

**MEMORANDUM FROM THE MINISTER FOR THE ECONOMY AND  
TRANSPORT**

**CONSTITUTIONAL LAW: DEVOLUTION, WALES**

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

**Draft Legislative Competence Order relating to learner  
transport and concessionary travel**

**Introduction**

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.32. It sets out the background to the provisions in the attached Welsh Assembly Government draft Legislative Competence Order which would confer additional legislative competence upon the National Assembly for Wales (the Assembly) and explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy contained in the White Paper "Better Governance for Wales". Section 95 empowers Her Majesty, by Order in Council, to confer competence on the Assembly for Wales to legislate by Assembly Measure on specified Matters. 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, in relation to Matters, subject to the limitations provided for by 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.
3. The draft LCO would confer further legislative competence on the Assembly by inserting a matter in the field of highways and transport (Field 10 within Schedule 5 to the 2006 Act) and by amending two exceptions relating to highways and transport in Part 2 (Exceptions to Matters) of Schedule 5, paragraph A1 to carve out additional areas of competence. These new legislative powers in respect of the specified matters will enable the Welsh Assembly Government, Assembly Members or Assembly Committees to bring forward proposals for legislation, in the form of Measures. These Measures will be subject to thorough scrutiny and approval by the Assembly.

## **Context**

4. The Assembly acquired a range of executive functions over highways and transport under the Government of Wales Act 1998. These functions were transferred to the Welsh Ministers by the 2006 Act.
5. Further executive powers have since been devolved to the Welsh Ministers in various Acts, including the Transport Act 2000, the Railways Act 2005, the Transport (Wales) Act 2006 and the Local Transport Act 2008. In addition, legislative competence has been conferred on the Assembly in the related area of learner travel (Matter 5.10 in the field of education and training), which was used by the Assembly to pass the Learner Travel (Wales) Measure 2008.
6. The Welsh Assembly Government is working to develop a safe and efficient transport network to support economic development and promote social cohesion. A cornerstone of this is the commitment in *One Wales* to bring forward legislation on learner transport, thereby improving safety for learners on the journey to and from school or the place where they receive education or training. This supports the Assembly Government's policy to reduce car use by making it possible for students to walk, cycle or take the bus safely, thus reducing road congestion and improving environmental, health, social and economic outcomes.
7. The concessionary travel scheme in Wales provides free travel on local bus services for the disabled, their companions, and those aged over 60. A rail pilot scheme is also in operation, providing free travel for eligible pass holders, on the Borderlands and Conwy Valley Lines until the end of September 2010, and on the Heart of Wales and Cambrian Coast Lines until 26 March 2010.

## **Current legislative framework**

8. The Assembly has legislative competence in relation to learner travel, covering "arrangements for persons to travel to and from the places where they receive education or training" (see matter 5.10 in Part 2 of Schedule 5). The persons referred to are:
  - (a) persons receiving nursery, primary, secondary or further education or training, and
  - (b) persons with learning difficulties or disabilities receiving higher education.
9. This competence was conferred originally, in a less extensive form, by section 178 of the Education and Inspections Act 2006 as a power for the Assembly to make regulations and following the enactment of the 2006 Act was converted into matter 10 in field 5 by the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007 (SI

2007/610). This matter was amended by The National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008 (SI 2008/1036).

10. Paragraph A1 of Part 2 of Schedule 5 to the 2006 Act<sup>1</sup>, lists general exceptions to all of the matters in Part 1 of that Schedule. The exceptions to matters are grouped under field headings. Sub-paragraph (2)<sup>2</sup> under the heading highways and transport sets out the following general exception:

”regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used, apart from  
(a) regulation of use of relevant vehicles carrying animals for the purposes of protecting human, animal, fish or plant health or the environment, and  
(b) regulation relating to Matter 10.1.”

“relevant vehicles” are defined for the purposes of the exception as meaning motor vehicles, mobile machinery and agricultural and forestry tractors.

11. This exception means that currently an Assembly Measure cannot include provision relating to learner travel which also regulates the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used. It rules out the regulation of the kinds of vehicle (including their construction and equipment) which may be used pursuant to learner transport arrangements.

