

**MEMORANDUM FROM THE DEPUTY MINISTER FOR HEALTH AND
SOCIAL SERVICES**

CONSTITUTIONAL LAW: DEVOLUTION, WALES

**The National Assembly for Wales (Legislative
Competence) (Social Welfare) Order 2009**

**Proposal for a Legislative Competence Order
relating to Carers**

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.32. It sets out the background to the provisions in the attached government draft Legislative Competence Order (LCO) which would confer additional legislative competence upon the National Assembly for Wales. It is laid in accordance with SO 22.13 and explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy. The UK Government's White Paper "Better Governance for Wales" published in June 2005 set out the UK Government's commitment to enhance the legislative powers of the National Assembly for Wales, as a democratically elected institution with its own detailed scrutiny procedures.
3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.
4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or a Legislative Competence Order, approved by the Assembly and both Houses of Parliament. The

latter route enables the Assembly to initiate the process for conferral of such competence, via a Legislative Competence Order.

5. The draft Legislative Competence Order would confer further legislative competence on the National Assembly for Wales, in the field of Social Welfare (field 15 within Schedule 5 to the 2006 Act).

Background

6. New legislative powers in respect of the specified 'matter' will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures, which are based on Welsh priorities and timescales. These Measures will be subject to thorough scrutiny and approval by the Assembly.
7. Carers are at the heart of 21st Century families and communities. In a changing society most people are living longer, many are developing long-term conditions and the vast majority have rising aspirations about their quality of life. Consequently, an increasing number of people will find themselves fulfilling caring responsibilities.
8. Many people, mainly women, are now balancing work, childcare and caring for an ageing parent. Increasing numbers of older people often care for their partner while providing childcare for grandchildren and parents of children with complex needs know they will be "lifetime" carers. The positive shift to independent living and care at home, away from institutionalisation, will continue to require a greater contribution from carers. At the same time families are now frequently scattered across the world, couples are struggling to retain a positive work life balance and in an ageing society some older people are left isolated with little or no support from family or friends.
9. Unpaid carers currently provide around 70% of care in the community and forecast demographic changes suggest that the pool of potential carers relative to numbers needing care is likely to decrease over the medium term. With an increasing life expectancy for those in need of care, it cannot be assumed that their carers will be able and willing to sustain their caring role over a longer period without help and support. There are also clear signs that informal care to older people by their adult children is unlikely to keep pace with demand, due to underlying demographic trends, a trend that is reflected across the UK (see for example "Informal Care for Older People Provided by Their Adult Children: Projections of Supply and Demand to 2041 in England, PSSRU Discussion Paper 2515) but is likely to be particularly acute in those parts of Wales where present reliance on informal carers is highest.
10. Many of the issues affecting carers and carers' services in Wales are common across the UK, and in putting together this proposal the Welsh

Assembly Government has taken note of the extensive consultations undertaken across the UK as part of the development of the UK Government's strategy "Carers at the heart of 21st century families and communities" and the evidence and analysis reflected in this report. However, the 2001 Census across England and Wales shows that Wales has a higher proportion of carers than any English region (11.7 per cent or 341,000 carers), the highest proportion of people with limiting long-term illness (23.3 per cent) and a level of permanent sickness and disability in the economically inactive population aged 16-74, which is higher than any region of England at 9.2 per cent. These figures alone suggest that a singular holistic approach may be necessary and appropriate to tackling the intensity of these issues in Wales.

11. The Welsh Assembly Government's *Carers Strategy for Wales Action Plan 2007*, recognised the need to mitigate the effects of these demographic changes, and foresaw that these changes including trends towards more dispersed families could require a range of measures designed to support carers in their caring role and help them maintain their own health and well being. The 2007 Action Plan will be reviewed in 2009. Detailed proposals for measures will be informed by the outcomes of this review of the Wales strategy.
12. The current legislative framework in relation to carers focuses mainly on statutory authorities' powers and duties. It includes:
 - **Disabled Persons (Services, Consultation and Representation) Act 1986**

This requires local authorities to have regard to the ability of the carer to provide or continue to provide care when deciding what services to provide to the disabled person.
 - **Carers (Recognition and Services) Act 1995**

This contains the core statutory responsibilities and requires local authorities to carry out an assessment of a carer's ability to provide and to continue to provide care, if the carer requests this, at the time of the assessment of the person they care for.
 - **Carers and Disabled Children Act 2000**

This extends the provisions of the 1995 Act to enable a local authority to undertake a separate assessment of a carer's needs and to supply services (or direct payments) directly to carers following assessment.
 - **Carers (Equal Opportunities) Act 2004**

This places a duty on local authorities to inform carers of their right to an assessment, and requires carers' assessments to consider whether the carer works or is undertaking education,

training or any leisure activity. It also provides for better co-operation between statutory agencies in the planning and provision of services for carers.

