



Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales

Proposed Provision of Mental Health Services  
LCO Committee

National Assembly for Wales  
(Legislative Competence) (No.6) Order 2008  
(Relating to Provision of Mental Health Services)

Committee Report  
June 2008

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Legislation Office  
Proposed Provision of Mental Health Services LCO Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

Tel: 029 2089 8019

Fax: 029 2089 8021

E-mail: [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk)

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## Proposed Provision of Mental Health Services LCO Committee

### Committee Membership

David Melding (Chair)	Welsh Conservative Party	South Wales Central
Janice Gregory	Labour	Ogmore
Bethan Jenkins	Plaid Cymru	South Wales West
Val Lloyd	Labour	Swansea East
Jenny Randerson	Welsh Liberal Democrats	Cardiff Central



## 1. Summary of Recommendations

1.1 These are the recommendations and conclusions of the Proposed Provision of Mental Health Services Legislative Competence Order Committee which was established to consider the Order proposed by Jonathan Morgan AM, the Member in Charge, and to inform the introduction of the draft Order and the Assembly's debate on it.

### *Our View*

- Recommendation 1: We agree in principle, that the legislative competence in the areas identified in the proposed Order should be conferred on the Assembly.
- Recommendation 2: We consider that, as a general principle, the proposed Order should be broadly drafted to allow the Assembly greater flexibility to identify the scope and definition of the rights and duties in relation to the provision of mental health services in subsequent Measures.
- Recommendation 3: In light of the strong support for including local authorities within the scope of the proposed Order, we recommend that the proposed Order is extended to include a duty on local authorities in relation to the "assessment" and "treatment and care" (see Recommendation 11 below) of people who are or may be mentally disordered. We also recommend that the proposed Order should seek broad competence in relation to "local authorities", and not only in relation to social services or social care.
- Recommendation 4: We wish to highlight the evidence regarding the particularly important role played by those caring for people with mental health disorders. We recommend that support for carers of persons with mental health disorders is taken into account in the development of legislation regarding the needs and rights of carers. We believe that this is beyond the scope of this proposed Order.
- Recommendation 5: We are satisfied that where the proposed Order refers to "persons" with mental disorders, it would encompass duties and services in relation to children and young people. We welcome the commitment from the Member in Charge to clarify this in the Explanatory Memorandum.
- Recommendation 6: Given the weight of evidence in favour of excluding those detained under the Mental Health Act from the scope of the proposed Order, we agree with the general principle that the proposed Order should not affect the provisions of the 1983 Act (subject to our recommendation below regarding the provision of advocacy services).
- Recommendation 7: We believe that further consideration should be given to the matter of whether the exclusion in the proposed Order in relation to the Mental Health Act is appropriately drafted, for example, whether

patients subject to guardianship under the 1983 Act need to be excluded as well as those detained. We recommend that the Member in Charge seeks to reach agreement on this matter with the Minister for Health and Social Services in light of further legal advice.

- Recommendation 8: We recommend removing the exclusion of persons subject to the 1983 Act in relation to the provision of independent advocacy. This would facilitate the development of a seamless advocacy service for persons with mental disorders without encroaching on sensitive matters relating to detention and the criminal justice system.
- Recommendation 9: We are persuaded that the decision regarding persons to whom the various duties should apply should be provided for in any subsequent Measure and that therefore the proposed Order should apply to those “who are or may be” mentally disordered as currently drafted. However, we note the concerns raised that this may capture a broad range of persons and we believe that there may be a need to introduce a gatekeeper role at the assessment stage in subsequent Measures.
- Recommendation 10: We suggest that it is more appropriate to refer to “persons with mental disorders” rather than “mentally disordered persons” which we believe would still be in line with the definition found in the 1983 Act.
- Recommendation 11: We recommend that the term “treatment and care” is used in the proposed Order to reflect the range of services which may be required to enable the recovery and rehabilitation of persons with mental disorders. We believe that this could be further defined in subsequent Measures - see, for example, the broad definition of “treatment” found in the 1983 Act.
- Recommendation 12: We believe that it would clarify the matter, if “independent mental health advocacy” was simply replaced with “independent advocacy” in relation to persons who are or may be mentally disordered. This would avoid any confusion with the statutory provision of “independent mental health advocacy” contained in the 1983 Act.



## 2. Introduction

2.1 Jonathan Morgan AM was successful in the ballot on 3 October 2007 for the opportunity to introduce a proposal to add to the legislative competence of the National Assembly. On 17 October 2007 following a debate in plenary session under Standing Order 22.50<sup>1</sup> the National Assembly for Wales ('the Assembly') gave Jonathan Morgan AM leave to introduce a proposed Order about and in connection with mental health.

2.2 On 18 February 2008 Jonathan Morgan AM (the Member in Charge) laid before the Assembly the proposed *National Assembly for Wales (Legislative Competence) (No.6) Order 2008 (Relating to Provision of Mental Health Services)* ('the proposed Order') and Explanatory Memorandum, in accordance with Standing Order 22.13 and 22.14 (included at Annex 1).

2.3 At its meeting on 19 February 2008 the Business Committee agreed to refer the proposed Order for detailed consideration to a committee and that the committee must report on the proposed Order by no later than 13 June 2008 (this date was subsequently extended to the 20 June).

2.4 Following a resolution in Plenary on 26 February 2008, the Proposed National Assembly for Wales (Legislative Competence) (No.6) Order 2008 (Relating to Provision of Mental Health Services) Committee ('the Committee') was established, in accordance with Standing Order 21.

2.5 The role of the Committee, as set out in Standing Order 22.19, was to consider and report on the proposed Order.

### *Terms of Reference*

2.6 The Committee met for the first time on 13 March 2008 when it agreed the terms of reference for its work:

(i) to consider the general principles of the proposed Order and whether legislative competence in the area identified in Matter 9 [ ] should be conferred on the Assembly; and

(ii) whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on Mental Health and Mental Health Services, in particular whether the terms of the proposed Order are too broadly or too narrowly defined.

### *Evidence*

2.7 We issued a general call for evidence and invited key stakeholders within the field of mental health services to submit written evidence to inform our work. A copy of the consultation letter is attached at Annex 2. We received 35 written submissions; a list of those who responded is attached at Annex 3.

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<sup>1</sup> RoP, 17 October 2007, page 71 - 88

2.8 We took oral evidence from a number of witnesses, details of which are attached at Annex 4. Supplementary written evidence from the Minister dated 14 May 2008 and 3 June 2008 is attached at Annex 5. The latter included further legal advice and was received as the Committee was considering its draft report. We were therefore regrettably not in a position to give further consideration to these matters in more detail.

2.9 Under Standing Order 22.21, in preparing our report we must, so far as is reasonably practicable, take into account any recommendations made on the proposed Order by:

- (i) any other committee of the National Assembly for Wales; and
- (ii) any committee of the House of Commons, the House of Lords or any Joint Committee of both Houses of Parliament.

2.10 No such recommendations have been made in respect of the proposed Order.

2.11 The following report and recommendations represent the conclusions we have reached based on the evidence received during the course of our work.

### 3. The general principle of the proposed Order

#### *Background*

3.1 The purpose of the proposed Order is to confer legislative competence on the National Assembly for Wales in relation to the provision of mental health services by amending Part 1 of Schedule 5 to the Government of Wales Act 2006 to insert the following matters to Field 5 (health and health services):

“Matter 9.[ ]

Provision for and in connection with -

(a) the assessment by the health service in Wales of persons who are or may be mentally disordered persons;

(b) duties on the health service in Wales to provide treatment for mentally disordered persons;

(c) independent mental health advocacy for persons who are or may be mentally disordered persons.

This matter does not include assessment of, treatment or advocacy for persons detained, liable to be detained or liable to recall under the Mental Health Act 1983 (or any statutory modification or re-enactment thereof).

