

MEMORANDUM FROM THE ENTERPRISE AND LEARNING COMMITTEE OF THE
NATIONAL ASSEMBLY FOR WALES

CONSTITUTIONAL LAW: DEVOLUTION, WALES

**The National Assembly for Wales (Legislative Competence)
(Highways and Transport) Order 2011**

Proposed Legislative Competence Order relating to the provision by highway authorities of routes for use solely or principally by any one or more of the following: pedestrians; cyclists; persons on horseback or leading a horse

Introduction

1. This Explanatory Memorandum sets out the background to the provisions in the accompanying Committee proposed Legislative Competence Order, which would confer additional legislative competence upon the National Assembly for Wales (“the Assembly”). It explains the scope of the power requested.
2. The constitutional context to this request is set by the Government of Wales Act 2006 (“the 2006 Act”). Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the Assembly to legislate by Assembly Measure on specified Matters. These Matters may be added to Fields within Part 1 of Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to Matters, subject to the limitations provided for in Parts 2 and 3 of Schedule 5 to the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order in this Memorandum.
3. The proposed Legislative Competence Order (LCO) would confer further legislative competence on the Assembly by inserting a Matter into the Field of Highways and Transport (Field 10, Part 1, Schedule 5 to the 2006 Act). These new legislative powers will enable the Welsh Assembly Government, Assembly Members or Assembly Committees to bring forward proposals for legislation, in the form of Measures which reflect the particular needs and circumstances in Wales. These Measures will be subject to thorough scrutiny and approval by the Assembly.

Context

4. The previous Assembly acquired a range of executive functions over highways and transport under the Government of Wales Act 1998 and the National Assembly for Wales (Transfer of Functions) Order 1999 made under that Act. These functions were transferred to the Welsh Ministers by the 2006 Act. These powers were enhanced by the Railways Act 2005, the 2006 Act and the Local Transport Act 2008.

5. Following an extensive process of stakeholder consultation, which demonstrated a strong desire for further powers in this area, and wide cross-party support, the Assembly's Enterprise and Learning Committee laid a proposed LCO before the Assembly on 4 June 2009. The proposed Order sought to extend the legislative competence of the Assembly to include the provision by highway authorities of routes principally for pedestrians and cyclists. The Order has been revised in the light of representations made on the proposed LCO laid before the Assembly and discussions with the Welsh Assembly Government and UK Government.
6. The Order will enable the Assembly to consider legislation that could vary the powers and duties of public highway authorities in relation to the provision of routes for use solely or principally by any one or more of the following: pedestrians; cyclists; persons on horseback or leading a horse. The Assembly currently has no legislative competence to do so.
7. This is the first Legislative Competence Order to be proposed by an Assembly Committee and also the first to come directly from the Assembly's petitions process. Furthermore, the petition came directly from civic society. It was proposed by Sustrans, a sustainable transport charity, and supported by many other voluntary organisations.
8. The Welsh Assembly Government has agreed to support this proposed LCO and to facilitate its progress.

Current Legislative Framework

9. The Assembly has legislative competence in relation to the establishment and maintenance of a coastal route, by virtue of Matter 16.2 in Part 1 of Schedule 5 to the 2006 Act. However, that competence only relates to routes used for recreational purposes, and does not include the creation of new highways. The Assembly has no legislative competence to enable it to consider legislation that could vary the powers and duties of public authorities in Wales in relation to footpaths, cycle routes and bridleways for broader purposes.

Highways Act 1980

10. Subject to some exceptions, the Welsh Ministers are the highway authority in Wales for trunk roads, special roads provided by them, highways for which they are expressly responsible by virtue of an Order made by them under any enactment, highways transferred to them under section 14 or 18 of the Highways Act 1980 ("the 1980 Act") and highways constructed by them that have not been transferred to any local highway authority (see s1(1) of the 1980 Act).
11. The council of a county or county borough (a "local council") is the highway authority for all highways in their area, whether or not

maintainable at public expense, where the Minister is not the highway authority under s1(1) of the 1980 Act (s.1(3A) of the 1980 Act).

