



**Cynulliad Cenedlaethol Cymru
The National Assembly for Wales**

**Pwyllgor Deddfwriaeth Rhif 4
Legislation Committee No. 4**

**Dydd Iau, 12 Tachwedd 2009
Thursday, 12 November 2009**

Cynnwys
Contents

- 3 Cyflwyniad, Ymddiheuriadau a Dirprwyon
Introduction, Apologies and Substitutions
- 4 Gorchymyn Arfaethedig Cynulliad Cenedlaethol Cymru (Cymhwysedd
Deddfwriaethol) (Addysg) 2010
The Proposed National Assembly for Wales (Legislative Competence) (Education)
Order 2010

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal,
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee.
In addition, an English translation of Welsh speeches is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

| | |
|------------------|--|
| Lorraine Barrett | Llafur Labour |
| Michael German | Democratiaid Rhyddfrydol Cymru (Cadeirydd y Pwyllgor) Welsh Liberal Democrats (Committee Chair) |
| Jonathan Morgan | Ceidwadwyr Cymreig Welsh Conservatives |
| Joyce Watson | Llafur Labour |
| Kirsty Williams | Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats |

Eraill yn bresennol
Others in attendance

| | |
|-----------------------|---|
| Jane Hutt | Aelod Cynulliad, Llafur (y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau) Assembly Member, Labour (the Minister for Children, Education, Lifelong Learning and Skills) |
| Dr David Lloyd-Thomas | Pennaeth, Is-Adran Llywodraethu a Refeniw Ysgolion, Llywodraeth Cynulliad Cymru Head of School Governance and School Revenue Branch, Welsh Assembly Government |
| Simon Morea | Gwasanaethau Cyfreithiol, Llywodraeth Cynulliad Cymru Legal Services, Welsh Assembly Government |

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

| | |
|-----------------|---|
| Stephen Davies | Cynghorydd Cyfreithiol Legal Adviser |
| Owain Roberts | Dirprwy Glerc Deputy Clerk |
| Gareth Williams | Clerc Clerk |

Dechreuodd y cyfarfod am 10.29 a.m.
The meeting began at 10.29 a.m.

Cyflwyniad, Ymddiheuriadau a Dirprwyon
Introduction, Apologies and Substitutions

[1] **Michael German:** Good morning, and welcome to Legislation Committee No. 4. We will be considering the Proposed National Assembly for Wales (Legislative Competence) (Education) Order 2010. I have received apologies from Bethan Jenkins who is unwell. The usual housekeeping arrangements apply. As there are people in the public gallery, I will read the instructions. We operate through the media of the English and Welsh languages. Headphones are provided, through which simultaneous interpretation may be received. They may also be used to amplify sound for anyone who is hard of hearing. The interpretation is on channel 1, and the verbatim proceedings can be heard on channel 0. There is no fire alarm test scheduled for today, so in the event of an alarm please exit quickly and follow the instructions of the ushers and staff to the nearest fire exit. Please switch off all mobile phones, pagers and

BlackBerrys as they interfere with the broadcasting equipment.

10.30 a.m.

**Gorchymyn Arfaethedig Cynulliad Cenedlaethol Cymru (Cymhwysedd
Deddfwriaethol) (Addysg) 2010
The Proposed National Assembly for Wales (Legislative Competence)
(Education) Order 2010**

[2] **Michael German:** I welcome Jane Hutt, the Minister for Children, Education, Lifelong Learning and Skills, and her officials to the meeting. The purpose of this session is to take evidence from you, Minister, regarding the proposed Order, which was laid before the Assembly by the Welsh Government on 20 October 2009. The proposed Order has been referred by the Business Committee to this legislation committee for scrutiny. We have been set a deadline for reporting of 22 January 2010. At our meeting on 22 October, the committee agreed its terms of reference, which are to consider the general principles of the proposed Order, to consider whether legislative competence in the areas identified in matters 5.2A, 5.2B and 5.2C should be conferred on the National Assembly, and to consider whether the terms of the proposed Order are too broadly or too narrowly defined. Minister, please introduce your colleagues before we continue.

[3] **The Minister for Children, Education, Lifelong Learning and Skills (Jane Hutt):** Thank you, Chair. I wish to introduce David Lloyd-Thomas, who is the school governance policy lead, and Simon Morea from legal services.

[4] **Michael German:** Do you want to say anything now, or shall we go straight questions?

[5] **Jane Hutt:** I wish to say a couple of words of introduction. First, I want to thank the committee for inviting me here to discuss the proposed Order. It provides me with the opportunity to explain the importance of the proposed Order, the timeliness of its introduction and the rationale behind it, and to deal directly with any concerns you have. We had a debate following my legislative statement in Plenary on 20 October.

[6] Field 5 of Schedule 5 to the Government of Wales Act 2006, which concerns education and training, is already well populated. The current law, which is mainly set out in the Education Act 2002, requires every maintained school in Wales to have its own governing body responsible for the local management of the school, placing governing bodies in a central and critical position for the successful and efficient delivery of education in schools. I was particularly pleased with the positive reaction of all political parties during the Plenary debate, notwithstanding specific issues raised in response to seeking competence in relation to the governance of maintained schools. We look forward to working with the committee over the next month or so to deal with those issues.

[7] **Michael German:** Thank you, Minister. I wish to start by getting on the record the general principle of the proposed Order. The explanatory memorandum sets out your reasons and the policy objectives you want to achieve by getting legislative competence. How will the proposed LCO enable you to achieve your policy objectives?