[...] Under the heading “Interpretation of this field” before the definition of “patient” insert— ““mentally disordered persons” means persons having any disorder or disability of the mind”.

#### *Explanatory Memorandum*

3.2 The Explanatory Memorandum refers to Wales’ existing Mental Health Strategy and National Service Framework for adult mental health services but the Member in Charge believes that these are “poorly served” by current mental health legislation. The Member in Charge explains that there is a distinctive set of challenges facing mental health services in Wales and that the proposed Order would “facilitate Measures to improve mental health services in Wales without undermining the common approach taken to compulsion across England and Wales under the amended *Mental Health Act 1983*”. In particular it would create the incentives required to focus efforts on early intervention and treatment whereas currently resources and effort concentrate on services for individuals subject to compulsion.

3.3 The Explanatory Memorandum states that the objective of the proposed Order is to enable the Assembly to bring forward Measures:

which would secure earlier assessment and treatment for mentally disordered persons. This could reduce the likelihood of further deterioration in mental

health and remove the need for the use of compulsory powers later on, minimising the distress experienced by service users and their families.<sup>2</sup>

and:

giving mentally disordered persons a right to independent mental health advocacy services in circumstances that will not be provided for under current legislation.<sup>3</sup>

3.4 The proposed Order is not intended to make changes to the powers of compulsory treatment and detention contained in the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*).

#### *Evidence from consultees*

3.5 Almost all respondents, both in written and oral evidence, supported the proposed Order to confer legislative competence relating to the provision of Mental Health Services. Many respondents believe that it will give the Assembly the opportunity to redress the balance between the rights of patients and the compulsion provisions of the 1983 Act.

3.6 Three objections were received from health service providers in written evidence,<sup>4</sup> who were concerned that future Measures resulting from the proposed Order could potentially be very broad and would divert resources away from service provision for those who need it the most. These concerns were echoed by several other respondents<sup>5</sup> but who nonetheless supported the general principle of the proposed Order.

3.7 Some respondents pointed to the existing targets and rights set out within the National Service Framework for Adult Mental Health Services in Wales (NSF) and believed that the solution lay in improving the implementation of the NSF.<sup>6</sup>

3.8 The Association of Directors of Social Services (“ADSS”) stated in their written evidence that the NSF is a good foundation for best practice but that legislation would reinforce these rights and would therefore be welcomed.<sup>7</sup>

3.9 Edwina Hart MBE AM, the Minister for Health and Social Services (the Minister) opened her evidence session with a broad statement of support for the proposed Order, and confirmed that it is in line with the Government’s commitment in “One Wales” to making mental health a key priority. She believed that legislative competence in these areas is “an appropriate and important area for the Assembly.”<sup>8</sup> She explained in her evidence to the committee that:

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<sup>2</sup> Explanatory Memorandum, *The National Assembly for Wales (Legislative Competence) (No. 6) Order 2008 – Provision of Mental Health Services*, para 9

<sup>3</sup> *Ibid*, para 10

<sup>4</sup> Wrexham and Flintshire Mental Health Services, *written evidence*, MH31; Dr. Lepping, *written evidence*, MH9; Claire Dicks, *written evidence*, MH26

<sup>5</sup> *Written evidence* - Royal College of Nursing: MH12; Abertawe Bro Morgannwg NHS Trust: MH34; Powys teaching Local Health Board: MH30

<sup>6</sup> *Written evidence* - Wrexham and Flintshire Mental Health Services: MH31; Claire Dicks: MH26

<sup>7</sup> ADSS, *written evidence*, MH5; RoP, para 55, 22 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>8</sup> The Minister for Health and Social Services, letter to the Chair, 14 May 2008

There are various duties for the NHS and for local government in terms of the provision of services that, individually, go some way to secure assessments, but taken collectively, that is not cohesive across Wales.<sup>9</sup>

### *Evidence from the Member in Charge*

3.10 The Member in Charge stated the motivation behind his proposed Order:

I firmly believe there is a desire for Wales to take the opportunity to address some of the deficiencies in mental health service provision. By legislating, we could secure that long-term planning and ensure that mental health services are a greater priority in Wales.<sup>10</sup>

3.11 He also acknowledged that it would require significant resources to implement. With regards to whether the same objectives could not be achieved via the National Service Framework, the Member in Charge believed that while it is a “sound strategy”, “it is not delivering the services that were anticipated in the strategy” and that the proposed Order would give it “legislative backing.”<sup>11</sup>

The difficulty with the provision of mental health services is that there are many bits of legislation that suggest that someone may have a right to access a particular service, or that there may be a duty on a body to co-ordinate the provision of certain services, but there is no one piece of legislation that brings all this together. I think that we have a strong case for saying that Wales could take a lead on the provision of mental health services; we could do something unique in comparison with England and Scotland.<sup>12</sup>

### *Our View*

3.12 We note the widespread support that exists for the proposed Order in principle, and for the conferral of legislative competence in the areas identified within the proposed Order. We also note the reasons put forward by the Member in Charge for seeking such legislative competence.

3.13 We agree in principle, that the legislative competence in the areas identified in the proposed Order should be conferred on the Assembly (Recommendation 1).

3.14 In considering whether the proposed Order is too broadly or too narrowly drawn, and the evidence received, we have highlighted a number of issues in relation to its scope and drafting. Our consideration of these issues is set out in sections 4 to 7.

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<sup>9</sup> RoP, para 11, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>10</sup> RoP, para 6, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>11</sup> RoP, para 4, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>12</sup> Ibid, para 80-81

#### 4. The scope of the proposed Order

##### *The scope: rights and duties*

4.1 A common view amongst the submissions was that there is a need to allow mentally disordered persons the ability to access mental health services at an early stage of their condition or illness.

4.2 The main point was whether a duty implied that people would have a right to an assessment and treatment and whether those “who are or may be mentally disordered” would be too wide or too narrow a group to capture. This is considered further below under the section on definitions (paragraphs 6.1 - 6.12).

4.3 The Law Society<sup>13</sup> expressed their concern at the potential “unwanted consequences” if the right to request an assessment is not limited to the service user or the primary carer as is the case under Scottish mental health legislation. However, they believed it would be possible to address these concerns in subsequent Measures where the Assembly could limit the right to those with a legitimate interest.

4.4 Hafal<sup>14</sup> and Royal College of Psychiatrists<sup>15</sup> made similar points while supporting the principle of ensuring earlier access to mental health services to allow service users to avoid becoming subject to the 1983 Act. They believed that the right to request an assessment had to be limited, and those to whom the legislation would apply would have to be carefully defined.

4.5 The Royal College of Psychiatrists went on to say:

there is quite a degree of concern among members of the college in Wales that this will force services to diversify to a greater extent, as we have already mentioned, so that the ‘worried well’—to use an unpleasant phrase—would be included in legislation that is intended to help those who are more seriously ill.<sup>16</sup>

4.6 The Royal College of Nursing<sup>17</sup> believed that the proposed Order would allow for legislation to promote mental health well-being in a different way.

##### *Evidence from the Member in Charge*

4.7 The Member in Charge explained that he drafted the proposed Order in broad terms so that the Assembly could have sufficient scope to outline in future Measures the range of people to whom the legislation should apply in future:<sup>18</sup>

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<sup>13</sup> The Law Society, *written evidence*, MH (3)-07-08(p.3): 13 May 2008

<sup>14</sup> RoP, para 54-55, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>15</sup> RoP, para 65, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>16</sup> *Ibid*, para 114

<sup>17</sup> RoP, para 42, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>18</sup> RoP, para 43, 8 April 2008 and para 44, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

If the Order were drafted solely to provide services for those who are severely mentally ill, we could not expand that in a Measure; it would restrict us in the future. So, I think that, on balance, it is best to ensure that the Order is as broad as possible in terms of the type of patient for whom we might wish to legislate in a Measure.

