:

- the constitution, functions and membership of governing bodies (principally sections 19, 20, 23 and 34 of EA 2002);
- the means by which governing bodies may collaborate or federate, including collaboration with Further Education Institutions ("FEI") (sections 24–26 EA 2002 and section 166 of the Education and Inspections Act 2006 ("E&I Act 2006"));

² *School Governance and Improvement in Wales—Universities of Birmingham and Glamorgan, 2004.*
The Annual Report of Her Majesty's Chief Inspector of Education and Training in Wales 2007–08.
Local Authority Training Provision for School Governors in Wales—All Wales Centre for Governor Training and Research, 2008.
Training Provision for Governing Body Chairs—All Wales Centre for Governor Training and Research, 2007.
The Quality of Training and Support Provided by LEAs to School Governors—Estyn, 2003.
The Training of School Governors in Wales—Education Dept, University of Swansea, 2000.

- the governing body’s responsibility for the conduct of the school and to promote high standards (sections 21 and 29B EA 2002 and section 38 of the E&I Act 2006); and
- powers to provide community facilities; to control school premises; and to determine session times; (sections 27–28; 31; 32; EA 2002 respectively).

20. Primary legislation also places requirements on governing bodies concerning their relationships with stakeholders, for example, by providing parents with an annual report, to hold a parents evening and have a process in place for dealing with complaints (sections 30; 33; and 29).

21. Complementing and supporting these core responsibilities and requirements, governing bodies also have functions in relation to innovation in schools (section 1 of the EA 2002, with sections 2–5 setting out administrative arrangements); the formation of companies (sections 11–13 of the EA 2002); the behaviour, discipline and welfare of pupils (section 88 of the E&I Act 2006 and section 61 SSFA 1998), including home-school agreements (section 110 SSFA 1998); consultation with pupils (Section 176 of the 2002 Act); admissions (section 43 E&I Act 2006), and further powers in the case of voluntary aided and foundation schools, where the school is the admissions authority (Part III, Chapter 1 of the SSFA 1998 (as amended) applies); religious worship (sections 70–71 SSFA 1998, as amended by section 55 E&I Act 2006); and charging (section 457 of the EA Act 1996). Voluntary and foundation school governing bodies may propose prescribed alterations to the school, closure of the school, or change of category (sections 28, 29, 30, 35 SSFA 1998).

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

23. Section 22 of the EA 2002 covers the requirement of LEAs to provide free information and training to school governors.

Scope

24. It is proposed that three Matters be inserted into Field 5 (education and training) in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to legislate on the issues described in the Matters by way of Assembly Measures.

25. Article 2 of the proposed LCO would insert new Matters 5.2A, 5.2B and 5.2C into Field 5. The following paragraphs describe each Matter in turn.

26. Matter 5.2A would provide the Assembly with competence to legislate with respect to the conduct and governance of schools maintained by local education authorities. With respect to governance it would allow the Assembly to legislate for the constitution and membership of governing bodies, which is currently set by Part III, Chapter 1 of the EA 2002, and for the training of governors; in short the structures for decision making and the quality of that decision making. The Assembly could pass legislation in relation to the creation (or abolition) of, and the allocation of functions amongst, bodies responsible for school governance. The Assembly would have the competence to legislate for how a body should conduct a school. For clarity, substantive changes to school finance and school staffing are not within the competence which would be created by this LCO. If new governance arrangements were created under the LCO, some linked changes to the persons or bodies with functions relating to staffing and finance would be required and so, to that extent, staffing and finance matters are within competence.

27. Matter 5.2B would provide the Assembly with competence to legislate in relation to securing collaboration between persons or bodies with functions in relation to schools maintained by a local education authority (federation of governing bodies would fall within the scope of Matter 5.2A). The Assembly already has the competence for and in connection with securing collaboration between a FEI and a school maintained by a local education authority under Matter 5.13. The current provisions relating to federation and collaboration in respect of school governing bodies are found at sections 24–26 of the Education Act 2002.

28. Matter 5.2C would provide competence for the Assembly to legislate in relation to the conferring of authority to establish a body, such as a school company or other educational body that can provide services to schools and FEI’s and could be able to exercise functions on behalf of local education authorities. It reflects and extends (in that it allows schools to provide services to a FEI) provision in respect of governing bodies found in sections 11 and 12 of the Education Act 2002.

Geographical limits of any Assembly Measure

29. Section 94 of the 2006 Act prohibits Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly's legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

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

Minister of the Crown functions

31. This proposed Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter (remove or modify) the functions of Ministers of the Crown without the consent of the Secretary of State. In relation to any future proposals that may impact on Minister of the Crown functions, the appropriate UK Government Departments will be consulted and agreement sought to any future proposals to remove or modify those functions.

CONCLUSION

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

Written evidence from Undeb Cenedlaethol Athrawon Cymru

PROPOSED SCHOOL GOVERNANCE LCO

Undeb Cenedlaethol Athrawon Cymru (UCAC) is pleased to have the opportunity to present evidence to the Welsh Affairs Committee on the proposed National Assembly for Wales (Legislative Competence) (Education) Order 2010, relating to School Governance.