[8] **Jane Hutt:** As Members will be aware, the proposed LCO itself will not achieve anything other than providing the necessary competence for the National Assembly for Wales to make Measures in pursuit of policy objectives. The proposed Order will not fulfil policy objectives. It is specifically about school governance and activities associated with that. The National Assembly for Wales already has competence for much of education law, but not

school governance, and yet, as I said in my opening remarks, school governors are at the heart of driving up standards of effectiveness and pupil attainment. So, it is about acquiring the competence to enable the National Assembly to legislate on matters relating to the strengthening or amending of school governance arrangements in Wales. It is also about bridging the gap in legislative competence in field 5 of Schedule 5 to the Government of Wales Act 2006.

[9] **Michael German:** Again for the record, given that you have some extensive powers in respect of the conduct and governance of schools, why do you need legislative competence? In other words, what is it that you cannot currently do that this proposed Order would enable you to do, and why can you not do it through your existing powers?

[10] **Jane Hutt:** That is a very fair question. 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. If you recognise that education policy in Wales has changed and developed dramatically since 1988, you will realise that those changing developments require flexibility in the current school governance arrangements. Education initiatives such as the 14-19 learning pathways and the school effectiveness framework require schools and further education institutions to work more closely together so that education is planned and organised effectively. So, we want to ensure that we have the competence in all aspects of school governance.

[11] **Michael German:** Following on from that, your explanatory memorandum includes the potential for the consolidation of education law for Wales. Can you give us an explanation of what that means?

[12] **Jane Hutt:** The crucial word there is 'potential' as far as opportunities for consolidation go. Education law for Wales is spread across various Acts of Parliament and growing numbers of Measures, so it is complicated and, arguably, messy. I am sure that Members would agree that, eventually, it would be beneficial to put all the education law into one body of statutes. However, the key point is about the potential of that direction and having that opportunity.

[13] **Michael German:** I must ask you again: on consolidation and what you are asking for, are there any powers in the field of governance that you would not have as a result of this proposed LCO going through? In other words, would this proposed LCO leave any gaps?

[14] **Jane Hutt:** Clearly, there are other matters that the Assembly could consider in the future, but I believe that we must focus on the opportunity that the transferral of competence relating to school governance would provide for further consolidation.

[15] **Michael German:** The question that I was asking related to the terms of this proposed Order, which is about governance. In that context, are there any powers that are not being transferred in the field of governance that you can see—

[16] **Jane Hutt:** I do not think so, no. I will consult my legal adviser.

[17] **Mr Morea:** It depends on how you define 'governance'. The way in which we have defined 'governance' and 'conduct' relates to the action or manner of carrying on a proceeding or business and the management or handling an issue. Therefore, our view is that the proposed LCO that we are seeking fulfils policy objectives. On the consolidation of law, clearly, we do not have the whole gamut of education law at the moment and to make a

completely consolidated education Measure, we would need, for example—

[18] **Jane Hutt:** More transfers of powers.

[19] **Mr Morea:** We would need more transfers of powers in relation to other education policy areas.

[20] **Michael German:** I am anxious to focus on this issue of governance, which is what the proposed Order is about. Could you give me an example of a competence in governance that you are not asking for, just so that we have a feel for what this is about?

[21] **Jane Hutt:** My understanding is that, as far as school governance is concerned, we are transferring all the powers that we need.

[22] **Michael German:** So, to be absolutely clear, there are no powers in school governance that are not being transferred.

[23] **Jane Hutt:** Yes.

[24] **Michael German:** In your Plenary statement, you said that the proposed LCO will allow for a Measure to support and improve governance arrangements as part of your commitment to ensuring the highest possible standards for schools. Could you explain how this proposed LCO will help you achieve that?

10.40 a.m.

[25] **Jane Hutt:** Thank you for that question, because it goes back to my previous point about the developments in education policy in Wales and making sure that we have the tools for the job in order to deliver them. The proposed LCO will only provide competence to make Measures that change the law for governance in pursuit of improved school governance. It will not change school governance itself, but it will give us the means to change the law on it, in order to make it possible to ensure that governors are able to pursue the highest standards possible for their schools. I have mentioned the 14-19 learning pathways, and there is much to be gained from collaboration between schools and further education institutions in that area. At the moment, that is done on an ad-hoc basis. There are good examples of where collaboration is working well, but we need to ensure that, for further opportunities, the law for school governance is competent.

[26] There is already extensive legislative competence in matters 5.12 and 5.13 for further education institutions in the area of governance. We are seeking to have the same level of governance for school governors that FEIs already have under the law.

[27] **Michael German:** I will not blur the issue with higher education at the moment. Jonathan has a question.

[28] **Jonathan Morgan:** Turning to the specifics and wording of matter 5.2A, why does it not simply say ‘governance of schools maintained by local education authorities’?

[29] **Jane Hutt:** That picks up what Simon was beginning to address. Matter 5.2A draws a distinction between the words ‘governance’ and ‘conduct’. Going back to my previous point, the term ‘governance’ is already featured in field 5, in matter 5.12, which relates to further education. When matter 5.12, on further education, was created, Parliamentary Counsel drew a distinction between conduct and governance. As a body of law, field 5 would be considered as a whole, and it is important that we draft 5.2A in the same way as that in which matter 5.12 was drafted. If matter 5.2A were simply to refer to governance, the existence of an already

clear distinction between conduct and governance in matter 5.12 for further education institutions would suggest that we are limiting the scope of governance for schools.