12. There are also a number of other transport exceptions that are potentially relevant to the Assembly’s legislative competence in respect of learner travel arrangements. They include:

- road traffic offences;
- driver licensing;
- driving instruction;
- insurance of motor vehicles;
- drivers’ hours;
- traffic regulation on special roads;
- pedestrian crossings,
- traffic signs;
- public service vehicle operator licensing;
- transport security;

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<sup>1</sup> This paragraph was inserted by the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009 (SI 2009/3006) and amended by the National Assembly for Wales (Legislative Competence) (Environment) Order 2010 (SI 2010/248),

<sup>2</sup> Substituted by article 3(3)(b) of the National Assembly for Wales (Legislative Competence) (Environment) Order 2010 (SI 2010/248)

- registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.
13. The Assembly has already made the Learner Travel (Wales) Measure which was approved by Her Majesty in Council on 10 December 2008.
14. The Welsh Ministers' powers in relation to concessionary travel are contained in Sections 145B to 152 of the Transport Act 2000. Section 145B of the Act, as amended by the Concessionary Bus Travel Act 2007, provides for mandatory travel concessions to be provided by operators of eligible services (at present local bus services) to certain classes of passenger, including those who are elderly or disabled.
15. Section 149 of the Act requires travel concession authorities (county and county borough councils) to reimburse operators for providing the concessions in accordance with arrangements agreed with the operators or determined by the authorities. According to Section 149(3), the Welsh Ministers may by regulation make provision:
- with respect to the determination by travel concession authorities of the amounts to be paid to individual operators, or to any class of operators, by way of reimbursement,
  - as to the manner of making any payments due to operators by way of reimbursement, and
  - about the terms on which, and the extent to which, travel concession authorities may employ any person as their agent for the purpose of making payments due to operators by way of reimbursement and the descriptions of persons who may be so employed.
16. The current regulations in Wales are the Mandatory Travel Concessions (Reimbursement Arrangements) (Wales) Regulations 2001:
- Regulation 3 sets the overall objective for reimbursement arrangements, namely that operators should not be financially better off or worse off as a result of providing mandatory travel concessions.
  - Regulation 4 requires that reimbursement payments must meet the costs incurred by operators in providing mandatory travel concessions and defines those costs.
  - Regulation 5 makes provision for the periods in respect of which payments are to be calculated and the dates when they must be made.
  - Regulation 6 requires authorities to adopt a standard method for determining the total number of journeys made by those entitled to the concessions and the fares values to be attributed to those journeys.
  - Regulation 7 requires authorities to review the calculations made in accordance with the standard method at least once every three years.

- Regulation 8 requires authorities, when adopting the standard method and when calculating reimbursement payments in accordance with that method, to have regard to guidance given by the Welsh Ministers.
17. Guidelines were issued by the Welsh Assembly Government in November 2001. Revised guidelines may be issued under Section 145B(6) of the Transport Act 2000.
18. The Welsh Ministers' powers of variation under Section 147 of the Transport Act 2000 include power to make any amendment of that Act that could have been made by amending or revoking any provision of the Travel Concessions (Extension of Entitlement) (Wales) Order 2001 (which was revoked by the 2007 Act). The following variations to the statutory concession could be made by way of statutory instrument in order to reduce the financial burden:
- Limit journeys to within a Welsh travel concession authority, i.e. local authority, or between a place in the authority's area and a place outside, but in the vicinity of that area, for example between Cardiff and Newport, but not Cardiff and Swansea.
  - Imposing times during which the concession applies by limiting travel to off-peak; that is, no free travel between, for example, 7:30am to 10:00am and 4:00pm to 6:00 pm.
  - Introduce a nominal fare. The Welsh Ministers are however obliged under the Transport Act 2000 to provide a waiver ensuring at least a half-price concession.
  - Limiting the class of service to which the mandatory concession applies – for example, not reimbursing concessionary journeys on the coach network (such as the TrawsCambria service).
  - Limiting or removing the concession of a companion to a disabled person as set out above.

