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Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

Eich cyf/Your ref  
Ein cyf/Our ref LF/CH/0015/07  
Ms Eleanor Burnham AM  
Chair of the Additional  
Learning Needs LCO  
Committee  
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National Assembly for Wales  
Cardiff Bay  
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*Dear Eleanor,*

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

*Best wishes,*

*Jane*

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

# WELSH ASSEMBLY GOVERNMENT EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **2. Travel Provisions**

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

- 2.1.1 The draft Learner (Travel) Wales measure is intended to make provision to enable Local Authorities (LAs) to provide in specified circumstances, free transportation to children with statements of SEN to and from school; to place a duty on LAs to consider whether it is necessary for travel arrangements to be made for a non stated child with learning difficulties or disability to attend school; and to enable the NAW to make regulations concerning travel arrangements for young persons aged 16-19 in receipt of education or training. Whilst this measure does not extend the travel provision to adults, the Assembly already has legislative competence under Matter 5.10 to pass measures that make provision about the travel of adults receiving primary, secondary or further education or training to and from the place where they receive it’
- 2.1.2 Matter 5.10 is widely drafted to enable the NAW to pass measures that make provision about the ‘travel of persons receiving primary, secondary or further education or training to and from the schools or other places where they receive it’.
- 2.1.3. Express provision is made in Matter 5.17 to exclude travel arrangements for purely legal technical reasons.

## **RESPONSES TO FURTHER ISSUES RAISED**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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