

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

CONSTITUTIONAL LAW: DEVOLUTION, WALES

**The National Assembly for Wales (Legislative
Competence) (No.4) Order 2008**

**Proposal for a Legislative Competence Order
relating to charging for Non- Residential Social
Care (Domiciliary Care)**

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached government proposed 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 proposed 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). Attached at Annex A is a copy of Schedule 5 showing the legislative competence that the Assembly has acquired to date and the mechanism by which it was conferred.

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. The provision of social services, including charging for services, is a devolved matter. Assessing the need for social services, as defined in section 1 of the Local Authority Social Services Act 1970, and the provision of these services is a local authority function. The powers of the Secretary of State under the 1970 Act were devolved by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999 and it is the Welsh Ministers who are responsible for issuing directions and guidance to local authorities as to the exercise of their social services functions. The Welsh Ministers are also responsible for regulating and supervising the provision of social care under various pieces of social care legislation including the Care Standards Act 2000 and the Health and Social Care (Community Health and Standards Act 2003).
8. In February 2007, the Welsh Assembly Government published its ten year strategy for Social Services in Wales "Fulfilled Lives, Supportive Communities". It sets out how modernised social services will contribute to a better Wales and to improving the lives of its citizens and emphasises the need for modern, accessible and responsive services, delivered flexibly, consistently and sustainably across organisational boundaries to a high standard.
9. It envisages a shift from residential care towards support at home and a switch towards more preventative services. This request for legislative competence therefore derives from a need to ensure that local authority social services charging arrangements support this strategy.
10. Under the terms of section 17 of the "Health and Social Services and Social Security Adjudications Act 1983" (HASSASSA) whether to charge, and how much to charge, for non-residential social services is at individual local authorities' discretion. This has resulted in significant variations in charging for comparable services.

11. Service users, carers and their representatives are concerned that charges are often set too high and that differing amounts can be charged by different local authorities for similar services resulting in inequities and uncertainties for these groups of people. There is also disparity in the way that benefits and/or disability related expenditure are treated in an individual's assessment.
12. This request for legislative competence is also made in the context of the limitations to the current settlement which, in some respects, restricts the Welsh Assembly Government from tackling Welsh priorities and issues. Whilst the Assembly Government can provide statutory guidance to local authorities under section 7 of the Local Authority Social Services Act 1970 on the exercise of their charging arrangements, this has been limited in its impact.
13. Using the powers in section 7 the Welsh Assembly Government issued "Fairer Charging" guidance to local authorities in 2002 in an attempt to address some of the problems with the wide variation in charging policies operated in Wales. It remains largely good practice except for four key elements which are statutory and which ensure service users are left with a guaranteed level of income after charging has been applied.
14. Section 7 therefore provides a vehicle for issuing general guidance in this area. However, if the Assembly Government were to issue further comprehensive guidance under section 7 in relation to charging for non-residential social care it would need to be sure that it did not fetter local authorities' fundamental discretion to charge for certain services and to recover such charges as they consider reasonable as set out in section 17 of HASSASSA. Any policy that sought to establish greater uniformity, for example by applying maximum charges or standard charges, could not therefore be achieved using section 7 powers. In this way the current executive powers of the Welsh Ministers are not sufficient to allow them to enable them to achieve a fairer and more consistent approach.
15. As well as issuing the "Fairer Charging" guidance, the former Minister for Health and Social Services announced, in February 2006, a package of measures aimed at reducing the impact of charging for non-residential social care for disabled and older people and a range of initiatives to improve the quality and quantity of those services for recipients and carers. He also announced an ongoing commitment to "keep the domiciliary care charging arrangements under review and to make reforms when there is an opportunity to do so".
16. Whilst the Assembly Government has therefore taken steps to ameliorate the impact of charging, other future developments suggest that further action on charging will be necessary:
 - a. Rising pressure on services, with budgets increasing more slowly

than in recent years, is likely to mean that individual local authorities will increasingly feel compelled to put up charges in ways which are likely to extend the current disparities;

- b. As a result of “Delivering Beyond Boundaries”, the Assembly Government’s framework for public services in Wales, there is likely to be a move towards more regionally commissioned and delivered services provided jointly by groupings of bodies. Again it will be important that the charging regimes are supportive of this.
17. New powers in this field would therefore enable the Welsh Assembly Government to bring forward coherent proposals for Measures, based on Welsh priorities and timescales that will allow us to achieve a fair and consistent approach to charging.