## **Rationale**

19. The aim of the draft LCO is to extend the legislative competence of the Assembly in relation to learner travel arrangements and to confer competence in relation to concessionary travel. This will enable the Assembly to legislate for Wales in these areas.
20. Although legislative competence has already been devolved to the Assembly in relation to arrangements for persons to travel to and from the places where they receive education or training, as noted above, it does not cover the use, construction and equipment of vehicles used for learner transport.
21. The current powers enabled the Assembly to pass the Learner Travel (Wales) Measure 2008, which, amongst other things, increased the entitlement to free transport for some primary school children and required the Welsh Ministers

to make a code of conduct in relation to the behaviour of those travelling to and from their places of learning. The consultation and scrutiny of the Learner Travel Measure highlighted widespread concern regarding related transport regulation and safety issues. However, the Assembly was unable to legislate in relation to the kinds of vehicles used to provide learner transport and the safety features they should have because it did not have the competence. This led to a cross-party call by Assembly Members to seek powers in this area, so that the Assembly could define the arrangements for learner transport where it is currently unable to do so.

22. This LCO proposes carve outs to the exceptions listed in paragraph A1 of Part 2 to Schedule 5, to enable the Assembly to consider legislating in relation to the safety of the vehicles used. This could, for instance, enable the Assembly to legislate to require local authorities only to use vehicles for learner transport which conform to the highest safety standards and/ or have certain characteristics (e.g. single deck vehicles, fitted with seatbelts and CCTV). Conferring competence by redefining this exception would enable the Assembly to address particular concerns in Wales.
23. To safeguard the long term sustainability of the concessionary travel scheme, the Welsh Assembly Government is also seeking competence for the Assembly over concessionary travel. This would enable the Assembly to consider legislating to exercise more rigorous control scheme over the scheme for example, by allowing the Assembly Government to directly negotiate reimbursement of operating costs with the operators and/ or administer the scheme directly. The current mechanism of reimbursing operators via local authorities fails to build in sufficient incentives to control costs since local authorities are reimbursed by the Assembly Government for the full costs incurred.
24. The competence provided by this LCO would also enable the Assembly to consider amending the legislative framework of the scheme. Under the current range of executive powers, the Welsh Ministers may directly negotiate reimbursement with the local bus operators (acting as the agents of the local authorities). But this may introduce potential conflicts of interest, since the legislation permits the determination of appeals by the Welsh Ministers themselves. Currently the Welsh Ministers have the power to regulate the process once an application has been made to them under section 150(6)(c) of the Transport Act 2000. However, the basic mechanisms that precede the consideration of an appeal are set out in the Transport Act 2000 and the Welsh Ministers have no powers to change these. A future Measure proposed by the Assembly could, for instance, describe the appeals process in full.

## Scope

25. Article 2(2) of the draft LCO will insert matter 10.2 into field 10: highways and transport of Schedule 5 to the 2006 Act to enable the Assembly to legislate over concessionary travel by way of Assembly Measures. This includes, but is not limited to, powers to directly administer the scheme and to determine agreements with Participating Operators. Participating Operators of Eligible Services are defined by the Travel Concessions (Eligible Services) Order 2002 (SI 2002 No 2023 (W.207) under the Transport Acts 1985 and 2000.
26. The term “bus services” has been used to ensure compatibility with the term used within the Transport Act 2000. Section 162(1) of the Transport Act 2000 (as amended by section 10 of the Local Transport Act 2008) refers to “bus services” as being “services using public service vehicles”. Section 1 of the Public Passenger Vehicles Act 1981 defines a “public service vehicle” as being a vehicle adapted to carry 8 or more passengers for hire or reward, or a vehicle not so adapted but which carries passengers for hire or reward at separate fares in the course of a business of carrying passengers. The term “bus services” potentially encompasses all bus services in Wales and is widely drafted for that reason. It will enable the Assembly to differentiate between services or specify services for the purposes of legislation such as community transport or long distance coach services within a Measure or any subordinate legislation.
27. The legislative competence of the Assembly will be limited in relation to concessionary travel by restricting competence over rail travel to Welsh services provided under a franchise agreement to which the Welsh Ministers are a party - meaning local and regional services currently provided under the Arriva Trains Wales franchise, but excluding services which operate under that franchise entirely in England. This also excludes the services which operate in Wales provided by First Great Western, Virgin and Cross-Country.
28. Legislative competence in relation to learner transport will be limited to learner transport as defined in Matter 5.10 of Schedule 5 to the Government of Wales Act 2006. This includes taxis and other private hire vehicles insofar as additional safety measures in respect of local authority contracted taxis used for school transport can be included in the licensing conditions. The power to regulate learner transport is limited to public authorities and institutions or other bodies concerned with the provision of education and training. This includes local education authorities, school governing bodies and independent schools including those vehicles owned and operated by educational establishments. It would however exclude travel arrangements made by parents or the students themselves, and would also exclude visiting vehicles.

