

Jane Hutt AM/AC

Y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau
Minister for Children, Education, Lifelong Learning and Skills



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf / Your ref:
Ein cyf / Our ref: LF/082/09

Mike German AM,
Chair of Legislative Committee 4
National Assembly for Wales
Cardiff Bay
Cardiff,
CF99 1NA

2nd December 2009

Dear Mike,

Further to my appearance before your Committee on 12 November and my letter to you Dated 25 November 2009 please see attached a note from my legal advisers to yours, as Chair, on two issues of legal definition and intent, namely the 'expressio unius exclusio alterius' maxim and the use of the word 'or' in Matter 5.2C.

Yours,

Jane

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Wedi'i argraffu ar bapur wedi'i ailgylchu (100%)

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The 'expressio unius exclusio alterius' maxim

1. The maxim *expressio unius exclusio alterius* (to express one thing is to exclude another) is one of the linguistic canons of construction. It only operates where not outweighed by other interpretive factors. The maxim often operates where a list of items is specified as falling within a particular word or phrase, or as being permissible instances of the exercise of a generally worded power, which is why in those cases it is common to see words inserted to make it clear that the list is not an exhaustive one. There is no list as such in this case.
2. The issue is whether the use of the unadorned words "including the allocation of functions etc" implies that "conduct and governance" is limited to allocating functions etc. In our view, it clearly does not and as a result there is no need to specify that those words do not limit the meaning of "conduct and governance". Our view is that no sensible interpretation of the wording used would lead the reader to assume that the competence as drafted simply permits a Measure to provide for the allocation of functions etc. in relation to maintained schools. To add "in particular" or "but not limited to" would therefore be superfluous.
3. Another way of looking at the point is to remind oneself that the maxim does not apply if there is an apparent reason for singling out the named thing other than an intention to exclude other things. There is a clear reason for singling out "the allocation of functions, property, rights and liabilities". In this draft Matter there is an apparent reason to include "the allocation of functions, property, rights and liabilities" as you might not ordinarily think that "governance" and "conduct" would include the "allocation" of functions (i.e. statutory powers and duties) amongst the key stakeholders who form part of the framework for the management and control of schools maintained by local education authorities.
4. Office of Welsh Legislative Counsel sees no need to alter the wording of the LCO in this respect.

The use of the word 'or' in Matter 5.2C

5. The use of the word 'or' in this Matter is not intended to be disjunctive; it does not mean that a "body" established would be **either** "to carry out activities relating to education and training" **or** "to exercise functions on behalf of local education authorities". Our view is that this Matter would allow a body to be established that would do both; it is a matter of drafting style.
6. Office of Welsh Legislative Counsel sees no need to alter the wording of the LCO in this respect.