[30] **Jonathan Morgan:** If, hypothetically, matter 5.2(a) were altered by removing the word ‘conduct’, what exactly would you lose from the definition?

[31] **Jane Hutt:** Would it be helpful if we explained what is meant by ‘conduct’? As far as I understand, the legal point of view is that for ‘governance’ you need ‘conduct’; you need both in order to provide full competence. That is what was sought by Parliamentary Counsel for further education institutions. We could go on to explain what is meant by ‘conduct’, as that may clarify why we need to include ‘conduct’ as well as ‘governance’. Would that be helpful?

[32] **Michael German:** I think that it would. Simon is raring to go.

[33] **Mr Morea:** There is a great deal of common ground between conduct and governance. The fact that the word ‘conduct’ has been hived off, as it were, in matter 5.12 by Parliamentary Counsel makes us view that, because they thought that conduct and governance were slightly different, it would be difficult interpretively, when a Measure was being made under the proposed matter, to decide what was conduct and what was governance—they are almost synonymous. As that has already been used and the body of law will be interpreted as a whole, it is important to ensure that conduct and governance are included. A distinction is also made in sections 19 and 20 of the Education Act 2002, which deals with how maintained schools should be governed, by requiring them to have governing bodies established and operating. Section 21 places a general responsibility for the conduct of the school. In order to ensure that the competence was as wide as possible, we viewed it necessary to use those two words.

[34] **Michael German:** What do you think was in Parliamentary Counsel’s mind when it originally used this terminology?

[35] **Jane Hutt:** It has already been used in legislation, as Simon said.

[36] **Michael German:** I was asking why it was there in the first place.

[37] **Jane Hutt:** It may be helpful to give an example of the distinction between conduct and governance, because it is always helpful to me. If you put it in the context of this proposed LCO, governance is what a governing body has to do and conduct is how it goes about it. So, to take a complaints procedure for example, under section 29 of the Education Act 2002, a governing body is required to have a complaints procedure and to publicise it. That is the governance side. However, the procedure of how it is implemented, the steps in dealing with it, and the attitude and aptitude of the governing body in operating the complaints procedure is the conduct side.

[38] **Jonathan Morgan:** Looking at the wording of matter 5.2A, why have you specifically included certain items such as the allocation of functions, property, rights and liabilities relating to maintained schools?

[39] **Jane Hutt:** This proposed LCO would enable an Assembly Measure to abolish and replace governing bodies. However, a governing body is not merely concerned with the conduct and governance of a school; it has other important functions in relation to a host of substantive education matters. Therefore, to be able to replace governing bodies, the competence needs to be wide enough to allow for the switching of all substantive responsibilities in relation to a maintained school and not just the reallocation of matters relating to conduct and governance. So, the competence needs to allow them to be switched

from an existing body to a newly created body or a combination of both. So, you have to insert the words referred to in matter 5.2A to allow that to happen. It goes on to make the point that a maintained school does not have a legal personality but, in our system, a school needs legal personality so that it can enter into legally binding arrangements. That means that the competence has to be wide enough to allow for the properties, rights and liabilities to be transferred to successor bodies. It is complex, but it is about ensuring that all those responsibilities are embedded in any new arrangement created.

[40] **Jonathan Morgan:** Does listing some of the functions imply that other functions will be excluded?

[41] **Jane Hutt:** No, it does not. I am aware that we are now entering the grounds of scrutiny of other proposed LCOs where this issue has also been raised, such as that on the environment, although I do not know whether any of you were involved in the scrutiny of that. There is a rule of interpretation that could limit the definition of governance and conduct in this instance only to the words that follow, including in matter 5.2A. We say that that rule of interpretation does not apply to matter 5.2A. The words that follow 'including' expand rather than limit the meaning of conduct and governance, but if you want further clarification on that, our officials will be working on it.

[42] **Jonathan Morgan:** We will need to explore that further. When we scrutinised the proposed LCO on the environment, we were told by the Welsh Government that using the word 'including' in one of the matters encompassed a specific view of statutory construction. So, in effect, by including certain things, you were assuming that you were excluding everything else. The 'including' was a very specific construction of what was intended by using that particular term. I am not sure how you can say that, in that case, 'including' meant one thing, but that it does not mean it in this case.

10.50 a.m.

[43] **Jane Hutt:** This is where we get into the Latin expression, which I do not know whether I can appropriately state today. Perhaps Simon wants to come in at this point. However, this point relates to whether the *expressio unius est exclusio alterius* rule should be engaged, which means that to express one thing is to exclude another. My understanding is that the maxim operates only when it is not outweighed by other interpretative factors, and that is the difference with the interpretative factor for the proposed Order on the environment.

[44] In this case, our view is that those words do not engage that legal maxim, as it could be reasonably argued that that allocation in relation to maintained schools is not a part of the conduct and governance, and therefore the list would not be treated as exhaustive.

[45] **Jonathan Morgan:** Thank you. What is the purpose of including the words 'allocation of'?

[46] **Jane Hutt:** I hoped to address that in my response to the earlier question. To reiterate, the words 'allocation of' and what follows are used to widen the competence to allow for the reallocation of all substantive responsibilities in relation to maintained schools. So, to give an example, if a Measure were to abolish governing bodies, the competence would be wide enough to allocate all the responsibilities of that governing body to another body, which could be an existing body, a newly created body or a combination of both. So, it is important that the words 'allocation of' are included, to make the competence wide enough.