4.8 The Member in Charge believed that the effect would be to produce legislation which would give rise to rights and explained:

Effectively, it is rights-based legislation without specifically saying that ‘This is a right to X, Y and X.’ It would place a duty on the relevant bodies to ensure that the services were provided. We would have to look at the scope of the Measure to see exactly how it could be drafted and outlined.<sup>19</sup>

#### *Our View*

4.9 We considered these concerns but we agree with the Member in Charge that, as a general principle, the proposed Order should be broadly drafted to allow the Assembly greater flexibility to identify the scope and definition of the rights and duties in subsequent Measures (Recommendation 2).

#### *Extending duties to local authorities*

4.10 As currently drafted the proposed Order only places duties on the “health service” in relation to the assessment and treatment of persons who are or may be mentally disordered.

#### *Evidence from consultees*

4.11 All respondents supporting the Order argued that in order for it to achieve its stated objectives and be effective it should also cover duties on local authorities, in particular social services.

4.12 This was also the key point that the Minister wished to make during the oral evidence session - that the Order needed to be extended to include duties on local authorities.<sup>20</sup>

4.13 There have been different views on whether the duty should extend generally to “local authorities” or specifically to “social services”. Mind Cymru suggested “complementary proposals in the field of social care.”<sup>21</sup> Gofal Cymru<sup>22</sup> noted that “it would seem sensible ... to include social care/local government services as well as health services”. “Social Care” was a term also used by Hafal and Denbighshire County Council.

4.14 Abertawe Bro Morgannwg NHS Trust said that any legislation would need to distinguish clearly between this new responsibility and the existing duties of

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<sup>19</sup> RoP, para 22, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>20</sup> RoP, para 23, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>21</sup> Mind Cymru, *written evidence*, MH 05-08 (p1): 29 April 2008

<sup>22</sup> Gofal Cymru, *written evidence*, MH (3)-07-08(p.1): 13 May 2008

local authorities under the Community Care Act 1990 to assess people who they consider may require Community Care Services.<sup>23</sup>

4.15 ADSS strongly supported extending the duties to local authorities. They explained the many ways in which local authorities support those with mental health problems and believed that only through imposing a joint legislative responsibility would the aims of the proposed Order be met:

we believe that the fundamental principle is a shared responsibility between the NHS and local government - and it is local government, not social services.<sup>24</sup>

#### *Evidence from the Member in Charge*

4.16 The Member in Charge was open to broadening the scope of the proposed Order in so far as it would extend to social care provided by local authorities rather than extending the duty to including local authorities generally. He did not agree with suggestions from witnesses that the duties on local authorities should encompass the whole range of support services which they may require, including housing, employment, education etc. He believed that it was necessary to focus the proposed Order on the health and care of people with mental disorders.<sup>25</sup>

4.17 His main concern was one of process, whether he would be allowed under Standing Orders to lay a draft proposed Order which went beyond the specified matters in the original ballot:

It would certainly be helpful in any recommendation to define the extension to social care as narrowly as possible, because I must be mindful of the original intention of the Order. It was not intended to examine a range of educational and housing opportunities, social welfare, supported employment and so on, although I understand that those aspects are important to a person's life, particularly if they are suffering from a mental illness. I approached the Order from the outset as a piece of health and care legislation; that was the reason for designing the Order in the way that it was. Clearly, I would need to look at the potential impact on the Order of any amendment and at whether it would be within our Standing Orders were it to be amended as you suggest.<sup>26</sup>

#### *Our View*

4.18 We note the evidence received on this issue. In order for future Measures to achieve the objective of providing holistic treatment and care to persons with mental disorders which would help prevent people from becoming subject to compulsory treatment, we believe that it is important that people with mental health problems receive care and support from both the health service and local authorities working together jointly and coherently.

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<sup>23</sup> Abertawe Bro Morgannwg University NHS Trust, *written evidence*, MH 34

<sup>24</sup> RoP, para 33, 22 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>25</sup> RoP, para 8-9, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>26</sup> *Ibid*, para 16



4.19 In light of the strong support for including local authorities within the scope of the proposed Order, we recommend that the proposed Order is extended to include a duty on local authorities in relation to the “assessment” and “treatment and care” (see Recommendation 11 below) of people who are or may be mentally disordered (Recommendation 3).

4.20 We note the concerns of the Member in Charge. However, we believe that the nature of the support services required from local authorities would be difficult to define at this stage. The specific duties on local authorities in relation to assessment and treatment can be further identified in subsequent Measures.

4.21 We therefore recommend that the proposed Order should seek broad competence in relation to “local authorities”, and not only in relation to social services or social care (included in Recommendation 3).

### *Duties on other organisations*

#### *Statutory Bodies*

4.22 Some witnesses pointed to the important role played by other statutory services in relation to supporting or addressing the needs of those with mental disorders, such as the police, probation services, prison services, employment services, and suggested that it might be useful to include some of these within the scope of the proposed Order.

4.23 The Law Society<sup>27</sup> did not believe that the duties in the proposed Order should be extended to cover others. They explained that all the support required to enable recovery as implied by the definition of “treatment” were services provided by the health services and local authorities and that the key was to ensure that these two services worked jointly to achieve this. Beyond this, local authorities could work in partnership with others as necessary.

4.24 The Police Federation<sup>28</sup> put forward the view that the proposed Order could ensure that “substantial progress can be made to benefit the rights and the care of mentally disordered persons who come into contact with the police.” They made a range of specific proposals relating to those detained in police stations under Section 136 of the *1983 Act*, including recommending designated custody suites for those with mental health problems. However, they did not suggest how the proposed Order might need to be changed to address this issue (see also paragraph 5.8).

4.25 Abertawe Bro Morgannwg University NHS Trust<sup>29</sup> singled out the prison services given the mental health problems within the prison population.

4.26 The Minister was satisfied that only local government and the health service would need to be mentioned specifically in the Order. The Minister preferred

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<sup>27</sup> RoPpara 103-104, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>28</sup> The Police Federation, *written submission*, MH 35

<sup>29</sup> Abertawe Bro Morgannwg University NHS Trust, *written submission*, MH 34

avoiding extending the proposed Order to cover the police as the service is not a devolved competence, and noted that there were other ways of addressing these issues rather than through placing duties on them.<sup>30</sup>

### *Voluntary sector*

4.27 The role which the voluntary sector plays in supporting people's needs and representing their interest is clear when considering all the evidence. However, none have suggested that there needs to be a reference to the voluntary sector in the proposed Order.

4.28 The Minister agreed that the voluntary sector is a key player, but believed that it would be for local government and health services to plan how to deliver the statutory duty placed on them in co-operation with the voluntary sector.<sup>31</sup>

### *Carers*

4.29 There was general recognition that carers of people with mental disorders needed support. Cardiff Community Health Council recommended amending the proposed Order to include carers - "it is as much about the signals that are given about the importance of carers in different settings."<sup>32</sup>

4.30 The Minister<sup>33</sup> did not support including carers within the scope of proposed Order, although she recognised that it was an issue that might need careful consideration.

4.31 Gofal Cymru<sup>34</sup> believed that the rights and benefits which future measures would provide will themselves bring benefits to carers and considered that the issue was best addressed elsewhere.

4.32 Mind Cymru<sup>35</sup> welcomed that the proposed code of practice for Wales for the Mental Health Act 2007 included for the first time a chapter on carers. They believed it would be helpful to cross reference the rights of carers which would be considered as part of the proposed Legislative Competence Order which Helen Mary Jones AM has been given leave to introduce.