Scope

18. 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 this issue by way of an Assembly Measure. The Order only covers charges levied by local authorities in respect of non-residential social care. It would not enable the Assembly to legislate in respect of charges levied for non-residential social care by private care providers. It also encompasses the charging arrangements for those service users in receipt of a direct payment to enable them, or persons looking after them, to secure non-residential social care to meet their needs. The definition of social care to be used in Field 15 is set out in the proposed Order dealing with Vulnerable Children and Child Poverty which also seeks to insert matters into this field. It can also be found at Annex A for ease of reference.
19. The Matter would enable the Assembly to ensure that where a local authority decides to charge it does so in accordance with such requirements as may be specified by or under an Assembly Measure. The Assembly Government also wishes to have the flexibility to set the level of charging at nil for specific services or for specific client groups, should it conclude that this is appropriate, and the Matter is drafted so as to enable such provision to be made by or under an Assembly Measure.
20. The principle purpose of this LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act that will enable the Assembly Government to regulate the setting of charges and remove the wide disparities that currently exist.

Exceptions

21. The matter covered in this Order will be subject to certain exceptions. The effect of the exceptions will be to exclude the following subjects

from the legislative competence in the new matter: child support (i.e. arrangements for the provision of maintenance by both parents of a child); tax credits; child benefit and guardian's allowance; social security; Independent Living Funds; and Motability. When the Order is formally laid before Parliament, these exceptions will be inserted by article 2(3) into a table at the end of Part 1, Schedule 5. The numbering of the matter is currently shown as 15.9 as Matters provisionally numbered 15.1 – 15.8 are contained in the Vulnerable Children order, which has not yet been referred to Parliament. The numbering of the Matter and the drafting of the exceptions will be adjusted as necessary in the final draft Order, depending on the progress of each of the proposed Orders under consideration.

Geographical limits of any Assembly Measure

22. Section 93 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.
23. 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

24. This proposed 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 the Minister of the Crown without the consent of the Secretary of State for Wales. 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

25. 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

government proposed Order to which this Explanatory Memorandum relates.

Gwenda Thomas
Deputy Minister for Health and Social Services

November 2007

SCHEDULE 5

ASSEMBLY MEASURES

Part 1

Matters

Field 1: agriculture, fisheries, forestry and rural development

Field 2: ancient monuments and historic buildings

Field 3: culture

Field 4: economic development

Field 5: education and training

Matter 5.1

Provision about the categories of school that may be maintained by local education authorities.

Matter 5.2

Provision about the establishment and discontinuance of schools maintained by local education authorities, their change from one category to another and their alteration in other respects.

Matter 5.3

Provision about the admission of pupils to schools maintained by local education authorities.

Matter 5.4

Provision about the curriculum in schools maintained by local education authorities.

Matter 5.5

Provision about school attendance, the behaviour of pupils at school, school discipline and the exclusion of pupils from school (including the duties of parents in connection with those matters).

Matter 5.6

Provision about the making of arrangements for the provision of education for persons of compulsory school age who have been excluded from schools or who for any other reason would not otherwise receive suitable education.

Matter 5.7

Provision about entitlement to primary, secondary and further education and to training.

Matter 5.8

Provision about the provision of services that are intended to encourage, enable or assist people—

- (a) to participate effectively in education or training,
- (b) to take advantage of opportunities for employment, or
- (c) to participate effectively in the life of their communities.

Matter 5.9

Provision about food and drink provided on school premises or provided for children at a place where they receive education or childcare.

Matter 5.10

Provision about the travel of persons receiving primary, secondary or further education or training to and from the schools or other places where they receive it.