- **The Work and Families Act 2006**

This came into force in Wales in April 2007. It requires employers to consider requests from people with caring responsibilities to work flexibly.

- **The Children and Young Persons Act 2008**

This will require local authorities to make adequate arrangements for short break provision for Disabled Children.

In addition the Welsh Assembly Government has a range of powers to inspect, regulate and issue statutory guidance in respect of local authority services under the Local Authority Social Services Act 1970, the Care Standards Act 2000 and the Health and Social Care (Community Health and Standards) Act 2003. It also has powers to direct the NHS under the National Health Services (Wales) Act 2006.

13. Despite this existing framework of legislation and guidance consultations with carers, carers' organisations and others have identified gaps in service provision that cannot currently be addressed. These include:

- a. concerns that carers' assessment and services for carers vary greatly and are very patchy across Wales. This concern was highlighted in a report produced by the Care and Social Services Inspectorate for Wales (CSSIW) in June 2008 [On the way up? Adult Social Care Performance Indicators in Wales 2006-07]. The kind of services provided to carers include, but are not limited to, respite care, peer support networks, support to access social, leisure and education activities, day centres, awareness raising with professionals; information, training and outreach services, direct payments and advocacy services.

- b. the need for renewed effort to identify carers, the wider provision of information for carers, and better engagement by the NHS with carers as partners in the provision of care [Carers Summit Conference Report April 2005]

- c. evidence that the presence of an unpaid carer in a household may reduce the likelihood of the carer being assessed for priority services by the local authority. Paradoxically, this reduces both the availability of services for the cared for person, (thereby increasing the burden on the carer), and the availability of compensatory services, such as respite, which benefit the carer. [See for example "Analysis of the Costs of

Domiciliary and Personal Care in Wales: Some Direct Evidence”: Bell & Dawson: March 2008]

d. indications that many young carers are still carrying an inappropriate burden of care, which has a measurable impact on their health as they grow into young adulthood [see for example Welsh Health Survey 2005/06: Health of Carers, 15/05/08]. Welsh Assembly Government guidance on the Carers and Disabled Children’s Act 2000 advised that “...support for young carers should be aimed primarily at helping any disabled or other adults with parental responsibility to carry out their parental role and to remove inappropriate responsibilities from young children.” And “.....any such services provided will be designed not to support them in their caring role but rather to ensure that they do not undertake a caring role that is inappropriate.” However the continuing emphasis on services to support young carers in their caring role, although welcomed by young carers themselves, suggests that we have not yet achieved the joined-up approach that is needed across social services for adults and for children, and the NHS.

14. The current framework of legislation and guidance in Wales has clearly proved insufficient to ensure that the Welsh Assembly Government’s policy objectives with regard to carers are given the necessary priority, so that these gaps and inconsistencies in service provision are tackled effectively. The Assembly Government’s “One Wales” programme of Government therefore included a commitment to prepare new legislation on carers rather than rely on existing reinforcement means alone such as performance measures and inspection, financial incentives or powers of direction. This proposal for legislative competence derives from the need to support the provision of care by carers and to promote the well-being of carers as noted above. In particular we envisage the need to improve the lives of carers in the following key areas:

a. to ensure that carers have the right information at the right time to support them in their caring role. The *Carers’ Strategy Implementation Plan in Wales 2000* highlighted a need for the provision of easily accessible, relevant and factually correct information for carers, as well as acknowledging the need for a longer term view of the information needs of carers. The kind of information carers may need from time to time would include information about financial benefits, employment provisions including flexible working, rights to a needs assessment, social services functions available to them, care planning for the person cared for, medicines management, safe handling and lifting and other matters related to the care of the person cared for.

b. to ensure that timely and appropriate practical and emotional help and support is provided to carers both to sustain them in their caring role and also to help them attain their personal ambitions for accessing education, training and employment opportunities. This would include giving them a right to appropriate breaks from caring responsibilities.

c. to ensure that statutory agencies (being those agencies mentioned in section 3(5) of the Carers (Equal Opportunities) Act 2004 (c.15) properly engage with carers as partners in the provision of care involving them at all levels in the assessment, delivery and evaluation of an individual's care arrangements.