[47] **Jonathan Morgan:** So, if matter 5.2A were to be reworded to remove those words, reading instead 'including the functions, property, rights and liabilities', are you saying that, in essence, that would prevent you from reallocating by Measure those functions, property,

rights and liabilities to another governing body or another model of governance?

[48] **Jane Hutt:** That is right.

[49] **Jonathan Morgan:** Okay.

[50] **Michael German:** I just want to pop back to the previous question, Minister. You mentioned that your lawyer was working on the *expressio unius est exclusio alterius* rule—and I am just showing off, as it is written down in front of me.

[51] **Jane Hutt:** Mike had a classical education. *[Laughter.]*

[52] **Michael German:** Would it be possible to have a note on that? We are all learning in this area, but this is one area in which we have to be absolutely clear. Our terms of reference are to ensure that we are not narrowing a competence, so we wish to make certain that we understand that. It would therefore be helpful if your lawyers could provide a note. We can always put the two lawyers' notes together.

[53] **Jane Hutt:** We will prepare a note for you, as Chair.

[54] **Michael German:** Thank you.

[55] **Jonathan Morgan:** I have one further question. Could you please explain the meaning of the word 'property'?

[56] **Jane Hutt:** This is in matter 5.2A and would allow for the reallocation of the day-to-day management and control of a property from the governing body to another body. We need to interpret that in the widest sense, so it could be land, buildings, furniture or equipment.

[57] **Kirsty Williams:** The explanatory memorandum draws attention to the increasing role of school governors within the school effectiveness framework. Could you explain the significance of that in the context of the proposed Order?

[58] **Jane Hutt:** There is no particular significance to the statement. The explanatory memorandum provided me with an opportunity to make the context of the proposed LCO clearer. That context is that governing bodies have a key role to play in the performance and improvement of schools. So, naturally, given our policy context at the moment, we are engaging all our schools in the school effectiveness framework, and governing bodies have a key role to play in that. As I have described on many occasions in the Assembly, the school effectiveness framework aims to stimulate, promote and facilitate more and better collaboration and the sharing of best practice between all parts of the education system. The explanatory memorandum refers to the school effectiveness framework because governing bodies are accountable for how their schools operate and, most importantly, for their outcomes in the form of educational effectiveness. Governors and governing bodies have a key role to play in delivering the SEF.

[59] **Kirsty Williams:** Should we therefore place a greater emphasis on the notes in the explanatory memorandum that draw attention to the fact that secondary school councils may nominate pupils to be associate governors, or is that also just a part of the narrative of setting the context of the proposed Order?

[60] **Jane Hutt:** It is very much a part of setting the context, with no particular significance. It is about trying to use the opportunity to restate our policy developments on the rights of children and young people, as underpinned by article 12 of the UN Convention on

the Rights of the Child and the fact that we already have legislation that requires all secondary schools to have school councils. Governing bodies are required to make provision so that two members of the school council can become associate pupil governors. It is, as Kirsty said, about setting the context of the policy background in Wales.

[61] **Kirsty Williams:** Minister, your memorandum also draws attention to the training that is available to governors and to the weaknesses in and unevenness of provision, building on the work of the Enterprise and Learning Committee, which also identified particular weaknesses in those arrangements in its review. How will the proposed Order provide the Welsh Government with the means to address those variations in governing bodies' effectiveness and the weaknesses in their training?

[62] **Jane Hutt:** This is also about ensuring that we have the competence to address the issues raised and the recommendations made by the Enterprise and Learning Committee in its valuable report. It would be useful to have the legislative competence to provide the means to address the issues raised in the committee report and in other evidence should legislation be necessary to deliver them. The proposed LCO does not itself address this issue; it provides the tools to do the job under a Measure.

[63] **Kirsty Williams:** To clarify, you do not currently have the competence to take all the actions that you would like to take in response to that report. However, this proposed LCO would allow you to act as you would wish in this regard.

[64] **Jane Hutt:** To permit Measures that might address the issues, yes.

[65] **Kirsty Williams:** And that cannot be done currently.

[66] **Jane Hutt:** We certainly cannot do that currently.

[67] **Kirsty Williams:** Thank you.

[68] The memorandum states that school finance and staffing are not within the competence of the proposed Order. What are the reasons for that, and what impact will it have on the National Assembly's ability to make law in this area?

[69] **Jane Hutt:** School staffing and funding have not been included in this proposed LCO, as they fall outside the area of competence that we are seeking. They are not governance issues, because they are not a part of the framework of decision making and accountability within which a school is run. Were we to gain competence in school staffing or school funding, the National Assembly would have to introduce a separate matter into field 5 of Schedule 5 to the Government of Wales Act 2006.

[70] I believe that this proposed LCO is the next step in an incremental change to build a body of competence for the Assembly, and that school governance is the first step, as it underpins and ensures that we have the competence that will provide us with the opportunities that we need to introduce Measures to ensure that our education service is delivered effectively.

[71] **Kirsty Williams:** May I ask for some clarification? My understanding is that governors do have a role to play in school staffing and finance issues, and that they would be accountable for decisions made in that regard. I am still not quite clear about why these aspects are not within the competence of the proposed Order. Governors do have a role in those aspects of school life.

11.00 a.m.