### *Evidence of the Member in Charge*

4.33 The Member in Charge stated that he wished to keep the proposed Order tightly focused on those who suffer from mental illness in order to have "a more effective piece of legislation". He believed that any issues in relation to carers should be dealt with by the Legislative Competence Order being pursued by Helen Mary Jones AM.<sup>36</sup>

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<sup>30</sup> RoP, para 25, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>31</sup> RoP, para 30, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>32</sup> RoP, para 125, Proposed Provision of Mental Health Services LCO Committee

<sup>33</sup> RoP, para 53, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>34</sup> RoP, para 42, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>35</sup> RoP, para 42, 29 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>36</sup> RoP, para 40, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

### *Our View*

4.34 We note the evidence regarding the role played by other statutory bodies and the voluntary sector and in particular carers, in relation to people with mental health problems. However, we do not believe it appropriate to extend the scope of the Order to encompass services beyond local authorities and the health service.

4.35 We wish to highlight the evidence regarding the particularly important role played by those caring for people with mental health disorders. We recommend that this is taken into account in the development of legislation regarding the needs and rights of carers. We believe that this is beyond the scope of this proposed Order (Recommendation 4).

### *Children and young people*

4.36 Several organisations questioned whether the proposed Order covers children and young people, such as the Children’s Commissioner for Wales, NSPCC and Barnado’s Cymru.

4.37 Their concerns were based on there being no reference to children in the Explanatory Memorandum. These organisations<sup>37</sup> wanted to include children and young people within the scope of the proposed Order as a means of addressing issues relating to the implementation of Child and Adolescent Mental Health Services (“CAMHS”) and how young people progress from CAMHS into Adult Mental Health Services.

4.38 The Minister<sup>38</sup> believed that the proposed Order would apply to all persons irrespective of their age, that it was effectively “age-blind”.

4.39 The Assembly Parliamentary Service (APS) Legal Services have provided legal advice which confirms that it would cover children and young people.

### *Evidence from the Member in Charge*

4.40 The Member in Charge confirmed that the proposed Order would confer competence in relation to mental health services for all persons in Wales - not just for those over the age of 18. He agreed that it would be useful to insert a reference to CAMHS in the Explanatory Memorandum to clarify this.<sup>39</sup>

### *Our View*

4.41 We note the concerns raised by some respondents regarding the inclusion of children and young people. We are satisfied that where the proposed Order refers to “persons” with mental disorders, it would encompass duties and services in relation to children and young people. We welcome the

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<sup>37</sup> *Written submissions* - MH 22: Barnardo’s Cymru; MH 32: Children’s Commissioner for Wales; MH 33: NSPCC Cymru/Wales

<sup>38</sup> RoP, para 56, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>39</sup> RoP, para 49, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

commitment from the Member in Charge to clarify this in the Explanatory Memorandum (Recommendation 5).

## 5. The interaction between the proposed Order and the Mental Health Act 1983 (as amended by the Mental Health Act 2007)

### *General*

5.1 The proposed Order would not confer competence in relation to “the assessment of, treatment or advocacy for persons detained, liable to be detained or liable to recall under the Mental Health Act 1983”.

5.2 The majority of respondents supported excluding those subject to compulsory treatment under the 1983 Act from the scope of the proposed Order. The principle reason for this was the belief that those patients already have access to the services that the proposed Order would enable Measures to provide.

5.3 Gofal Cymru<sup>40</sup> noted that the criminal justice aspects of the 1983 Act meant that, in its opinion, the proposed Order would be unlikely to gain approval from parliament if it were thought that “powers were being sought to alter it [the 1983 Act]” a point echoed by Hafal<sup>41</sup> in its oral evidence.

5.4 However, the Minister<sup>42</sup> raised the issue of whether the exclusion was sufficiently wide as it only excludes those who are detained, but that there may be other groups of persons to whom the 1983 Act applies which she believed may have been unintentionally missed. She gave two examples - those received into guardianship (sections 7 and 37 of the 1983 Act) and potentially those on supervised community treatment.

5.5 The Minister explained that the Order as drafted would not therefore preclude the Assembly from legislating in relation to the assessment, treatment and provision of advocacy services to those subject to a guardianship order. She further stated:

Some of the phrases adopted in the exclusion of the proposed Order are not defined in the 1983 Act, and I would not wish to see ambiguity in this area.<sup>43</sup>

5.6 Abertawe Bro Morgannwg Trust<sup>44</sup> raised a point about how the proposed Order would interact with the 1983 Act, and the need to avoid confusion about the interaction between the two. Cardiff Community Health Council made a similar point in their evidence session:

People do not necessarily stay on orders for long periods. So, if they are dipping in and out of rights, it will create some serious difficulties in terms of consistency and sending a message about people’s rights.<sup>45</sup>

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<sup>40</sup> RoP, para 17, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>41</sup> RoP, para 39, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>42</sup> The Minister, letter to the Chair, 14 May 2008

<sup>43</sup> Ibid

<sup>44</sup> Abertawe Bro Morgannwg University NHS Trust, *written submission*, MH 34:

<sup>45</sup> RoP, para 132, Proposed Provision of Mental Health Services LCO Committee

5.7 Hafal believed that one way of ensuring that there was consistency of care through what was planned in subsequent Measures and that provided under the Mental Health Act was through the code of practice for the Mental Health Act which is the responsibility of Welsh Ministers.<sup>46</sup>

5.8 The Police Federation<sup>47</sup> concentrated their submission on those persons brought to a police station under Section 136 of the *Mental Health Act 1983* (Mentally disordered persons found in public places). The Police Federation contests that such persons are not adequately provided for by existing mental health legislation, and should be brought within the scope of the proposed Order to allow future Measures to address a number of issues which they highlighted.

It is the Federation's contention that the grey area of 'mental health patients' being brought initially into police custody/safety should not be considered in line with those being assessed for detention, or liable to be detained or liable to recall under the Mental Health Act 1983 (or any statutory modification or re-enactment thereof).

#### *Right to independent advocacy*

5.9 There was general support for giving a wider range of people access to advocacy services. Powys tLHB<sup>48</sup> supported the provision but believed that a general right to advocacy would be unnecessary and unworkable.

5.10 During evidence sessions, witnesses generally felt that it was not necessary to mention within the proposed Order who should be responsible for commissioning and providing the service, given the different arrangements which currently existed, so long as it was independent. Some respondents offered views on what should be considered "independent".

5.11 The Law Society<sup>49</sup> explained that if the proposed Order was to proceed and future Measures provided for "Measure advocates" then there would be three types of statutory advocacy services - the other two being Independent Mental Health Advocates under the new Mental Health Act 2007 and Independent Mental Capacity Advocates under the Mental Capacity Act. They explained that so long as these statutory services were consistent with the Acts from which they emanated then it would be feasible to have these services provided by one person, so long as they were able to discharge all the statutory obligations.

5.12 The Minister said that the proposed Order was helpful in relation to advocacy issues, given the limitations of the service within Wales. However, she had concerns that patients under the 1983 Act might fall outside the scope of any advocacy services provided for in future Measures "and that people who are detained under the Act might have an imbalance of access." In her letter, she states that:

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<sup>46</sup> RoP, para 22, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>47</sup> The Police Federation, *written submission*, MH 35

<sup>48</sup> Powys Teaching Local Health Board, *written evidence*, MH 30:

<sup>49</sup> RoP, para 107, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

legislative competence should be sought for all persons who are or may be mentally disordered including those for whom the new Independent Mental Health Advocates (IMHAs) will be available by virtue of them being qualifying patients under the Mental Health Act 1983.<sup>50</sup>

5.13 Another respondent also feared that the “most vulnerable would receive an inferior service”. Cymar and Mind Cymru said that there was a need for a co-ordination between existing advocacy services. Cymar<sup>51</sup> supported removing the exclusion:

We would like to see the advocacy services integrated, ideally so that people can have an ongoing relationship with an advocate, whilst they are detained or otherwise.

