

To: Business Committee

From: Jane Hutt AM
Business Minister

EXPLANATORY MEMORANDUM

CONSTITUTION LAW

DEVOLUTION, WALES

NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (CONVERSION OF FRAMEWORK POWERS) ORDER 2007

Summary

The purpose of the Order is to convert the wide powers of the Assembly, as currently constituted, to make subordinate legislation (known as ‘framework powers’) contained in the NHS Redress Act 2006 and the Education and Inspections Act 2006 into Assembly Measure-making powers. This Order is necessary to reflect the new devolution settlement contained in the Government of Wales Act 2006.

1. This Memorandum is submitted to the Assembly's Business Committee in relation to the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007, in accordance with Standing Order 26.
2. A copy of the Instrument is submitted with this Memorandum.

Enabling Power

3. The powers enabling this Instrument to be made are contained in section 162 of, and paragraph 31(2) and (4) of Schedule 11 to, the Government of Wales Act 2006. The National Assembly for Wales's consent is required before this Instrument can be made.

Effect

4. The Order in Council will amend Schedule 5 to the Government of Wales Act 2006 (GOWA 2006) in order to enable the Assembly, as constituted by that Act (i.e. post-separation), to pass Assembly Measures about any of the policy areas covered by the framework powers in section 17 of the NHS Redress Act 2006 and sections 178 & 179 of the Education and Inspections Act 2006. This will be achieved by specifying these policy areas as Matters under the ‘health and health services’ and ‘education and training’ fields in Part 1 of Schedule 5 to GOWA 2006 and repealing the framework powers.

5. Section 17 of the NHS Redress Act enables the Assembly to make regulations providing a mechanism for the out-of-court settlement of certain clinical negligence claims. Sections 178 & 179 of the Education and Inspection Act enables the Assembly to make Regulations applying to Wales in respect of: organisation of maintained schools; admission of pupils to maintained schools; the curriculum in maintained schools; attendance, discipline and behaviour, including putting in place educational provision for excluded pupils; entitlement to education and training, and services to encourage, support or assist young people with regards to education and training; and food and drink provided for children in schools and day care

Target Implementation

6. It is intended that this Instrument will proceed to Plenary on 7 March 2007 for the Assembly to consider giving its approval to the Order in Council. If the Assembly does approve the Order in Council, then the Queen will make the Order at the meeting of the Privy Council on 4 April 2007 before it is laid before Parliament to come into force on the appointment of the new First Minister following the Assembly elections.
7. If the Order was not made prior to legal separation of the National Assembly for Wales and the Welsh Assembly Government, following the May 2007 elections, the framework powers would transfer to Welsh Ministers (along with all other Assembly powers to make subordinate legislation) rather than to the Assembly.

Financial Implications

8. There are no financial implications arising from the making of this Instrument.

Consultation

With Stakeholders

9. There has been no public consultation on the draft Order, as it gives effect to the policy underlying the Government of Wales Act 2006. The Act gives effect to the proposals contained in the White Paper "Better Governance for Wales", published in June 2005, which was the subject of a full public consultation.

With Subject Committees

10. The Minister for Education and Lifelong Learning wrote to the Chair of the Education and Lifelong Learning Committee on 4 December 2006 informing the Committee of the Secretary of State's intention to take forward the Order and enclosing a copy of the draft Order. This letter was considered at the Committee's meeting on 7 December 2006 (ELLS(2)-16-06(p.13)). The Committee scrutinised the draft Order on 17 January 2007 (ELLS(2)-01-07(p.4)). The Committee was content for the Order to be made. A transcript of the discussion is attached at Annex A. The Order in Council was also notified to the Health and Social Services Committee, via a letter from the Minister for Health and Social Services to the Chair of the Committee on 7 December 2006, enclosing a copy of the draft Order. This letter was circulated to Committee Members outside of the Committee asking for

comments by 13 December 2006. The Clerk to the Committee has confirmed that no comments were received.

ANNEX A

**Deddf Llywodraeth Cymru 2006—Gorchymyn Arfaethedig Cynulliad
Cenedlaethol Cymru (Trosglwyddo Pwerau Fframwaith) (Cymhwysedd
Deddfwriaethol) 2007
Government of Wales Act 2006—Proposed National Assembly for Wales
(Conversion of Framework Power) (Legislative Competence)
Order 2007**

[126] **Peter Black:** I welcome Sarah Canning from the Assembly Government's Constitutional Affairs Unit. Minister, are you going to introduce this item?