[72] **Jane Hutt:** That is right. They do have a role in recruitment, school appointments, and disciplinary proceedings, and they also have responsibility for their budgets under the local management of schools. If you were to transfer the competence for school staffing and school funding, you would be talking about the wider responsibilities of how the pay and conditions for the teaching staff complement would be managed, as well as the school funding as a whole. It would not be about the responsibilities that currently exist, as you said, for dealing with staff appointments, recruitment and budgeting.

[73] School staffing and funding have not been included in the proposed LCO because they fall outside the area of competence being sought. If you were to go down that route, we would be talking about changing or abolishing teacher workload agreements and issues relating to schoolteachers' pay and conditions, which are non-devolved. I believe that it is right that they are outside the scope of the proposed LCO.

[74] **Kirsty Williams:** Is there not a difference between having the legislative competence to act in those particular areas and you, as a Government, pursuing Measures within that competence? Would it not be a more complete transfer of power to take the opportunity to look at those now, rather than at a later date?

[75] **Jane Hutt:** It is something that the Assembly could consider in the future—legislation to place responsibility for all staffing matters with local authorities through school governing bodies. David, do you want to clarify this from the existing policy and legal point of view?

[76] **Dr Lloyd-Thomas:** By all means. It 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. From the point of view of the competence that we are trying to seek, by 'school governance' we mean the law surrounding who, in a legal sense, is responsible for the running of the school—where the buck stops and who is accountable for what—and also the law on how those persons have to be constituted as a group of people, the way in which they operate and so forth. That is what we mean by 'school governance'.

[77] Those people, whoever they are, will do a whole range of things that, in a legal sense, are termed as 'functions'. Staffing and funding are examples of functions. So, insofar as the proposed LCO is concerned, we are seeking competence to change the law on how you choose a group of people and how you set them up to be responsible for what goes on in a school, and how they relate to other groups of people with the same functions elsewhere, or to the local education authority. However, it would be outside the legal concept of school governance to go into unpicking and having the ability to change the law for the functions themselves, such as funding or staffing. Those would be separate areas of legal competence, which, if sought, would have to be the subject of additional matters.

[78] **Michael German:** I will let Joyce in and then I have a question on the same thing.

[79] **Joyce Watson:** Thank you for that explanation, and thanks too to the Minister. My concern is that if we did seek the competence, could we end up in a situation that could lead to regional pay structures, or even locally determined pay structures, that might not necessarily be to the advantage of the teaching staff?

[80] **Jane Hutt:** This is an area in which that type of policy direction could emanate from having the competence transferred for staffing and finance matters. As I said at the beginning, the Government is committed to the current arrangements for school funding and staffing. We believe that it is appropriate that it is delivered within the current legislative framework. We

do not want to use the proposed LCO to start going into other areas of competence, which are not the main purpose. The main purpose, as David has said, of the proposed LCO is to ensure that we have the appropriate powers for the governance of schools in the context of wider educational effectiveness. If we start to expand it, it becomes a different LCO.

[81] **Michael German:** I want to bring you back to what you said in response to an earlier question about the word ‘conduct’. I am paraphrasing here, but you said that conduct was around the legal constraints regarding how you operate as a governing body or in governance terms. Surely the way in which you manage your budget and deal with your staffing, as a governing body, is a ‘how’ question and is, therefore, about the conduct of governing bodies. I understand the point that you are making about the broader area, but this is a ‘how’ question, is it not?

[82] **Jane Hutt:** I will bring David back in to clarify the point, but this is about how you deal with the governance responsibilities at a school governing body level. I use the example of the complaints procedure, because the governance is what is required and the conduct is how you do that. On the question about staffing matters and funding, if we were to go down the route of transferring that competence, we would open up a whole new policy area—which we have not chosen to do at this point in time—of the wider arrangements. An example of that is pay and conditions, and the funding arrangements for schools is another. We have not chosen to seek competence for that policy area in this proposed LCO. If we start diluting the proposed LCO, which I believe we would if we added too much to it for the transfer of power, we are moving away from its purpose and objective, namely to ensure that we have competence in relation to school governance.

[83] **Michael German:** Forgive me, Minister; this is an important point, because it is the primary purpose for which this committee was set up and it is in our terms of reference. I call on Jonathan and then Kirsty on the same issue.

[84] **Jonathan Morgan:** In paragraph 26 on page 9 of the explanatory memorandum, it says that

[85] ‘the Assembly could pass legislation in relation to the creation (or abolition) of, and the allocation of functions amongst, bodies responsible for school governance’.

[86] I am still unclear as to why you have not sought to include, in your words, staffing and finance because that adds new policy areas that you do not want to touch. They are key, core functions of a governing body. If you are saying that the Assembly will be able to examine the allocation of functions among bodies responsible for the governance of schools, staffing and finance are a crucial part of that. Many school governing bodies would argue that that is their bread-and-butter work as a governing body, because managing your staffing complement is principally what the governing body is there to achieve.

[87] **Jane Hutt:** We must clarify the point—I will bring Simon and David in, if that would be helpful—that there is no question that school staffing and finance are not the functions of governors. I am sure that all of us around the table have been school governors. They are the functions of governors and the responsibilities are clearly defined in the current legislative arrangements. We are seeking to enhance the governance opportunities of the whole governing body, in relation not only to its own competence, but also to its collaboration with other bodies. We are not taking away; we are respecting the role and functions of governors.

11.10 a.m.