This does not include provision about any of the following—

- (a) the regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used;
- (b) road traffic offences;
- (c) driver licensing;
- (d) driving instruction;
- (e) insurance of motor vehicles;
- (f) drivers' hours;
- (g) traffic regulation on special roads, pedestrian crossings, traffic signs and speed limits;
- (h) public service vehicle operator licensing;
- (i) the provision and regulation of railway services, apart from financial assistance which—
 - (i) does not relate to the carriage of goods,
 - (ii) is not made in connection with a railway administration order, and
 - (iii) is not made in connection with Council Regulation (EEC) 1191/69 as amended by Council Regulation (EEC) No. 1893/91 on public service obligations in transport;
- (j) transport security;
- (k) shipping, apart from financial assistance for shipping services to, from or within Wales;
- (l) navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation;
- (m) technical and safety standards of vessels;

- (n) harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for communications between places in Wales;
- (o) registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

*Matter 5.11*¹

Provision for and in connection with securing the provision of facilities for post-16 education or training.

Matter 5.12

Provision for and in connection with the establishment and dissolution of—

- (a) institutions concerned with the provision of further education, and
- (b) bodies that conduct such institutions,

including the circumstances in which an educational institution becomes or ceases to be an institution concerned with the provision of further education.

Provision about—

- (a) the conduct and functions of such institutions and bodies that conduct such institutions;
- (b) the property, rights and liabilities of such institutions and bodies that conduct such institutions;
- (c) property held by any person for the purposes of such an institution;
- (d) the governance and staff of such institutions.

Matter 5.13

Provision for and in connection with securing collaboration—

- (a) between bodies that conduct institutions concerned with the provision of further education, or
- (b) between one or more such bodies and other persons or bodies that have functions relating to education or training in Wales,

including, in particular, provision for and in connection with the establishment of bodies for the purpose of discharging functions on behalf of one or more persons or bodies that are party to arrangements for collaboration.

¹ Matters 5.11 – 5.16 of this Schedule have been inserted by the Further Education and Training Act 2007 and will come into force on the 23rd December 2007.

Matter 5.14

The provision of financial resources for and in connection with—

- (a) education or training provided by institutions concerned with the provision of further education;
- (b) post-16 education or training provided otherwise than by such institutions;
- (c) the carrying out of research relating to education or training falling within paragraph (a) or (b).

Matter 5.15

The inspection of—

- (a) education or training provided by institutions concerned with the provision of further education;
- (b) post-16 education or training provided otherwise than by such institutions;
- (c) the training of teachers and specialist teaching assistants for schools;
- (d) services of the kinds mentioned in matter 5.8.

Matter 5.16

The provision of advice and information in connection with, and the carrying out of studies in relation to, any of the kinds of education, training or services mentioned in matter 5.15.

Interpretation of this field

In this field—

“post-16 education” means—

- (a) education (other than higher education) suitable to the requirements of persons who are above compulsory school age, and
- (b) organised leisure-time occupation connected with such education;

“post-16 training” means—

(a) training suitable to the requirements of persons who are above compulsory school age, and

(b) organised leisure-time occupation connected with such training.

References in this field to an institution concerned with the provision of further education are references to an educational institution, other than a school or an institution within the higher education sector (within the meaning of the Further and Higher Education Act 1992), that is conducted (whether or not exclusively) for the purpose of providing further education.

Expressions used in this field and in the Education Act 1996 have the same meaning in this field as in that Act.

Field 6: environment

Field 7: fire and rescue services and promotion of fire safety

Field 8: food

Field 9: health and health services

Matter 9.1

Provision for and in connection with the provision of redress without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales.

Interpretation of this field

In this field-

“the health service in Wales” means the health service continued under section 1(1) of the National Health Service (Wales) Act 2006;

“illness” has the same meaning as in that Act;

“patient” has the same meaning as in that Act;

“personal injury” includes any disease and any impairment of a person’s physical or mental health;

“qualifying liability in tort” means liability in tort owed in respect of or consequent upon personal injury or loss arising out of or in connection with

breach of a duty of care owed to any person in connection with the diagnosis or illness or the care or treatment of any patient.