UCAC is a teaching union with 5,000 members who are teachers, head-teachers and lecturers in Further and Higher Education. UCAC is the only teaching union which has its headquarters in Wales.

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

1.1 UCAC is firmly of the opinion that matters 5.2A, 5.2B and 5.2C are in the spirit and the scope of the devolution settlement.

1.2 The legislative competence outlined in this Order will enable the Welsh Assembly Government to make arrangements for the governance of schools which are better suited to the education system in Wales as it currently stands, and which provide better compatibility with the direction of education policy in Wales in a more general sense. Since education policy in Wales is becoming increasingly divergent from equivalent policy in other parts of the United Kingdom, it is entirely appropriate that legislative competence over matters relating to school governance should reside with the National Assembly for Wales.

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

2.1 UCAC believes that the use of the LCO mechanism is in accordance with the Government of Wales Act 2006.

3. *To what extent is there a demand for legislation on the matters in question?*

3.1 A number of developments have led to demand for legislation on these matters. One of these is the need to implement recommendations contained in the report, *The Role of School Governors* (July 2009), of the National Assembly's Enterprise and Learning Committee.

3.2 Further demand stems from the need for equivalent legislative competence in relation to governance for the schools sector as already resides with the National Assembly for Wales for the Further Education sector. Developments in 14 to 19 Learning Pathways policy, as well as the "Transformation Agenda" make this a pressing priority.

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?*

4.1 UCAC sees no need for the formation or abolition of Welsh institutions or structures as a result of the proposed LCO.

5. *Further points*

5.1 UCAC would like to make one point with reference to Matter 5.2B. We do not see the need for the word ‘Securing’ at the beginning of this clause. The clause as it currently stands could be construed in a narrower sense than we believe was intended, and could unnecessarily and inappropriately restrict the competence of the National Assembly to deal more generally with “collaboration” between relevant persons and bodies. Furthermore, it adds an inappropriate note of directiveness.

5.2 Beginning the clause with “Collaboration between persons or bodies . . .” has the added merit of making it grammatically consistent with the other proposed clauses, 5.2A and 5.2C (and indeed, with all other clauses in Field 5, Schedule 5 to the Government of Wales Act 2006), which begin with nouns (ie “conduct and governance”, “establishment” and “involvement”) rather than with verbs.

**Supplementary written evidence from Jane Hutt AM, Minister for Children, Education,
Lifelong Learning and Skills**

LETTER TO MIKE GERMAN AM, CHAIR OF LEGISLATION COMMITTEE NUMBER 4, NATIONAL ASSEMBLY FOR WALES

Thank you for inviting me to appear before your Committee on 12 November. I look forward to returning on 10 December 2009.

I have instructed officials to provide your Committee with a note on the issues raised during my appearance and this will be with you soon. However, I am also aware that there continues to be a level of confusion about what is included in the LCO in relation to staffing and finance following the scrutiny meetings with the Welsh Local Government Association and Estyn and also that Governors Wales has asked for greater clarity on Matter 5.2A. Therefore I have decided to provide you with a note on this specific issue to facilitate greater understanding of what is within the scope of the LCO; what is out of the scope of the LCO given that devolved powers already exists within Schedule 5, Field 5 of the Government of Wales Act 2006; and what powers are not being sought via this LCO.

WITHIN SCOPE OF THE LCO

This LCO would enable the National Assembly for Wales to consider legislation in relation to the quality of governance for a maintained school and also the system of governance, including who is to exercise the whole range of statutory functions that relate to maintained schools. When we talk of functions, we mean statutory powers and duties that are undertaken a part of the governance role within schools.

The scope of the LCO has been drafted to encompass the whole of the school governance framework within which school governors currently operate, and persons are held to account. In relation to school governing bodies this would mean the processes, systems and functions of governing bodies and governors, and the way and manner in which they conduct themselves and discharge their functions, duties and responsibilities.

This includes setting the strategic framework for the school by setting aims and objectives and setting policies and targets to achieve those aims and objectives. The current School Government (Terms of Reference) (Wales) Regulations 2000 and associated guidance in Circular NAFW 34/2000 gives further advice on the existing roles and responsibilities of school governors and governing bodies. It also includes responsibility for forming committees to deal with the appointment and dismissal of staff (including redundancies); and dealing with staff capability and staff grievance matters; and managing the delegated budget effectively ie, not going into a deficit budget.

EXISTING COMPETENCE THAT THE LCO COMPLEMENTS

The National Assembly for Wales already has extensive competence for education within Field 5 of Schedule 5 to the Government of Wales Act 2006. In summary, these include the following in relation to schools maintained by an LEA:

- categories of schools;
- the establishment and discontinuance of schools or their change from one category to another;
- admissions of pupils to schools;
- curriculum provided in maintained schools;
- school attendance, behaviour of pupils at school, pupils discipline and exclusion of pupils;
- provision of education for pupils who have been excluded from school;

- entitlement to primary, secondary (and Further) education and training;
- provision of food and drink provided on school premises; and
- travel arrangements for nursery, primary, secondary (and FE) to and from school.