[88] However, we are saying that at this point in time, we do not want—although future Assemblies or Governments may want to do this—to gain competence for the wider matters,

which fall much more into Government policy areas. For example, I have mentioned pay and conditions, the teacher workload arrangements and the funding arrangements for schools. At present, this Government is content with the arrangements, but they are based in primary legislation and we would have to seek further transfers if we were to make those changes. The point that Joyce made is very relevant, because it is a policy point about why we want to retain existing arrangements and we do not want to seek competence for those purposes. These are policy issues, but perhaps David or Simon might want to clarify—

[89] **Dr Lloyd-Thomas:** I think that it is worth noting that there is a large body of specific law with regards to staffing and the funding of schools, which illustrates perhaps that they are in a different sort of context. The example that the Minister gave earlier, when she was trying to explain the difference between conduct and governance, was about complaint procedures that governing bodies must have by law. The amount of law for that is very small; it is one section in one Act; that is a facet of governance. However, for staffing and funding, there are many sections of law.

[90] The second point that I would make is that, as Simon has mentioned earlier, the thinking behind the drafting of the proposed LCO was informed by what Parliamentary Counsel had done for matters 5.12 and 5.13 for further education institutions, and the need to follow that format, because all of the law is interpreted as one body by the courts. It is worthwhile noting that, at least insofar as staffing is concerned, this specific reference to staffing in further education institutions would point to the fact that, had the LCO on school governance been proposed to cover staffing, we would have had to make specific reference to staffing in it, in addition. Simon might correct me, but we would have had to include an additional matter.

[91] **Mr Morea:** That is absolutely correct. Parliamentary Counsel, when drafting matter 5.12, drew a distinction between governance and staffing, and obviously considered that staffing was not governance. Therefore, that informed the drafting of this matter 5.2A. I suppose that it is also worth mentioning that governing bodies have many functions that, in relation to admissions, for example, if it is a voluntary aided school or curriculum discipline, are covered by different matters already in Schedule 5.

[92] **Michael German:** Kirsty, could you ask the final question, so that we can scoop them all up together?

[93] **Kirsty Williams:** Yes. The Minister has explained fairly clearly that the Government has taken a policy decision not to pursue competence over finance and staffing, so they are not within the competence of the proposed Order. Yet, paragraph 26 of the explanatory memorandum goes on to state, after the points that Jonathan made, that in effect you can chip, chop and change functions, that

[94] ‘if new governance arrangements were created under the LCO’,

[95] which is the Government’s intention,

[96] ‘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’.

[97] Given that the Minister has taken a policy decision that she does not want competence over staffing and finance, but that her own memorandum goes on to say that they are within the competence, can she explain which aspects of staffing and finance are within and without competence?

[98] **Jane Hutt:** That is an important point to clarify, Kirsty. This point in the explanatory memorandum relates to the fact that the current body of competence, which David has just described, and is quite considerable given the current responsibilities of governors in relation to staffing and finance matters, would have to transfer. It would be a transfer of functions to any new body or arrangement that was set up. This refers to the current competence functions of governing bodies, which will be transferred. So, it is not about opening up the parameters of any further competence in staffing and finance, it is about transferring the responsibilities that they already have to a new body.

[99] **Michael German:** Jonathan, do you want to move on to your next question?

[100] **Jonathan Morgan:** Yes, thank you, Chair. Minister, paragraph 21 of the explanatory memorandum highlights the differences in functions of different types of governing bodies, such as the admissions arrangements for voluntary aided and foundation schools. How could the proposed Order be used to affect the different types of governing bodies?

[101] **Jane Hutt:** The proposed LCO would not affect the governance arrangements or responsibilities of different categories of schools. It would only provide the Assembly with the competence to legislate by a Measure. There will be a great deal of scrutiny and consultation when Measure-making opportunities come forward.

[102] **Jonathan Morgan:** I will repeat the question, because I do not think that you have answered it. As this committee has now dealt with quite a considerable number of LCOs, we understand how the system works. This proposed Order will provide powers to the Assembly Government to bring in changes, therefore, what could be done in affecting the different types of governing bodies?

[103] **Jane Hutt:** I will clarify again what I said in answer to your previous question. The Assembly already has competence in matter 5.3 of field 5 in Schedule 5 to the Government of Wales Act 2006 to legislate for admission arrangements in maintained schools in Wales. Where we already have competence, we need to clarify that this will not be making any difference.

[104] **Jonathan Morgan:** I will give you a hypothetical scenario. You have said publicly that this is not about having the competence and the ability to change categories of schools. So, once this Order, if it passes, provides competence, there will still be categories of schools in Wales—voluntary aided, foundation, and so on. However, what makes those categories relevant is the types of powers and functions of the governing bodies. So, within this proposed competence Order, if the power is transferred, are you able to legislate in a way that alters the functions and responsibilities of those governing bodies, for example a foundation school has greater powers to make better use of school property in comparison with an ordinary maintained school? While you may retain the categories, those categories, in essence, could become quite meaningless if you decide to radically alter the powers and responsibilities of the governing bodies that are responsible for those schools. That is what I am getting at.

[105] **Jane Hutt:** It could alter the constitutions of the governing bodies, but it could not alter their functions. That is the important point.

[106] **Dr Lloyd-Thomas:** The important point to bear in mind is should this competence be granted, it will work alongside all of the other matters that have already given the Assembly competence, and you rightly mentioned matter 5.1 of field 5 on the categories of schools. So, the proposed Order would provide the competence to create different types of governing body, and one could envisage that there could be differences between the different categories of school in respect of that—in the way that there are now or in different ways—because they

are constituted in different ways, with different categories of governor on those bodies if they are foundation or voluntary-aided schools. That is the core point. So, in a roundabout way, the answer is ‘yes’ to your question, in that this proposed Order would have some potential to develop or alter a governing body, which was specific to a particular category of school. However, as the Minister said, it would not change the functions, for the reasons that were debated earlier.