[127] **Jane Davidson:** Thank you, Chair. The committee agreed, at its meeting on 7 December, that it would scrutinise this draft order at today's meeting. The purpose and content of the draft Order was set out in a letter to the Chair of the committee and was submitted as a paper to note at that meeting and in the paper before you at this meeting. I will not repeat everything in the paper before you, but I draw your attention to a few points. The draft Order is an Order in Council that will ultimately be made by Her Majesty, and it is being taken forward by the Secretary of State for Wales. The Order is made under a power that is contained in the Government of Wales Act 2006, which requires that a draft of the Order must be laid before, and approved by a resolution of, the Assembly before it can be made by the Queen. It is then subject to negative parliamentary procedure at Westminster, and the Assembly Plenary session to consider the draft Order is planned for 31 January.

[128] This is the only Order in Council of its kind that will be made. The power allowing this Order to be made is a transitional provision that will not be needed when the Government of Wales Act 2006 is fully implemented following the May 2007 elections. To explain that further, under the current devolution settlement, the only way to give the Assembly relatively wide powers to make legislation is for UK Bills of Parliament to give the Assembly wide powers to make subordinate legislation—what we call framework powers—to distinguish them from the narrower powers to make subordinate legislation in Wales. During the passage of the Government of Wales Bill, the UK Government made it clear that these framework powers would be converted into Measure-making powers, so that they remain with the Assembly rather than passing to Welsh Ministers. So, in essence, by passing this, you ensure that the powers go to the Assembly. If you do not pass it, they stay with the Minister.

[129] Now that the Government of Wales Act 2006 has been enacted, the Bills provide for matters to be inserted directly into schedule 5 of the Government of Wales Act 2006 so that the Assembly will have the power to pass Measures in relation to those matters. So, after the education inspections and NHS Redress Act 2006, there will be no further framework powers to make subordinate legislation that will need to be converted into powers to pass Assembly Measures, because the Assembly will then acquire the powers to pass the Measures through those two routes: UK Bills that insert matters directly into schedule 5; or another type of Order in Council—the legislative competence Order—that will specify matters to be included in schedule 5.

[130] The committee paper and attached annexes—a copy of the draft Order and draft explanatory memorandum—give you all the information that you need about the purpose and content of the Order. Sarah from the constitutional affairs unit is here, and I am sure she will be happy to answer any questions.

[131] **Peter Black:** Are we doing this because it fell through a hole, if you like—that

all the previous framework powers were caught up with the Government of Wales Act 2006 and this one was not? It seems to me that there have been framework powers in other Acts that are not being converted in this way.

[132] **Ms Canning:** I do not think that it has fallen through a hole. When we looked at these framework powers, there was a feeling that they were very wide powers that needed to be converted into powers for the Assembly. The other framework powers were not as wide. These powers were put together after the 'Better Governance for Wales' White Paper, and the UK Government is firmly behind the idea that the Assembly should get very wide subordinate-legislation-making powers. So, the earlier powers were not in a form that would allow them to be put, as matters, into schedule 5. Those powers were not wide enough for us to do that. These are the only two sets of framework powers that will be transformed in this way.

[133] **Janet Ryder:** The Minister said that it was detailed in the report that it has to fit a tight timescale. These are scheduled to come to Plenary on 31 January. I am sure that the Minister is aware that there is a union that has indicated that there may be industrial action on that day. That action may affect the working of the Assembly. If that should happen, what are the alternative plans to ensure that this meets the timetable?

[134] **Ms Canning:** The tight deadlines in relation to the timetable actually relate to another Bill that you will all be aware of, the Further Education and Training Bill. The main reason for our wanting to do this as quickly as possible is the interaction between this and that Bill. That Bill puts matters into schedule 5 itself and gives Measure-making powers to the Assembly. It is quite a technical issue really; all those matters have to be numbered. So, under the field of education and training in schedule 5 there are matters 5.1, 5.2 and 5.3 and, once our Order has gone through, the numbering on the matters that are going to be inserted as a result of the Further Education and Training Bill will need to be changed. That will lengthen the parliamentary process of that Bill. Our main drive for getting things done as quickly as we are trying to achieve is to fit in with that. Having said that, we obviously still have to do this before May 2007. If 31 January does not come off, from the Assembly's point of view, it will not be a massive problem if this is a week or two later going to Plenary.