5.14 Abertawe Bro Morgannwg University NHS Trust<sup>52</sup> suggested that there could be opportunities for collaborative working with the Independent Mental Health Advocacy service under the Mental Health Act. Denbighshire County Council<sup>53</sup> also flagged up the need to take into account how this would interact with their locally commissioned advocacy service.

5.15 NSPCC Cymru/Wales<sup>54</sup> noted in their written evidence that children and young people who suffer from a mental disorder are currently entitled to independent advocacy under the *Children Act 1989*. They requested clarification of how the proposed Order and subsequent Measures could affect existing advocacy provision.

5.16 APS Legal Services advise that it would be possible to remove advocacy services from the exception of persons detained under the Mental Health Act.

#### *Evidence of the Member in Charge*

5.17 The Member in Charge explained his reasoning for excluding those people detained under the Mental Health Act:

First, there are already provisions in statute covering those people who are detained under the 1983 and the 2007 Acts – those provisions set out their entitlement as patients who have been detained under the law, including the right to advocacy. Naturally, one of the difficulties with legislating on mental health is that there is an aspect of such legislation that falls within the criminal justice system. The criminal justice system is not devolved, and what I wanted to avoid, if and when this is examined by Parliament, was a criticism that the Assembly is straying into the field of criminal justice.<sup>55</sup>

5.18 During his second evidence session, the Member in Charge acknowledged that as people under a guardianship order were not excluded then legally they would fall within the remit of the proposed Order. He indicated that he would be

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<sup>50</sup> The Minister, letter to the Chair, 14 May 2008

<sup>51</sup> Cymar, *written evidence*, MH(3)-05-08(p2): 29 April 2008

<sup>52</sup> Abertawe Bro Morgannwg University NHS Trust, *written evidence*, MH 34

<sup>53</sup> Denbighshire County Council, *written evidence*, MH 17

<sup>54</sup> NSPCC Cymru/Wales, *written evidence*, MH 33

<sup>55</sup> RoP, para 45, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee

willing to consider the concerns of the Minister regarding whether patients under a guardianship Order should be excluded and to revisit the drafting of the exclusion to ensure that there was no duplication of provision between those subject to treatment under the Mental Health Act and future Measures.<sup>56</sup>

5.19 When questioned on the matter of whether persons subject to the Mental Health Act should be able to access the independent advocacy services which would be provided under future Measures, the Member in Charge said that he was minded to consider redrafting the Order, following the advice of the Minister.<sup>57</sup> He recognised that the scope of advocacy under the Mental Health Act is “quite narrow” and that a future Measure may provide a greater range of advocacy services for those who are not detained:

if we removed from the Order the exclusion from advocacy services of those who are detained under the Act, those people would have access to the much greater range of advocacy services that we are looking to provide through this Order. So, that would be one way of ensuring that those people who are detained would have access to something better than what they currently receive.

5.20 However, he was clear that he did not feel it appropriate to extend the provisions on assessment and treatment in the proposed Order to those who are detained under the Act.<sup>58</sup>

#### *Our View*

5.21 Given the weight of evidence in favour of excluding those detained under the 1983 Act from the scope of the proposed Order, we agree with the general principle that the proposed Order should not affect the provisions of the 1983 Act (subject to our recommendation below regarding the provision of advocacy services) (Recommendation 6).

5.22 We note the concern of the Minister in relation to the potential overlap with those subject to the 1983 Act. We believe that further consideration should be given to the matter of whether the exclusion in the Order in relation to the 1983 Act is appropriately drafted, for example, whether patients subject to guardianship under the 1983 Act need to be excluded as well as those detained. We recommend that the Member in Charge seeks to reach agreement on this matter with the Minister for Health and Social Services in light of further legal advice (Recommendation 7).

5.23 In relation to the right to advocacy, several witnesses have raised concerns regarding the potential for the creation of two parallel advocacy systems under the 1983 Act and future Measures. This could be especially problematic for people who are subject to detention for short periods of time and would therefore move between the two systems.

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<sup>56</sup> RoP, para 35, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>57</sup> RoP, para 28, 20 May 2008 Proposed Provision of Mental Health Services LCO Committee

<sup>58</sup> RoP, para 76, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee



5.24 We sympathise with those who raised concerns regarding the creation of two different advocacy services for people with mental disorders, whereby those who are most in need of support, receive an advocacy service which would potentially be more limited than that required by a future Measure.

5.25 We therefore recommend removing the exclusion of persons subject to the Mental Health Act in relation to the provision of independent advocacy. This would facilitate the development of a seamless advocacy service for persons with mental disorders without encroaching on sensitive matters relating to detention and the criminal justice system (Recommendation 8).

## 6. Definitions and terminology in the proposed Order

### *“Persons who are or may be mentally disordered persons”*

6.1 The proposed Order would cover all those “who are or may be” persons with mental disorders. We considered whether this was appropriate and whether it would cause any legal problems.

6.2 The Minister believed that this was a legal issue. In her letter to the Chair, the Minister explained that she did not wish to see the Order limited to those who have previously had an episode of mental ill-health. She believed that it was not appropriate to address this matter at the Order stage.

I would anticipate that the Measures will need to be “staged” so that rights and obligations around assessment, treatment and advocacy are conferred for particular groups at particular times. To exclude a particular group unnecessarily at this stage - such as those who have not previously had an episode of severe mental illness - would undermine this approach.<sup>59</sup>

6.3 The Law Society<sup>60</sup> did not support the use of the term “who may be” as it could potentially capture anyone. They preferred the use of “appears to be” which at least then implies that there has to be a factual basis for them being so. This is the approach taken in the NHS Community Care Act where a person qualifies if he or she “appears” to the social services authorities to be in need.

6.4 Hafal<sup>61</sup> also believed that “may be” could be too open ended. They preferred the use of “appears to be”:

My understanding from the lawyers is that ‘appear to be’ is fair ground for saying that you do not have to prove that you are, but that you merely need to show that that was the appearance of things. Therefore, it is trying to judge what the right middle ground is; we thought that ‘may be’ was extremely wide.

6.5 The Royal College of Psychiatrists said:

I think that, in a sense, the wording is not so important, as long as it captures a group of people who we would subsequently redefine as those who are the most needy.<sup>62</sup>

6.6 ADSS believed that it was not too broad and that there is “a wonderful opportunity to embed in the legislation a statutory responsibility to promote prevention.”<sup>63</sup>

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<sup>59</sup> The Minister, letter to the Chair, 14 May 2008

<sup>60</sup> RoP, para 82, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>64</sup> RoP, para 43, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>62</sup> RoP, para 106, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>63</sup> RoP, para 27, 22 April 2008, Proposed Provision of Mental Health Services LCO Committee

## *Evidence of the Member in Charge*

6.7 The Member in Charge explained the rationale behind the use of a wide descriptor:

The feeling was that, by using the phrase that you described, we could give the Assembly sufficient scope to outline by Measure the range of people to whom the legislation should apply in future. It may be that the Assembly would determine that the legislation should apply to a narrow category of mentally ill persons, or it could determine that it was very wide in its application.<sup>64</sup>

6.8 He stated that he did not have a strong view on whether “may be” or “appears to be” would be preferable, although he recognised that “appear to be” would be a “stronger test” involving a judgement at that point as to whether someone is mentally disordered. He felt that there would have to be “a gatekeeper of some sort”:

Anyone can self-refer, but you need someone to make the judgment as to whether someone needs that wider assessment to determine what those needs are, how those needs can be met, and how a package of care could be put together. The problem with self-referral is that you could end up making a series of assessments and then judging that someone is not mentally disordered at all. However, that person may then feel entitled to services.<sup>65</sup>

## *Our View*

6.9 We recognise that if the proposed Order applies to those “who are or may be” mentally disordered this will capture a broad range of persons. We note the concerns regarding the wide potential for self-referral if duties relate to all those captured by this definition.