[107] **Lorraine Barrett:** Matter 5.2B relates to

[108] ‘Securing collaboration between persons or bodies with functions relating to schools maintained by local education authorities.’

[109] The explanatory memorandum states that the Deputy Minister for Skills has established a review group to advise him about options for reform of governance arrangements for further education institutions.

11.20 a.m.

[110] The Minister’s statement to Plenary included some examples of collaborative working between schools and colleges, including primary schools, which I find interesting. What is the impact of the word ‘securing’ in matter 5.2B, and what would be the effect of removing it?

[111] **Jane Hutt:** Matter 5.2B will be interpreted in the context of the whole of field 5 of Schedule 5, and therefore the words used in matter 5.13(a) are relevant. Again, this is legalistic and technical, but matter 5.13(a) was inserted to try to ensure that we have analogous competence with the FE institutions. Matter 5.13(a) was inserted by the Further Education and Training Act 2007, and uses the term ‘securing collaboration’, so if we remove the word ‘securing’ it could cast doubt on the interpretation given to matter 5.2B. We need to avoid that risk by including the term. Does that make sense?

[112] **Lorraine Barrett:** I will probably have to read through your comments in the Record of Proceedings and consider them later.

[113] **Michael German:** The impression that we are getting, Minister, is that we are having to live with the drafting that Parliamentary Counsel did in the past. We would like to understand why Parliamentary Counsel drafted in that way in the first place.

[114] **Jane Hutt:** Again, it goes back to the questions of legal interpretation that arise once you start building a body of law around education.

[115] **Lorraine Barrett:** I think that we have had the legal explanation for that, so I will leave that for now, but what about the meaning of the word ‘functions’ in matter 5.2B?

[116] **Jane Hutt:** Again, ‘functions’ is a fairly technical term. It is a term that is used in matter 5.2A, B and C, meaning the same in each instance. It is defined in section 158 of the Government of Wales Act 2006 as a power or duty, and has the same definition in section 579 of the Education Act 1996. Reference to a ‘function’ should be read as a power or duty in relation to a school maintained by a local education authority—for the record.

[117] **Lorraine Barrett:** I mentioned the Deputy Minister for Skills establishing a review group in relation to FE governance. Can you explain why you are bringing forward this proposed Order before the outcome of that review is known?

[118] **Jane Hutt:** That is a fair question, Lorraine. The proposed LCO is about the

Assembly acquiring the competence for school governance; it is not about FE governance, and we have already explained that we want to bring in parallel powers there. A separate law exists for FE governance. As I said yesterday in answer to questions in Plenary, I am awaiting the Deputy Minister's review of FE governance arrangements, and we do not know what proposals will emerge from it. What is important is that, whatever comes out of that governance review, we ensure that our school governance competence is on a par with FE governance. It means that, if we pass this proposed LCO, we will have the ability to support review recommendations that might put in place FE and school governance arrangements that may, again, respond to what we have been discussing in relation to 14-19 learning pathways collaboration. If we did not have this competence that we are seeking through the proposed LCO, that might hamper opportunities for future collaboration, which may or may not emerge from the FE governance review.

[119] **Lorraine Barrett:** Are you confident, then, that the extent of this proposed Order will be sufficient to incorporate whatever comes out of the review—that you will have the capacity to deal with it?

[120] **Jane Hutt:** I am sure that Members will have in mind many of the arrangements that are developing within their constituencies and neighbouring constituencies where we need to ensure that we can drive forward a collaboration opportunity in governance arrangements. We believe that this will not hamper anything that may come out of the FE governance review.

[121] **Lorraine Barrett:** In your statements to Plenary, you gave some examples of existing collaborative work between schools and colleges. Do you still feel that there is more to do? Is that why you are seeking further legislative competence? If there is already collaborative work going on, what more is needed?

[122] **Jane Hutt:** That is a very fair point. I mentioned in my statement that we have some good examples, and I gave some examples at the time. However, this is often done through goodwill and endeavour, rather than due to any legal arrangements. We need to ensure that, as a result of this proposed LCO, we have the legal stimulus to ensure that collaborative working takes place. Next month or January, regulations will be made that will allow school governing bodies to unite, so that there is one body in place for several schools. Those are the federation regulations. We expect federations to stimulate collaboration between schools so that they work together within one governing body's strategic framework. So, we are doing what we can under existing legislation. There is some provision for collaborative arrangements under the Education Act 2002. However, it is still under the governance framework established by that Act, and we want to go beyond that. If the governance for schools changed, we would need to have the legal mechanisms to ensure that there can be a requirement for collaboration, rather than expecting goodwill and endeavour. That is particularly necessary for collaboration between schools and FEIs.

[123] **Joyce Watson:** Good morning, Minister. Moving on to matter 5.2C, which will be inserted into field 5 of the Government of Wales Act 2006, my questions are probably quite technical. Matter 5.2C relates to the establishment of bodies to carry out functions relating to local authority maintained schools to carry out activities relating to education or training or to exercise functions on behalf of LEAs. What type of bodies do you envisage being established, and what will be the purpose of those?