29. This LCO does not devolve legislative competence in relation to the technical standards of vehicles which apply throughout Great Britain. These are areas which will continue to be determined by the UK Government, working within the framework of European law. Any future legislation brought forward by the Assembly in this area would have to be compatible with the regulatory regime for vehicle safety under UK law, and the overarching requirement within the 2006 Act to be compliant with EU law, as well as the general Treaty principles pertaining to operation of the internal market.
30. Article 3(3) of the Order amends a general exception to matters in Part 1 for “transport security”. The amendment would make clear that an Assembly Measure could regulate the carriage of supervising adults on vehicles used pursuant to learner transport arrangements. This excludes competence in relation to all other aspects of transport security including terrorism.
31. This LCO does not seek to devolve competence in relation to learner transport on trains. The safety of trains is regulated under the Health and Safety at Work etc. Act 1974 and functions within this Act are not devolved to the Welsh Ministers.
32. Article 4 of the LCO is an addition to the provisions of the proposed Order. It makes a technical amendment to Schedule 5 to reflect the introduction of Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road which repealed two earlier EEC Regulations, 1107/70 and 1191/69 except insofar as they apply to freight transport services, in which case the 1969 Regulations will continue to have effect until 2 December 2012. It replaces references to the repealed regulations with references to the new regulation. This new provision has been kept separate from the other amendments to Schedule 5 which have been made as a result of the addition of competence in the fields of learner transport and concessionary travel.

### **Pre-legislative Scrutiny**

33. The proposed Order was subject to pre-legislative scrutiny by the National Assembly for Wales Legislation Committee No. 3 as well as the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee and appropriate amendments have been made to this Memorandum.
34. Legislation Committee No. 3 published its report on 29 January 2010. The Committee made one main recommendation in relation to the LCO; that consideration be given to the inclusion of learner travel by rail within the scope of the proposed Order. The safety of trains is regulated under the Health and Safety at Work etc. Act 1974, and this Act is not devolved and therefore it is not possible to extend the scope of the LCO in this way.

35. The Constitution Committee of the House of Lords concluded that this LCO does not raise any matters of constitutional principle.

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

36. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. This means that the Assembly is not able, by Measure, to confer on the Welsh Ministers, Welsh local authorities or any other public authority, functions which do not relate to Wales. A provision of an Assembly Measure is not law if it is outside the Assembly's legislative competence.

37. Any provision of a Measure which makes the provisions of that or any other Measure effective, enables the provisions of that or any other Measure to be enforced or is otherwise incidental to or consequential on such a provision of a Measure, is also within the Assembly's legislative competence.

### **Minister of the Crown functions**

38. This LCO in itself does not modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 to the 2006 Act, the Assembly may not by Measure alter the functions of a Minister of the Crown without their consent. In relation to any future proposals that may impact on Minister of the Crown functions, the appropriate UK Government Department will be consulted and agreement sought to any proposals to remove or modify these functions.

### **Conclusion**

39. For the reasons outlined above, the Welsh Assembly Government proposes that legislative competence should be conferred on the National Assembly for Wales in relation to learner transport and concessionary travel, in the terms of the draft LCO attached.

Ieuan Wyn Jones  
Deputy First Minister and Minister for the Economy and Transport  
February 2010