6.10 However, we are persuaded that the decision regarding persons to whom the various duties should apply should be provided for in any subsequent Measure and that therefore the proposed Order should apply to those “who are or may be” mentally disordered as currently drafted (Recommendation 9).

6.11 We note that some respondents suggested the use of “appears to be” and that this implies that an initial assessment of that person may have to be undertaken by a third party before a person would be subject to a mental disorder assessment.

6.12 We believe that there may be a need to introduce this gate-keeper role at the assessment stage (included in Recommendation 9). However we believe that this could be addressed in future Measures and that the use of “may be” is preferable within the proposed Order. This would encompass those who “appear to be” and is also more frequently used when drafting legislation. The use of

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<sup>64</sup> RoP, para 90, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>65</sup> RoP, para 68, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

“may be” would allow persons who are recovering from mental health disorders to be within the scope of the proposed Order as well.

*Whether the term “mentally disordered persons” is appropriate*

6.13 The proposed Order applies to “mentally disordered persons” and also includes a definition of “mentally disordered persons” which would apply to Field 9 (health and health services) – “persons having any disorder or disability of the mind.”

6.14 Different views were expressed about how persons with mental health problems should be defined. Many respondents agreed with it as it matches the definition in the Mental Health Act.<sup>66</sup> The Royal College of Psychiatrists believed the term to be sufficiently broad and that in line with general terminology in use.<sup>67</sup>

6.15 Gofal Cymru<sup>68</sup> suggested that the term “mental disorder” has negative connotations. They urged the Committee to consider broadening the definition to “mental distress” which would go beyond current legislative definitions. They felt that this would enable measures promoting mental health well-being to be adopted as well. Cymar<sup>69</sup> and Mind Cymru<sup>70</sup> also supported the use of “mental distress”. Mind Cymru hoped that it would enable legislation to support people with a wider range of mental health problem. WCVA also made a similar point about interpreting the definition of “mentally disordered persons” as widely as possible.

6.16 Hafal believed that the proposed definition was sufficient, but took an opposing view from WCVA stating that future Measures should:

...identify a much narrower definition in order to provide more substantial rights, but to a much smaller group of people.

6.17 The Law Society<sup>71</sup> believed that it was necessary to distinguish from “mental distress” which might facilitate general public health measures and preventative strategies and “mental disorder” which is already quite wide. They felt that the proposed Order would have sufficient impact as currently drafted, allowing the Assembly to make Measures which would keep more people out of the compulsory treatment system.

6.18 The Minister<sup>72</sup> preferred “mental disorder” as it is a more clearly defined term.

6.19 The Royal College of Nursing Wales<sup>73</sup> suggested that the definition should include a reference to the “brain” as well as the “mind”. The Law Society noted

<sup>66</sup> ADSS, Healthcare Inspectorate Wales, ABM University NHS Trust, Caerphilly tLHB

<sup>67</sup> RoP, para 106, 110, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>68</sup> RoP, para 26, 29, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>69</sup> RoP, para 97, 29 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>70</sup> RoP, para 32, 29 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>71</sup> RoP, para 127, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>72</sup> RoP, para 59, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>73</sup> RoP, para 26, 13 May 2008, Proposed Provision of Mental Health Services LCO Committee

that “mental disorder” as defined in the Mental Health Act 2007 was different to the definition used in the Mental Capacity Act which includes disability of the mind or brain so that it would include those who were brain injured but not necessarily suffering from a mental disorder. They believed that there may be resistance to a wider definition of this kind.

#### 6.20 APS Legal services have advised:

If it is intended to include such non-medical causes of distress, then such a term would be appropriate. If, however, it is intended to limit the scope of the LCO to medical conditions, “mental disorder” would appear more appropriate.

#### *Evidence of the Member in Charge*

6.21 The Member in Charge<sup>74</sup> prefers the term “mental disorder” as it is used in current legislation, rather than “mental distress” which he believed suggested “a lower level of importance”.

#### *Our View*

6.22 We agree with the Member in Charge that “mental distress” suggests a lower threshold and that this would include non-medical causes of distress. We are persuaded that the term “mentally disorder” is the most appropriate term and believe it important to use terms which are consistent with the 1983 Act. We consider “mental distress” to be too diluted a term to use which could capture too broad a group of people within the context of the stated policy aims of the proposed Order.

6.23 We suggest that it is more appropriate to refer to “persons with mental disorders” rather than “mentally disordered persons” which we believe would still be in line with the definition found in the 1983 Act (Recommendation 10).

#### *Whether “treatment” should be defined*

6.24 The proposed Order does not include any interpretation of what is meant by the term “treatment”.

6.25 There was broad consensus that treatment should be understood as being wider than just medical treatment. The main thrust of evidence supported greater clarity in the proposed Order on this point, but that if the term was to be defined, then it should be an open definition rather than limiting it to certain types of treatment.

6.26 When put to witnesses, many considered the more detailed but non-exhaustive definition in the Mental Health (Care and Treatment) (Scotland) Act 2003 useful. APS Legal Services advised that it is consistent with the Mental

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<sup>74</sup> RoP, para 54, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

Health Act 1983 definition, and suggested that the latter definition may be preferable as it relates to the jurisdiction of England and Wales.

6.27 In her second letter to the Chair the Minister<sup>75</sup> suggested that the term “care or treatment” would be the most appropriate for use within the Matter. She was concerned that inserting a definition of treatment in relation to the proposed Matter on mental health services would affect the interpretation of “treatment” which is already used in Field 9 of Part 1 of Schedule 5 to the Government of Wales Act 2006 under Matter 9.1 in relation to NHS redress. She believed that these terms could be defined in subsequent Measures.

#### *Evidence from the Member in Charge*

6.28 During the first evidence session, the Member in Charge said:

If treatment is too defined, or if a number of categories are set out, the more you set out on paper, the greater chance is of missing something. ...but defining it as we have done allows scope for the Assembly to make future Measures in the way that it wishes.<sup>76</sup>

6.29 However, during the second oral evidence session, he stated that he would be happy to consider incorporating the definition of “treatment” set out in section 145 of the 1983 Act which “does not expand too widely, but it gives a flavour of what treatment and care may look like, in terms of rehabilitation as well.”<sup>77</sup>

#### *Our View*

6.30 We recommend that the term “treatment and care” is used in the proposed Order to reflect the range of services which may be required to enable the recovery and rehabilitation of persons with mental disorders. We believe that this could be further defined in subsequent Measures - see, for example, the broad definition of “treatment” found in the 1983 Act (Recommendation 11).

#### **Independent advocacy**

6.31 The proposed Order does not include any definition of what is meant by “independent mental health advocacy”.

6.32 Many respondent agreed about the importance of ensuring that advocates were “independent” and that this would need to be carefully defined. However, generally it was felt that this could be addressed at the Measure stage.

6.33 The Minister was concerned that confusion may be caused by the use of the term “independent mental health advocate” as this is a particular term used in the new Mental Health Act 2007 to describe the statutory advocacy available

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<sup>75</sup> The Minister, letter to the Chair, 3 June 2008

<sup>76</sup> RoP, para 76, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>77</sup> RoP, para 59, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

under that legislation. The Minister believed that the wording used to describe the independent advocacy envisaged needed further consideration.<sup>78</sup>

#### *Evidence of the Member in Charge*

6.34 The Member in Charge believed it more sensible to define independent advocacy in later Measures<sup>79</sup>, in order to avoid being “too prescriptive at this stage by stating in the Order what we regard advocacy to be.”<sup>80</sup>

6.35 He also indicated that he would be willing to discuss with the Minister how best to term “independent mental health advocacy” within the proposed Order.