12. Section 36 of the 1980 Act provides that certain highways, including footpaths, shall be maintainable at public expense.
13. Section 41 of the 1980 Act places a duty on the highway authority to maintain a highway at public expense. In practice, it is very rare for the Welsh Ministers to be the highway authority for public paths that are maintainable at public expense. The duty generally rests with local councils, who may create footpaths, bridleways and restricted byways by agreement or compulsorily (Sections 25 and 26 of the 1980 Act).
14. By virtue of s.65(1) of the 1980 Act, a highway authority may construct a cycle track as part of a highway maintainable at the public expense. This power is exercisable by the Welsh Ministers in respect of trunk roads and by local councils in respect of highways for which they are the highway authority.
15. The term 'highway' is not defined in the 1980 Act. In common law, a highway may be defined as a way over which all members of the public have the right to pass and to re-pass. The public's use of the way must be as of right, not on sufferance or by licence. Classes of highway include the following:
 - (a) carriageway highways, with vehicular rights;
 - (b) byways open to all traffic;
 - (c) restricted byways, for travel by foot, on horseback, and for vehicles other than mechanically propelled vehicles;
 - (d) bridleways, for travel on foot and horseback. Cyclists have the right to ride pedal cycles on bridleways (subject to any byelaws or orders made by the local authority));
 - (e) footpaths, which carry only a right of way by foot;
 - (f) cycle tracks, which may or may not also include the right of way on foot.

Wildlife and Countryside Act 1981

16. Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on local councils to record and continually review public rights of way. In practice, local councils will record the highways described in paragraph 15 (b) to (e) above. In Wales cycle tracks cannot be recorded on definitive maps and statements. If rights of way are turned into cycle tracks they are removed from the definitive map and statement.

Cycle Tracks Act 1984

17. Section 3 of the Cycle Tracks Act 1984 allows local councils, by order, to convert footpaths into cycle tracks. Once the Order is made, the public has a right of way over the cycle track on pedal cycles and also on foot.

The two ways may be separated (e.g. by the provision of barriers or markings) in the interests of public safety. A council cannot however make an Order under this section which crosses any agricultural land unless every person having a legal interest in that land has consented.

Transport (Wales) Act 2006

18. Section 1 of the Transport (Wales) Act 2006 imposes a general transport duty on the Welsh Ministers. It requires them to develop policies for the promotion and encouragement of safe, integrated, sustainable, efficient and economic facilities and services for pedestrians and cyclists and to carry out their functions so as to implement those policies. Section 2 requires the Welsh Ministers to publish, and to keep under review, the Wales Transport Strategy, which must set out those policies and how it is proposed to implement the general transport duty.

Government of Wales Act 2006

19. The Welsh Ministers have a power to do anything that they consider appropriate to achieve the object of the promotion or improvement of the social, economic or environmental well-being of Wales (s.60(1)), a power to give financial assistance (s.70(1)) and a power to do anything that is calculated to facilitate or is conducive or incidental to the exercise of their functions (s.71). Local authorities have similar powers under local government legislation in respect of their own areas.

Rationale

20. The aim of the proposed LCO is to extend the competence of the Assembly in relation to the provision by highway authorities in Wales of routes for use solely or principally by any one or more of the following: pedestrians, cyclists; persons on horseback or leading a horse. This will enable the Assembly to legislate in these areas. Currently the Welsh Ministers have extensive executive functions in relation to highways and transport but the Assembly has no corresponding legislative competence. Although legislative competence has been devolved in relation to road user charging, concessionary fares and learner transport, such competence does not cover the provision by highway authorities of routes for pedestrians, cyclists and persons riding or leading horses.
21. During the stakeholder consultation on the potential LCO conducted by the Assembly's Enterprise and Learning Committee, a number of organisations outlined the multiple benefits of increasing the levels of walking and cycling in Wales. These included the promotion of sustainable travel by replacing car journeys with walking or cycling; the health benefits of increased physical activity; environmental benefits such as a reduction in carbon emissions and impact on climate change; as well as local environmental improvements of noise reduction and

better air quality. The economic benefits from recreation, tourism, and to the wider rural economy were also emphasised.

22. The Enterprise and Learning Committee received numerous representations on how the provision of traffic-free non-motorised routes can contribute significantly to increasing participation in walking and cycling. Evidence submitted showed a strong correlation between the provision of an extensive integrated network of traffic-free cycle paths and high utility cycling rates. It was noted that traffic-free routes also show a mix of walking and cycling use. For example, 48 per cent of the users of the National Cycle Network were walkers and 50 per cent were cyclists. In addition, it is essential to the success of such traffic-free routes that they are:
- convenient and locally accessible
 - specifically designed to accommodate the needs of disabled people and anyone for whom traffic free routes may present complicating factors
 - interconnected and not piecemeal or ad hoc
 - direct to destinations and not circuitous
 - high quality with a well maintained infrastructure and local environment.
23. The current range of powers held by highway authorities to develop traffic-free routes for walking, cycling and riding or leading horses tends to be piecemeal in nature reflecting the different legal frameworks from which the powers are derived. In addition, research carried out for the Countryside Council for Wales by the Countryside Agency (2005) showed that the powers in relation to the creation of Public Rights of Way are not widely used by local authorities, perhaps because of perceived compensation implications. More generally local authorities' priorities often lay elsewhere and that the ability to impose duties on local authorities is a key rationale for seeking additional primary legislation making powers.
24. Variations in the use of powers by highway authorities to develop traffic-free routes can also result in the development of unconnected linear routes rather than in the expansion of a national network of walking, cycling and horse riding routes. The Police Services in Wales made the case that what was required was:
- “...something much more purposefully and coherently planned and integrated than the peripheral haphazard and (crucially) short routes so often produced in the UK to date.”
25. In addition the range of duties and functions placed upon highway authorities does not prescribe the design standards and maintenance of walking, cycling and horse riding routes. In practice this results in a wide variation in track design, construction and maintenance. As the submission by the Cyclists' Touring Club Cymru commented:

“...not all traffic-free routes are good.[...]Cycle tracks alongside roads (as distinct from those entirely separate from the road network) in particular are often very poorly designed, serving only to create conflict between pedestrians and cyclists (something neither group wants), whilst increasing the hazards cyclists face when crossing junctions and driveways.”

26. Conferring competence on the Assembly for walking, cycling and horse riding routes would allow it to consider the most appropriate legislative framework for Wales that could address the issues outlined above. For instance, it would enable Assembly Committees, Assembly Members or the Welsh Assembly Government to propose legislation that could:
- enable the current legislative framework to be consolidated and clarified in one national network;
 - develop clear and transparent lines of responsibility towards the provision and maintenance of walking, cycling and horse riding routes by highway authorities;
 - propose guidance on the management of shared use paths to ensure the requirements of vulnerable users are taken into account;
 - impose a duty on highway authorities to cooperate across administrative boundaries to develop and maintain walking, cycling and horse riding routes; and
 - propose national standards of design, construction and maintenance.
27. The Assembly Government has agreed to support the Enterprise and Learning Committee’s proposal for competence and believes that this LCO could help to contribute to the Welsh Assembly Government’s policy aims to develop a larger number of traffic-free walking and cycling routes, as set out in its National Transport Plan, and to the specific targets for increasing walking and cycling, as set out in its Walking and Cycling Action Plan.
28. Part 4 of the 2006 Act includes provisions (the "Assembly Act provisions") which would enable the Assembly to pass legislation known as Acts of the Assembly if the majority of those voting in a referendum in Wales vote in favour (and the Assembly approves an order commencing the Assembly Act provisions). Part 1 of Schedule 7 to the 2006 Act sets out the subjects in relation to which the Assembly may pass Acts, and exceptions to those subjects which would remain non-devolved.
29. The matter to be inserted into Schedule 5 to the 2006 Act by this Order does not appear in the same terms in Schedule 7. However, the competence conferred by matter 10.3 would fall within the broader subject "Highways, including bridges and tunnels" in paragraph 10 of Part 1 of Schedule 7. This means that, in the event of an affirmative vote in the referendum which is due to be held on 3 March 2011, the

Assembly would be able to pass Assembly Acts in relation to the subject-matter of matter 10.3. The Assembly's competence in Schedule 7 is subject to exceptions relating to highways and transport which have the same effect as the general exceptions set out under that heading in Part 2 of Schedule 5.

30. In the event of a “no” vote in the referendum, the Assembly Act provisions will not be commenced and Part 3 of the 2006 Act will remain in force. The current process will continue, whereby the Welsh Assembly Government and Assembly Members and Committees will be able to seek legislative competence for the Assembly on a case by case basis through LCOs under section 95 of the 2006 Act. In this scenario, the proposed Order would confer legislative competence on the Assembly in relation to the routes identified in matter 10.3, but not in relation to highways more generally.
31. The outcome of the next year’s referendum on extending the primary law-making powers of the Assembly cannot be assumed and therefore the Assembly Government supports this request coming forward at this time.

Scope

32. It is proposed that Matter 10.3 be inserted into Field 10: highways and transport of Schedule 5 to the 2006 Act:

“Matter 10.3

Provision by highway authorities of routes for use solely or principally by any one or more of the following: pedestrians; cyclists; persons on horseback or leading a horse.”