[124] **Jane Hutt:** At this stage, Joyce, we cannot comment on the type of bodies that could be established or their purpose because that would come out of any Measure-making opportunities. The point is that the matter seeks broad competence and could permit the creation of a range of bodies with various purposes. However, it must all be about the objective to improve our schools and their performance and support them in some way. I would like to make a policy point about this. This is not about providing opportunities to, for

example, introduce academies. That is not within the competence, and we have no intention in Wales of introducing academies.

[125] **Joyce Watson:** Thank you for clearing up that point because I was going to ask about that as a follow-up question. What is meant under matter 5.2C, by the term ‘function’ relating to schools, and what might those functions be?

[126] **Jane Hutt:** I think that it is important to note that the definition in matters 5.2B and 5.2C refer to persons or bodies with functions relating to schools maintained by local education authorities. That is the key point. I have said a bit already about what the term ‘function’ means, but this relates to those schools maintained by local education authorities. That is what we are dealing with in this proposed legislative competence Order.

11.30 a.m.

[127] **Joyce Watson:** Thank you. Again, I am trying to clarify what particular words mean under matter 5.2C. The word ‘or’ appears at the end of the sentence in point (i). What is the purpose of including that word and what would be the effect of it?

[128] **Jane Hutt:** In the context of Matter 5.2C, the placing of the word ‘or’ at the end of the sentence does not imply that the establishment of bodies must be either to carry out activities in relation to education and training or to exercise functions on behalf of local education authorities; our view is that a body could be established to carry out both of those functions. If there is doubt or confusion, or possible misunderstanding, regarding this matter, we will look at this point. It is not ‘either’ and ‘or’ but both.

[129] **Michael German:** That would be very helpful.

[130] **Joyce Watson:** My next point is again about clarification of the words used. Can you explain what the terms ‘bodies’ and ‘involvement’ mean?

[131] **Jane Hutt:** I hope that I have explained the meaning of the word ‘bodies’ to some extent. The competence that we are seeking to gain goes much wider than merely establishing bodies, for example. Bodies could be organisations that are set up to provide common services to schools and/or further education institutions, such as cleaning, procurement or advisory services. So, at a strategic level, this could result, for example, in establishing a body that could undertake school improvements or provide advisory services, as I have just mentioned. The Education and School Improvement Service is an example of such a body that already exists. The body could enable a local authority or several local authorities to provide those services, which could include governor training or support. Matter 5.2C would also allow for the establishment of bodies that exercise local authority functions. That could be an important additional competence that goes beyond current opportunities in primary legislation. So, it could be an important tool in our policy aim of getting local authorities to collaborate more in service delivery and working in new ways to promote efficiency and effectiveness beyond the borders—it goes into the Beecham agenda. The proposed Order refers to establishing a body or bodies to provide services, but it is not specific about what that body might be. That could be determined in any Measure. I hope that I have explained the point that this is not about enabling other arrangements to be set up by, for example, academies, which are not maintained by local authorities. The proposed LCO only seeks competence for schools maintained by local authorities.

[132] On ‘involvement’, 5.2C allows for a Measure to be made that would establish a body to carry out activities relating to education and training or to exercise functions on behalf of local education authorities. So, if you were to establish such a body, you would need to ensure that everybody engaged in that would be involved with the body. Those who establish it need

to be involved. The participation of the body that has been established would ensure that they could provide staff or invest in the body formed. So, again, for the record, I think that we need to make that point clear, Chair.

[133] **Michael German:** I would like to finish with a couple of questions on numbering. I know that there are sections of the Government of Wales Act 2006 that have been numbered in the way you have numbered these matters, namely 5.2A, 5.2B and 5.2C, but all the proposed LCOs that we have been asked to consider in this committee have contained the numbering 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. You could nice and neatly have had 5.19, 5.20 and 5.21. You are establishing a new procedure for numbering. Why have you done that?

[134] **Mr Morea:** The reason why we have proposed matters 5.2A, 5.2B and 5.2C is because there is such a body of competence already in education and training, and it seemed sensible to have them fit in that way. You have matter 5.1 on the categories, and then there is the establishment and discontinuance. In a holistic view of a school, governance would come in after that, which is why we have these matters as 5.2A, 5.2B and 5.2C, rather than numbering them to come right at the end, after the matters on further education, inspection and children and young persons.

[135] **Jane Hutt:** It is linking it to the competence—

[136] **Michael German:** You could have also logically put it alongside the further education ones, to which you have referred consistently this morning with regard to locking them together. You could have just added them to the FE ones.

[137] **Mr Morea:** Except that this is all to do with schools maintained by local education authorities. It is so that when we are looking at the competence in field 5, then they would all be under the same area.

[138] **Michael German:** I suspect this will be a matter that the House of Lords Constitution Committee will look at in scrutiny. It has a view on numbering and making it clear for the reader. As long as you are satisfied that you can stand by this numbering, we will not worry too much about it. It does show how we are now in a different ballgame with regard to how we order matters within fields, but that is a question for another day. Thank you, Minister, for attending this morning and for giving us such long answers. Thank you for offering a note from Simon on the ultra vires, or whatever it was; I do not have the words in front of me, so I cannot repeat them. I will just say to Members that, during the course of this meeting, I have asked our legal adviser to provide a note on certain aspect of issues that Members have raised, and that will be before us in the next meeting. Our next meeting will be next week when we will be taking evidence from Estyn and the Welsh Local Government Association. Thank you for your attendance this morning.

*Daeth y cyfarfod i ben am 11.37 a.m.
The meeting ended at 11.37 a.m.*