#### *Our view*

6.36 We are satisfied that there is no need to further define what may constitute “independent advocacy” within the proposed Order, and that this could be addressed in a subsequent Measure.

6.37 We note the Minister’s concern regarding the potential for confusion between the reference to “independent mental health advocacy” in the proposed Order and the statutory provision required by the 1983 Act. We agree that it could be inferred that they refer to the same statutory requirements whereas future Measures resulting from the proposed Order may go beyond what is provided for in the 1983 Act (see parag 6.32 above).

6.38 We therefore believe that it would clarify the matter, if “independent mental health advocacy” was simply replaced with “independent advocacy” in relation to persons who are or may be mentally disordered (Recommendation 12).

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<sup>78</sup> The Minister, letter to the Chair, 14 May 2008 and RoP, para 42, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>79</sup> RoP, para 53, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>80</sup> RoP, para 30-31, 20 May 2008, Proposed Provision of Mental Health Services LCO Committee

## 7. Cross-border issues relating to the reference to “the health service in Wales”

7.1 The proposed Order refers to “the health service in Wales”. We questioned witnesses on whether this would pose any legal problems where patients residing in Wales receive treatment or services outside of Wales and vice versa.

7.2 The Royal College of Psychiatrists<sup>81</sup> considered the more interesting issue would be the provision of services in Wales that were “providing something that we perhaps felt did not meet the requirements of the proposed Order, but were being commissioned from elsewhere.”

7.3 ADSS Cymru<sup>82</sup> suggested that cross-border issues were best dealt with through local agreements rather than by “legislative directive”. It was also suggested by ADSS Cymru and the Chartered Society of Physiotherapy in Wales that we could learn from the experience of colleagues in Scotland with regards to any cross-border issues.

7.4 Some respondents, such as Mind Cymru<sup>83</sup> and the Royal College of Psychiatrists<sup>84</sup>, regard the Order as an opportunity to develop the objective of locally accessible services.

7.5 The Minister did not foresee any difficulty with cross-border issues.

### *Evidence of the Member in Charge*

7.6 The Member in Charge was confident that there would be no insurmountable problems regarding cross-border issues and that protocols are already in place for the treatment of Welsh residents outside Wales and that the duties do not extend to any bodies outside Wales.<sup>85</sup>

7.7 Joane Jackson, APS Legal Services and legal advisor to Jonathan Morgan explained that the definition of the health service was similarly defined in the NHS Redress Measure.<sup>86</sup>

### *Our View*

7.8 We believe that any cross-border considerations arising as a result of any future Measures can be dealt with in accordance with current health service protocols.

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<sup>81</sup> RoP, para 103, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>82</sup> Association of Directors of Social Services, *written evidence*, MH(3) 04-08(p1): 22 April 2008 and RoP, para 49-50, 22 April 2008

<sup>83</sup> RoP, para 50, 29 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>84</sup> RoP, para 97, 15 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>85</sup> RoP, para 66, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee

<sup>86</sup> RoP, para 66, 8 April 2008, Proposed Provision of Mental Health Services LCO Committee







*Draft Order laid before the National Assembly for Wales and Parliament under section 95(5) of the Government of Wales Act 2006, for approval by resolution of the Assembly and of each House of Parliament.*

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STATUTORY INSTRUMENTS

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**200[ ] No.**

**CONSTITUTIONAL LAW,**

**DEVOLUTION, WALES**

**The National Assembly for Wales (Legislative Competence)  
(No 6) Order 2008**

*Made* - - - - - \*\*\*

*Coming into force in accordance with Article 1*

At the Court at Buckingham Palace, the \*\*\* day of \*\*\*2008

Present

The Queen's Most Excellent Majesty in Council

In accordance with section 95(5) of the Government of Wales Act 2006(a) a draft of this order has been laid before, and approved by resolution of, the National Assembly for Wales and each House of Parliament.

Accordingly, Her Majesty, in pursuance of section 95(1) of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order as follows:-

**Citation and commencement**

1. This Order may be cited as the National Assembly for Wales (Legislative Competence) (No 6) Order 2008 and it comes into force on the day after the day on which it is made.

**Amendments to Schedule 5 to the Government of Wales Act 2006**

2.—(1) Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.

(2) In Field 9 (health and health services) insert—

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(a) 2006 (c. 32)

“Matter 9.[ ]

Provision for and in connection with –

- (a) the assessment by the health service in Wales of persons who are or may be mentally disordered persons;
- (b) duties on the health service in Wales to provide treatment for mentally disordered persons;
- (c) independent mental health advocacy for persons who are or may be mentally disordered persons.

This matter does not include assessment of, treatment or advocacy for persons detained, liable to be detained or liable to recall under the Mental Health Act 1983 (or any statutory modification or re-enactment thereof).

- (3) Under the heading “Interpretation of this field” before the definition of “patient” insert—  
““mentally disordered persons” means persons having any disorder or disability of the mind”.

Clerk to the Privy Council

#### **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order amends Schedule 5 to the Government of Wales Act 2006 (“the 2006 Act”). The effect of the Order is to extend the legislative competence of the National Assembly for Wales to make new laws for Wales by Measure under section 93 of the 2006 Act.

Article 2 inserts a new matter 9.[ ] into Field 9 (health and health services). The new matter inserted is about providing for the assessment, treatment and provision of independent mental health advocacy services for mentally disordered persons who are not detained, liable to detention or liable to recall under the Mental Health Act 1983.. Any provision of an Assembly Measure relating to new matter 9. [ ] will be within the legislative competence of the Assembly by virtue of this matter and section 94(4) of the 2006 Act.

**Member Proposed Legislative Competence Order:  
Mental Health  
Draft Explanatory Memorandum**

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 Member 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 an LCO, 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 an LCO.
5. The proposed LCO would confer further legislative competence on the National Assembly for Wales, in the field of Health and Health services (field 9, Part 1, Schedule 5 to the 2006 Act).
6. New legislative powers in respect of the specified "matter" will enable the Assembly Government, Assembly Members and Assembly Committees to bring forward coherent 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. On 3 October 2007 Jonathan Morgan AM won the ballot to bring forward a proposed LCO. On 17 October 2007 the National Assembly for Wales, in accordance with Standing Order No. 22.50 agreed that Jonathan Morgan may lay a proposed Order, to give effect to the outline proposed Order provided on 3 October 2007 under Standing Order No. 22.48, and an explanatory memorandum.

## Background

8. The objectives of the proposed LCO are to confer legislative competence on the National Assembly for Wales so that Assembly Measures may be brought forward providing mentally disordered persons with a right to assessment by the health service in Wales, duties on the health service to provide treatment, and a right to independent mental health advocacy. These rights would be applicable to mentally disordered persons who are not subject to compulsory powers under the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*).
9. The first objective of the proposed LCO is to enable Measures to be brought forward which would secure earlier assessment and treatment for mentally disordered persons. This could reduce the likelihood of further deterioration in mental health and remove the need for the use of compulsory powers later on, minimising the distress experienced by service users and their families.
10. The second objective of the proposed LCO is to give the National Assembly for Wales the power to make a Measure giving mentally disordered persons a right to independent mental health advocacy services in circumstances that will not be provided for under current legislation<sup>1</sup>.
11. Responsibility for mental health services and for mental health policy development is devolved to the Welsh Assembly Government. It is with this body that Welsh mental health charities, campaigning groups and service users and providers engage in discussion and negotiation around the specific needs and circumstances of mental health service provision that exist in Wales.
12. Accordingly, Wales has its own Mental Health Strategy and National Service Framework for adult mental health services which are well regarded by many users and service providers but which are poorly served by current mental health legislation in England and Wales.
13. Key themes of the National Service Framework for mental health services include the development of effective, comprehensive and responsive services; the empowerment of mental health service users; and the promotion of good mental health together with action

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<sup>1</sup> The *Mental Health Act 2007* is expected to be commenced in October 2009 in Wales.

to tackle stigma. The aims of the proposed LCO resonate closely with these themes.