WHAT POWERS ARE NOT BEING SOUGHT VIA THIS LCO

The LCO excludes staffing issues and the apportionment and allocation of funding to schools.

Staffing

Teachers pay and conditions issues as set out in the School Teachers Pay and Conditions Document 2009 and guidance on School Teachers' Pay and Conditions are not devolved to Wales. The Secretary of State for Children, Schools and Families in England has responsibility for determining these matters for England and Wales and for issuing guidance to schools and local authorities who are required to have regard to the statutory guidance. The 2009 Document sets out the framework for issues such as:

- pay and allowances for Head Teachers, Leadership Groups, teachers and class room assistants;
- conditions of Employment for all heads, deputies, assistant heads and teaching staff; and
- framework of professional standards.

However, governing bodies do have some flexibility and discretion to determine specific pay ranges for their school and head teacher within the agreed framework, but they cannot amend or alter the framework or work outside it.

The functions that governing bodies currently exercise in relation to staffing will remain the same; a Measure made under this LCO cannot substantively amend the law on staffing. However, a Measure would be able to "re-allocate" a "staffing" function to another person within the education system.

Financing of Schools

The Assembly Government is committed to delegating funding to Local Authorities as they are best placed to determine local priorities. LAs in Wales receive their funding via the Revenue Support Grant (RSG) and they determine how much of that is earmarked for education. LAs also determine the budget for each school using an agreed formula and delegate that funding to the governing body to manage.

But the delegation of the RSG from Welsh Assembly Government to LAs, and LAs determination of how much is earmarked for education and subsequently for each school are Local Authority functions and are not therefore within the scope of the LCO.

The functions that governing bodies currently exercise in relation to finance will remain the same; a Measure made under this LCO cannot substantively amend the law on school finance. However, a Measure would be able to "re-allocate" a "finance" function to another person within the education system.

Therefore in summary the LCO has been drafted to ensure issues which are linked to roles and responsibilities of governors are included but existing UK and NAFW powers for staffing and finance are unaffected.

25 November 2009

Statement by Leighton Andrews, Minister for Children, Education and Lifelong Learning, Welsh Assembly Government

THE ROLE OF WELSH MINISTERS IN RELATION TO SCHOOL CLOSURES

The School Standards and Framework Act 1998 sets out the legal framework for school reorganisation in Wales. The Welsh Ministers and local authorities have specific and distinct roles to play within that framework.

Ministers can propose changes to the legal framework on school organisation through an Assembly Measure or by making regulations. In addition, Ministers are responsible for setting the guidance which local authorities must take into account when they develop their plans to change schools. Guidance was published in Circular 23/02, which has now been replaced by Circular 21/09 for all proposals for change published from 1 January 2010 onwards. The guidance makes it clear that school reorganisation should help to provide schools which deliver the best possible educational experiences for all children and young people.

It is the responsibility of local authorities to keep school provision under review and to plan school places, taking into account their local knowledge and the best interests of local learners. They should also aim to provide schools efficiently so as to make the most of funding available for education, for the direct benefit of learners. The legal framework provides local authorities with the powers to make changes if they decide that it is necessary.

The legal framework ensures that all interested parties have a voice in the process of school reorganisation. When a local authority decides to close schools, or make other substantial changes, it must first consult the people who would be affected. Interested parties include, amongst others, pupils, parents, teachers, governors, and other schools which might be affected by the change. Local people must be given enough information and enough time to make their views known. The local authority must then consider the points raised in the consultation before deciding whether to continue with the changes.

In most local authorities, the decision on whether to proceed with reorganisations is taken by the Cabinet. The next step in the legal process is the publication of proposals in a statutory notice which normally provides a two month period when any individual may object to the proposed plans. If there are no objections to the statutory notice, the local authority must decide whether or not to make the changes proposed, and normally needs to make this decision within a further two months. If any objections are made, local authorities must send these to the Welsh Ministers within one month of the end of the objection period as there is an additional role for Ministers to play, in that they must make the final decision on whether or not the proposal should be approved.

The guidance in circulars 23/02 and 21/09 also sets out all the factors that the Welsh Ministers will take into account when they have to decide statutory proposals. Of greatest importance are the interests of learners, and whether the proposal would be likely to improve standards of education. The Welsh Ministers will also take account of the issues raised by statutory objectors, the arguments put forward by the local authority in support of the proposed change and whether local authorities have followed the correct legal process.

The Minister for Children, Education and Lifelong Learning usually makes the decision on statutory proposals on behalf of the Welsh Ministers. Normally, if a school were in that Minister's constituency, the decision would be referred to the First Minister.

The Welsh Ministers aim to issue a decision within six months of the publication of the statutory notice, or three months following the receipt of all the papers, including the objections. When large numbers of objections arise, or proposals are particularly complex, decisions will take longer than this.

Guidance published by the Welsh Assembly Government can be found on the website at: <http://wales.gov.uk/topics/educationandskills/publications/circulars/schoolorganisation/?lang=en>

12 January 2010