Field 10: highways and transport

Field 11: housing

Field 12: local government

Matter 12.1²

Provision for and in connection with—

(a) the constitution of new principal areas and the abolition or alteration of existing principal areas, and

(b) the establishment of councils for new principal areas and the abolition of existing principal councils.

“Principal area” means a county borough or a county in Wales, and “principal council” means a council for a principal area.

Matter 12.2

Provision for and in connection with—

(a) the procedure for the making and coming into force of byelaws, and

(b) the enforcement of byelaws.

“Byelaws” means those of a class which may be confirmed by the Welsh Ministers (but the provision which may be made includes provision to remove a requirement of confirmation).

Matter 12.3

Any of the following—

(a) the principles which are to govern the conduct of members of relevant authorities,

(b) codes of conduct for such members,

(c) the conferral on any person of functions relating to the promotion or maintenance of high standards of conduct of such members (including the establishment of bodies to have such functions),

(d) the making or handling of allegations that members (or former members) of relevant authorities have breached standards of conduct, including in particular—

(i) the investigation and adjudication of such allegations and reports on the outcome of investigations,

² Matters 12.1 – 12.5, Paragraph 2A of Part 2 and Paragraph 7A of Part 3 of this Schedule have been inserted by the Local Government and Public Involvement in Health Act 2007 and come into force on the 30th December 2007.

(ii) the action that may be taken where breaches are found to have occurred,

(e) codes of conduct for employees of relevant authorities.

For the purposes of this matter—

“relevant authority” has the same meaning as in Part 3 of the Local Government Act 2000, except that other than in paragraph (d) it does not include a police authority,

“member” includes a co-opted member within the meaning of that Part.

Matter 12.4

Provision for and in connection with strategies of county councils and county borough councils for promoting or improving the economic, social or environmental wellbeing of their areas or contributing to the achievement of sustainable development in the United Kingdom, including provision imposing requirements in connection with such strategies on other persons with functions of a public nature.

Matter 12.5

Provision for and in connection with—

(a) the making of arrangements by relevant Welsh authorities to secure improvement in the way in which their functions are exercised,

(b) the making of arrangements by relevant Welsh authorities for the involvement in the exercise of their functions of people who are likely to be affected by, or interested in, the exercise of the functions, and

(c) the assessment and inspection of the performance of relevant Welsh authorities in exercising their functions.

The following are “relevant Welsh authorities”—

(a) a county council, county borough council or community council in Wales,

(b) a National Park authority for a National Park in Wales,

(c) a fire and rescue authority in Wales constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies,

(d) a levying body within the meaning of section 74(1) of the Local Government Finance Act 1988 in respect of which the county council or charging authority referred to in section 74(1)(b) of that Act was a council or authority for an area in Wales,

(e) a body to which section 75 of that Act applies (special levies) and which as regards the financial year beginning in 1989 had power to levy a rate by reference to property in Wales.

Field 13: National Assembly for Wales

Matter 13.1.

Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly.

Matter 13.2.

Conferral of functions on the Assembly Commission for and in connection with facilitating the exercise by the Assembly of its functions (including the provision to the Assembly of the property, staff and services required for the Assembly's purposes).

Matter 13.3

Provision for and in connection with the payment of salaries, allowances, pensions and gratuities to or in respect of Assembly members, the First Minister, any Welsh Minister appointed under section 48, the Counsel General and any Deputy Welsh Minister.

Matter 13.4

Provision for and in connection with the creation and maintenance of a register of interests of Assembly members and the Counsel General.

Matter 13.5.

Provision about the meaning of Welsh words and phrases in-

- (a) Assembly Measures,
- (b) subordinate legislation made under Assembly Measures, and
- (c) subordinate legislation not so made but made by the Welsh Ministers, the First Minister or the Counsel General.

Matter 13.6

Provision for and in connection with the procedures for dealing with proposed private Assembly Measures, including, in particular-

- (a) procedures for hearing the promoters of, and objectors, to proposed private Assembly Measures,
- (b) the persons who may represent such promoters and objectors, and the qualifications that such persons must possess,
- (c) the imposition of fees for and in connection with the promotion of proposed private Assembly Measures, and
- (d) the assessment of costs incurred in connection with proposed private Assembly Measures.