33. Provisions in any proposed Measure arising from the Order will need to relate to the above Matter (see section 94(4)(a) of the 2006 Act). The term ‘Provision by highway authorities of routes’ is intended to cover a wide range of potential functions. These include not only the creation of routes but aspects related to their ongoing development e.g. the maintenance and improvement of routes, design standards, the provision of special facilities for routes and requirements for co-operation between local councils. The “routes” covered by the matter could include byways, bridleways, footpaths and cycle tracks.
34. The term “principally” is used to enable the Assembly to legislate not just in relation to routes which are used exclusively by pedestrians, cyclists and those on horseback or leading a horse, but also in relation to routes which are mainly for use by those groups but are shared with other users. For example, routes used primarily by pedestrians but also by wheelchair users and vehicles that comply with the Use of Invalid Carriages on Highways Regulations 1988 (SI 1988/2268) fall within

scope. Similarly, ancillary provision could be made for use by emergency vehicles, farm vehicles and vehicles exempted from the definition of motor vehicle listed in section 189(1)(c) of the Road Traffic Act 1988 (i.e. grass cutting machines, certain vehicles controlled by pedestrians and specified electrically assisted vehicles). The term “principally” is also intended to cater for circumstances when routes cross roads or where cycle lanes form a designated part of a road rather than an adjoining footpath.

Pre-legislative scrutiny by the National Assembly for Wales

35. On 17 October 2007 Sustrans submitted a petition for consideration to the Petitions Committee on behalf of a coalition of organisations that included BT, Royal Mail, BMA, Age Concern, Play Wales and Keep Wales Tidy. The petition was later supported by the Countryside Council for Wales, the Children's Commissioner for Wales and the Association of Chief Constables for Wales. It urged the Assembly to seek further powers to develop and maintain a network of traffic free paths for walkers and cyclists across Wales. The Committee considered the petition in late 2007, taking evidence from the petitioners, and referred the petition to the Enterprise and Learning Committee for further consideration.
36. Having considered the petition, the Enterprise and Learning Committee prepared a potential Order in relation to footpaths and cycle routes, and sought the views of consultees in September 2008. A total of 19 written responses were received. Fifteen organisations or individuals further provided oral evidence to the Committee from October 2008 to March 2009. The detailed responses are published on the Enterprise and Learning Committee's website. <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-scrutiny-committees/bus-committees-third-els-home/bus-committees-third-els-inquiry/bus-committees-third-els-inquiry-lco.htm>.
37. The broad consensus among respondents, including the Welsh Local Government Association, was that legislative competence should be conferred on the Assembly.
38. In June 2009, the Enterprise and Learning Committee laid a proposed LCO before the Assembly, which had been amended to take account of the results of the consultation responses and the oral evidence it had heard.
39. The consultation process raised only one issue of principle regarding the potential Order. Some disability groups wished to include a specific duty to have regard to the rights of disabled persons. The Committee took the view that as the principle of equality of treatment is enshrined in Sections 35 and 77 of the 2006 Act, there was no need to make specific reference to it in the Order. However, the Committee recognised the concerns of the disability groups about shared use routes and

considered that this issue must be addressed in any Measure arising from the Order.

40. The Committee made two other changes to the LCO following the consultation exercise. First, a number of respondents expressed reservations about the term “Traffic Free Routes” in the title of the Order, for example whether or not motorised scooters and wheelchairs would be included. For this reason the term “Traffic Free Routes” was replaced by the term “Highways and Transport” in the title, Second, the Matter was changed to read “for use primarily by pedestrians or cyclists or both”. The wording has been further amended to reflect current practice as to format and content, following discussions with the Welsh Assembly Government.
41. The current wording also reflects the fact that the Enterprise and Learning Committee received representations that horse riding should be included in the LCO. Given the closely entwined public rights of way network in Wales the scope of the proposed Order includes persons riding or leading horses.
42. The Assembly agreed in Plenary in July 2009 that there is no need for detailed consideration of the proposed Order by a Legislation Committee, as the Enterprise and Learning Committee had already undertaken a consultation and scrutinised the proposed Order. The Assembly reserves, however, the right to scrutinise the draft Order before it is laid.

Geographical limits of any National Assembly for Wales Measure

43. Section 94 of the 2006 Act provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly’s legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.
44. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales.

Minister of the Crown Functions

45. This proposed Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Parts 2 and 3 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the

functions of a Minister of the Crown without the consent of the Secretary of State. In relation to any future proposals that may impact on Minister of the Crown functions the appropriate UK Government Department will be consulted and agreement sought to any proposals to change or modify these functions.

Conclusion

46. For the reasons outlined above, the Enterprise and Learning Committee wishes to propose that legislative competence should be conferred on the Assembly in relation to the provision by highway authorities of routes for use solely or principally by any one or more of the following: pedestrians; cyclists; persons on horseback or leading a horse, in the terms of the proposed Order.

10 December 2010