Scope

15. It is proposed that the Matter be inserted under Field 15: Social Welfare in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to legislate on these issues by way of an Assembly Measure. Carers in this context means carers of individuals cared for of any age, but in the case of individuals caring for children it covers only children with a physical or mental impairment. The Order would not allow the Assembly to legislate in respect of persons who provide care by virtue of a contract of employment or other contract or as a volunteer for a body. Neither would the Order confer power on the Assembly to alter the employment rights of carers. However, it would enable the Assembly to legislate in respect of someone who volunteers for a body but who, in addition, or as a consequence, provides care that is regular and substantial above and beyond their work as part of that body.
16. The definition of carer in this matter does not exactly mirror that given in the Carers and Disabled Children Act 2000 in that it contains no age restriction. This will ensure that the Assembly is able to legislate to promote the well-being of children and young people who are carrying out caring responsibilities, as well as older carers. The National Assembly already has competence in relation to social care services for children; persons who care for, or who are about to care for, children; and young persons. This matter will enable a Measure to broaden provision beyond that relating only to social care services and provide a single framework for a range of services to support carers.
17. The Matter would enable the Assembly to ensure that the provision of care by carers is supported and that their well-being is promoted. It would, for example, allow for a requirement to be placed on relevant public sector agencies to develop carers information strategies along the lines of the Scottish legislation in this area; for them to work together effectively to support the provision of care by carers and to promote their well-being (particularly the well-being of young carers); and also for improvements to be made to carers' access to replacement care (respite care) with provision for an entitlement to respite for defined groups. The matter specifies that it includes, "but is not limited to", the provision of social care services. This means that Assembly Measures made in reliance on this matter could make provision which, in promoting the well-being of carers and supporting the provision of care by them, was not exclusively confined to social care services: such as, provision to ensure that health bodies take the

interests of carers into account, for example in making arrangements for appointments, discharge arrangements and collection of prescriptions for the person being cared for.

18. The definition of “well-being” to be used in relation to the matter is as set out in the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008. The definition of “social care services” in that Order is to be amended by virtue of this Order so as to include the provision of “information”. For ease of reference, the definitions can also be found at Annex A.
19. The principal purpose of this LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the 2006 Act that will enable the Assembly Government to improve services for carers and fulfil the commitment given in “One Wales”.

Changes to the Order following pre-legislative scrutiny

20. The following changes have been made to the order following pre-legislative scrutiny by the National Assembly for Wales Legislation Committee No 3, the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee:
 - Exceptions – article 3 of the proposed Order made technical amendments to Section 94 and Schedule 5 of the 2006 Act. The effect of the amendments was twofold; to apply the exceptions to matters listed in the table in the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 to all matters in Part 1 of Schedule 5 and to effect a change from drafting exceptions as matter specific to making them of general application to all matters. After further consideration we have decided that this new approach to exceptions will now be subject to a separate and subsequent Order – the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009.

Article 3 now amends the table of social welfare exceptions currently in Part 1 of Schedule 5. The effect of this will be to exclude the following subjects from the scope of the legislative competence of the new matter: child support (i.e. arrangements for the provision of maintenance by both parents of a child); child trust funds; tax credits; child benefit and guardian’s allowance; social security; Independent Living Funds; Motability; vaccine damage payments; the Children’s Commissioner established under the Children Act 2004; family law and proceedings and welfare foods.