Field 14: public administration

Field 15: social welfare

Field 16: sport and recreation

Field 17: tourism

Field 18: town and country planning

Field 19: water and flood defence

Field 20: Welsh language

PART 2

GENEAL RESTRICTIONS

Functions of Ministers of the Crown

1 (1) A provision of an Assembly Measure cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a Minister of the Crown.

(2) A provision of an Assembly Measure cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.

Criminal offences

2 (1) A provision of an Assembly Measure cannot create, or confer power by subordinate legislation to create, any criminal offence punishable-

- (a) on summary conviction, with imprisonment for a period exceeding the prescribed term or with a fine exceeding the amount specified as level 5 on the standard scale, or
- (b) on conviction on indictment, with a period of imprisonment exceeding two years.

(2) In sub-paragraph (1) "the prescribed term" means-

- (a) where the offence is a summary offence, 51 weeks, and
- (b) where the offence is triable either way, twelve months.

Police areas

2A A provision of an Assembly Measure cannot make any alteration in police areas.

Enactments other than this Act

3 A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the Table below:

TABLE

<i>Enactment</i>	<i>Provisions protected from modification</i>
European Communities Act 1972 (c.68)	The whole Act
Data Protection Act 1998 (c.29)	The whole Act
Government of Wales Act 1998 (c.38)	Sections 144(7), 145, 145A and 146A1
Human Rights Act 1998 (c. 42)	The whole Act
Civil Contingencies Act 2004 (c.36)	The whole Act
Re-Use of Public Sector Information Regulations 2005 (S.I. 2005/1505)	The whole set of Regulations

4 A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, any provision of an Act of Parliament other than this Act which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund.

5 A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, any functions of the Comptroller and Auditor General.

This Act

6(1) A provision of an Assembly Measure cannot make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in this Act.

(2) Sub-paragraph (1) does not apply to sections 20, 22, 24, 36(1) to (5) and (7) to (11), 53, 54 and 156(2) to (5).

(3) Sub-paragraph (1) does not apply to any provision-

- (a) making modifications of so much of any enactment as is modified by this Act, or
- (b) repealing so much of any provision of this Act as amends any enactment, if the provision ceases to have effect in consequence of any provision of, or made under, an Assembly Measure.

PART 3

EXCEPTIONS FROM PART 2

Functions of Ministers of the Crown

7 Part 2 does not prevent a provision of an Assembly Measure removing or

modifying, or conferring power by subordinate legislation to remove or modify, any function of a Minister of the Crown if the Secretary of State consents to the provision.

Police areas

7A Part 2 does not prevent a provision of an Assembly Measure making an alteration to the boundary of a police area in Wales if the Secretary of State consents to the provision.

Comptroller and Auditor General

8 Part 2 does not prevent a provision of an Assembly Measure modifying, or conferring power by subordinate legislation to modify, any enactment relating to the Comptroller and Auditor General if the Secretary of State consents to the provision.

Restatement

9 Part 2 does not prevent a provision of an Assembly Measure-

- (a) restating the law (or restating it with such modifications as are not prevented by that Part), or
- (b) repealing or revoking any spent enactment,

or conferring power by subordinate legislation to do so.

Subordinate legislation

10 Part 2 does not prevent an Assembly Measure making modifications of, or conferring power by subordinate legislation to make modifications of, an enactment for or in connection with any of the following purposes-

- (a) making different provision about the document by which a power to make, confirm or approve subordinate legislation is to be exercised,
- (b) making provision (or no provision) for the procedure, in relation to the Assembly, to which legislation made in the exercise of such a power (or the instrument or other document in which it is contained) is to be subject, and
- (c) applying any enactment comprised in or made under an Assembly Measure relating to the documents by which such powers may be exercised.

Data Protection Act 1998

11. Part 2 does not prevent an Assembly Measure making modifications of, or conferring power by subordinate legislation to make modifications of, section 31(6) of the Data Protection Act 1998 so that it applies to complaints under any Assembly Measure relating to matter 9.1 in Part 1.