[135] **Janet Ryder:** So there would still be an opportunity to deal with this?

[136] **Ms Canning:** Yes, it would be fine, because it could still get to the Privy Council meeting at the beginning of March. Even if it missed that meeting, it could go at the beginning of April and still be in force in time for May.

[137] **Jane Davidson:** It is worth adding that the only decision that the Assembly is making on this Bill is whether it wants to leave powers with the Minister or have the powers itself. I think that the Assembly will want to decide that it has the powers, and I think that we could do that in two minutes, if necessary, at any meeting.

[138] **Peter Black:** There is also the crucial matter of how we number the schedule to the Government of Wales Act 2006, of course.

[139] **William Graham:** I assume that every effort will be made under the protocols for the Assembly to meet on the day that it is scheduled to meet, and that if it cannot do so, it will meet as soon as possible.

[140] **Peter Black:** I am sure that that is the case. Janet, do you want to come in?

10.20 a.m.

[141] **Janet Ryder:** In relation to the Bill itself, you said that these are very wide powers. Will you expand on what some of them are, because if you look at some of the provisions in the draft Order, they all start with the words 'provision for' and 'in connection with'? How broadly is that 'in connection with' defined? For example, how wide is

'in connection with the admission of pupils to schools?'

[142] What is the breadth that that can encompass?

[143] **Janet Davidson:** I will start the answer there, because you have had a chance to scrutinise all of this under the Education and Inspections Bill. All those powers were laid out in the Bill, and I pointed out at the time that we were very excited to have very wide powers under our new legislative competence in all the areas spelled out in that Bill. So, if you go back to your notes on the Education and Inspections Bill, you will see that that determines the width of the powers.

[144] **Janet Ryder:** So you do not want to answer that question?

[145] **Janet Davidson:** I am answering the question. I am saying that you have had the information before, because this is related to the very wide framework powers that we took under the Education and Inspections Bill, which we have been commended for. I cannot possibly, in a short session in this committee, answer a question on the width of every single power in that Bill. If you want to ask about the width of any of the powers in that Bill, please write to me.

[146] **Ms Canning:** [*Inaudible.*]—the draft Order gives you an idea of what an Order in Council giving Measure-making powers to the Assembly will look like, in terms of how wide the powers can be. As a non-lawyer, I cannot tell you exactly what could go in under each of those headings, and I am not an education policy official either so I cannot answer with any detail on that particular point.

[147] **Peter Black:** It seems to me, looking at the matters to be inserted into the schedule, that they are fairly clear about what you can and cannot do. For example, you can make

'Provision for and in connection with the admission of pupils into schools maintained by local education authorities.'

[148] That is fairly specific, but it is also fairly wide in terms of the types of provision that you can make. That is the point, is it not? We get to develop policy, and it is similar to the schedule in the Further Education Bill, which I have also looked at. In a sense, these seem to be a bit wider in the Further Education Bill.

[149] **Ms Jackson:** I think that this is something that will develop over time as the Assembly exercises its new Measure-making powers. It seems that you are asking what can you do, then, when this says 'provision for' and 'in connection with'. Some of it is very specific, but with regard to the words 'in connection with', you would have to look at an actual intention to see whether it was in connection with the main thrust of the matter. This happens all the time when people are drafting Bills. A Bill will have what is called a long title, which can be something as open as 'to make provision for the NHS in Wales', for instance, to give you a topic that we will not get too worked up about in this committee. When you want to add something into that, you would have to go back to the long title to see whether or not you could do that.

You would look at a particular provision and ask whether it really is 'in connection with', and ties in with, the categories of school that we can maintain and with admission? So, it will be a very big process of development for the officials who are drafting Measures, and the developers of policy, and yourselves when you come to look at proposed Measures. There are a lot of exciting things to do in the future.

[150] **Peter Black:** I take it that committee is content with this Order. I see that you are. We will no doubt have further discussions on this on 31 January, assuming that we are here.

10.24 a.m.