- Use of the phrase ‘in particular’ – the term ‘in particular’ in matter 15.9 of the proposed Order has been replaced by the term ‘but is not limited to’ in order to make it clear that the Order encompasses support for carers provided by a range of bodies, and not just social care services. This reflects proposals made by witnesses in giving evidence;

- Volunteer for any body – Whilst the definition of Carers in the Order is very wide, it is not intended to cover those who care “by virtue of a contract of employment or other contract with any person”, nor those who act “as a volunteer for any body (whether or not incorporated)”. The Welsh Affairs Committee expressed concern that this wording might disadvantage those who are volunteer carers for a body, but who also provide voluntary care in addition to this role. The Committee recommended that the wording of the LCO be amended to make this clear. The Welsh Assembly Government agrees that an individual who provides care as a volunteer for a body, but who also provides care above and beyond that role, should not be disadvantaged. It is, however, confident that the Order as drafted would not exclude this category of carer and that an amendment is not therefore necessary. Paragraph 12 of this Memorandum has been amended so as to provide reassurance on this point.

The term ‘any body’ has been replaced by the term ‘a body’. This is a technical amendment that has no effect on the substance of the LCO. It has been made to ensure that there is no risk of misinterpreting the provision.

- Article 2(2) – article 2(2) amends matter 15.1 to allow the National Assembly for Wales to make provision by Measure about payments in respect of individuals with needs relating to their well being so that any person may secure social care services on their behalf. This amendment is needed to ensure that the Assembly’s competence under matter 15.1 encompasses the making of payments to all persons to whom direct payments may be made. Matter 15.1 as originally enacted only allows provision about payments to secure social care services if they are made to the person with those needs or to a person looking after them. Matter 15.1 was added to Schedule 5 to the Government of Wales Act 2006 prior to the Health and Social Care Act 2008 which made amendments to the relevant direct payments legislation. The category of person to whom direct payments may be made was expanded as a result of changes made to section 57 of the Health and Social Care Act 2001 by the 2008 Act. The amended section 57 gives the Welsh Ministers the power, by regulation, to expand the category of recipients to include a representative of the service user, a deputy appointed by the Court of Protection under the Mental Capacity Act 2005, a donee of a lasting power of attorney or such other person as a local authority considers to be a suitable person.

Committee recommendations/conclusions

21. The word “regular” in the definition of carers has been retained in the Order. The Assembly Scrutiny Committee expressed reservations about the use of this word regular, which it considered could exclude

some patterns of care, for example, those patterns of care which might be irregular and highly variable.

22. The test that applies to the definition of carers in the LCO is drawn from the Carers and Disabled Children Act 2000 which uses the wording substantial and regular.
23. There is no intention that those whose caring patterns are irregular and highly variable should come within the scope of the LCO. There is a risk that, otherwise, carers who adopt a caring role on a one off basis, for example, caring for someone who has broken their leg in an accident, would be defined as carers, and that is not the policy intention. The policy intention is that only those who provide a “substantial amount of care on a regular basis” are to fall within the definition of carer in the LCO. The assumption of a caring role which is recurrent, follows a discernible pattern, or happens in certain circumstances (e.g. someone who adopts a caring role for a disabled father whenever his or her mother is at work or otherwise unable to perform a caring role) would be included. Specifically, persons who suffer from unpredictable episodes of mental illness that are likely to recur will also be included. The caring role that is intended to be covered by the LCO is one which may vary over time, but which nonetheless may present a regular and substantial burden for carers.
24. The Welsh Affairs Committee expressed concern that placing new duties on local authorities and health boards with regard to carers will have cross-border implications where carers may live across the border from the person they are caring for. The Committee noted the need for effective collaboration between border authorities to ensure that all carers’ needs are met and that local authorities are clear about their duties. The Welsh Assembly Government agrees that effective cross-border collaboration is vitally important, and believes that how to achieve this is best decided at Measure stage.

Geographical limits of any Assembly Measure

25. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It 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.
26. 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

27. This draft Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 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 remove or modify these functions.

Conclusion

28. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the provisions of the draft Order to which this Explanatory Memorandum relates.

Gwenda Thomas
Deputy Minister for Health and Social Services
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Interpretations

“social care services” means any of the following provided in connection with the well-being of any person: residential or non-residential care services; *information*, advice, counselling or advocacy services; or any other assistance

“well-being”, in relation to individuals, means well-being so far as relating to any of the following—

- (a) health and emotional well-being;
- (b) protection from harm and neglect,
- (c) education, training and recreation,
- (d) the contribution made by them to society,
- (e) social and economic well-being,
- (f) securing their rights.