14. Scotland has used its devolved legislative powers to introduce rights for persons with a mental disorder to an assessment of need and to independent advocacy, whether or not they are subject to compulsory powers, under the *Mental Health (Care and Treatment) (Scotland) Act 2003*. This Act confers rights on persons with a mental disorder in Scotland that are not enjoyed by those in England and Wales. The Scottish model is much admired for adopting a humane and inclusive approach to mental health legislation.
15. In July 2007 the *Mental Health Act 2007* received Royal Assent. The Act amended the *Mental Health Act 1983* and was the culmination of several attempts by the Westminster Government to reform mental health legislation in England and Wales. Two draft mental health bills had been published, in 2002 and 2004, but both had been highly contentious and had subsequently been dropped.
16. Following the attainment of new powers by the National Assembly for Wales under the *Government of Wales Act 2006* and the passing of the *Mental Health Act 2007* the Welsh Assembly Government sought stakeholder views on the future direction of mental health legislation in Wales.
17. In its response to the Welsh Assembly Government<sup>2</sup> the Welsh mental health charity Hafal stated that early intervention and treatment is the key to reducing the use of compulsion for those with mental disorders. Around half of those subject to compulsory treatment have previously asked for help and had it denied to them<sup>3</sup>.
18. There is strong evidence to support the view that early support and treatment helps prevent further deterioration in mental health<sup>4</sup>. The provision of services at an earlier stage in the cycle of mental illness would reduce the need to use compulsory powers later on. This is the preferred option of service users and their families<sup>5</sup>.
19. The use of compulsion in mental health services should be reserved as an action of last resort in circumstances where a failure to intervene would put the individual and others at risk. The process of compulsion can be traumatic and cause severe disruption to the individual's life, home, and family relationships, and can prolong the recovery process<sup>6</sup>.
20. Since devolution Wales has developed its own arrangements for the commissioning and delivery of health services. Mental health services in particular have been developing in Wales at a different

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<sup>2</sup> Hafal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 13, paragraph 2.5

<sup>3</sup> Hafal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 13, paragraph 4.8

<sup>4</sup> Ted Unsworth (2007) *Future Direction of Mental Health Legislation in Wales* Ev 08, paragraph 1

<sup>5</sup> Gofal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 16 p2

<sup>6</sup> College of Occupational Therapists (2007) *Future Direction of Mental Health Legislation in Wales* Ev 18, p1

pace to those in England and elsewhere in the UK. Services in many parts of Wales need to respond bilingually, and to a population which may be sparsely distributed. There is therefore a distinctive set of challenges facing mental health services in Wales which can more effectively be addressed by Welsh legislation. The proposed LCO would facilitate Measures to improve mental health services in Wales without undermining the common approach taken to compulsion across England and Wales under the amended *Mental Health Act 1983*. The recognition by The Joint Committee on the Draft Mental Health Bill 2004<sup>7</sup>, the Wales Audit office<sup>8</sup> and others, of the differences in need and service provision in Wales is a sound basis for asking that this proposed LCO be conferred on the National Assembly for Wales.

21. Mental health services in Wales are undergoing a process of development to address the aims of the Mental Health Strategy and National Service Framework which seek to locate more services in the primary care and community sectors. A re-balancing of mental health services towards early intervention would help shift the focus towards community-based treatment and accelerate the modernisation of mental health services in Wales.
22. The emphasis on compulsory treatment in current mental health legislation in England and Wales focuses resources and effort on services for individuals subject to compulsion. The right to earlier assessment and services that would be facilitated by the proposed LCO would create the incentive that is needed to ensure that service providers focus their efforts on early intervention and treatment<sup>9</sup>.
23. The right to independent advocacy will be available to individuals subject to compulsory powers and those receiving certain types of treatment under the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*). However, those that fall outside these categories cannot expect to receive the support of an independent advocate as of right.
24. The proposed LCO would allow the National Assembly for Wales, by Measure, to confer a right to independent advocacy on mentally disordered persons at a time when their mental health and usual support mechanisms may be breaking down, leaving them vulnerable when key decisions about treatment and support services need to be made.

## Scope

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<sup>7</sup> Joint Committee on the Draft Mental Health Bill 2004, *Draft Mental Health Bill* HL Paper 79-I HC 95-I, para 450 <http://www.publications.parliament.uk/pa/lt200405/jtselect/jtment/79/79.pdf>

<sup>8</sup> *Adult mental health services in Wales: A baseline review of service provision*, Wales Audit Office, October 2005: [http://www.wao.gov.uk/assets/englishdocuments/Adult\\_Mental\\_Health\\_Services\\_Baseline\\_Review.pdf](http://www.wao.gov.uk/assets/englishdocuments/Adult_Mental_Health_Services_Baseline_Review.pdf)

<sup>9</sup> Hafal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 13, paragraph 2.5



25. It is proposed that the following Matter be inserted under Field 9 Health and Health Services 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:

Provision for and in connection with:

- a) the assessment by the health service in Wales of persons who are or may be mentally disordered persons,
- b) duties on the health service in Wales to provide treatment for mentally disordered persons,
- c) independent mental health advocacy for persons who are or may be mentally disordered persons.

This matter does not include assessment of, treatment or advocacy for persons detained, liable to be detained or liable to recall under the Mental Health Act 1983 (or any statutory modification or re-enactment thereof).

*Interpretation of this field*

“mentally disordered persons” means persons having any disorder or disability of the mind.”

26. The principle purpose of this proposed LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act that will enable Welsh Ministers to ensure that mentally disordered persons receive an assessment of need, treatment, and independent advocacy in circumstances that will not be provided for under current legislation.
27. It is not intended that the proposed LCO will be used to make changes to the powers of compulsory treatment and detention contained in the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*).

**Geographical limits of any Assembly Measure**

28. 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.

29. 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**

30. 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**

31. For the reasons outlined above, Jonathan Morgan proposes that the legislative competence should be conferred on the National Assembly for Wales in accordance with the provisions of the proposed Order to which this Explanatory Memorandum relates.

February 2008

**Y Pwyllgor ar y Gorchymyn Arfaethedig  
ynghylch Darparu Gwasanaethau Iechyd  
Meddwl**

**Proposed Provision of Mental Health  
Services Legislative Competence Order  
Committee**



**Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales**

Bae Caerdydd / Cardiff Bay  
Caerdydd / Cardiff CF99 1NA

13 March 2008

Dear Colleague

### **Public Consultation – Invitation to respond**

#### **Proposed Provision of Mental Health Services LCO Committee – The National Assembly for Wales (Legislative Competence) (No 6) Order 2008 (Relating to Provision of Mental Health Services)**

The National Assembly for Wales established a Committee on 26 February 2008 to consider and report on the Proposed Provision of Mental Health Services Legislative Competence Order (LCO). I am writing to invite you to submit evidence to the Committee on the proposed LCO by the 25 April 2008.

The purpose of the Committee's work is to scrutinise:

- The general principles of the proposed Order ie, that legislative competence as specified in '*Matter 9 [ ]*' be conferred to the Assembly.
- Whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on Mental Health and Mental Health Services, in particular whether the terms of the proposed Order are too broadly or too narrowly defined.

The Committee's work will focus on considering whether the Assembly should have the power, in principle, to legislate by Measure in the area identified in the proposed Order, i.e. mental health and mental health services. It will avoid engaging in detailed discussions on the specific proposed Measures which could be brought forward as a result of the conferral of legislative competence, for example, views relating to how Measures should be implemented and financing of policies. This will be a matter for scrutiny by the Assembly at a later date.

A copy of the proposed Order and its accompanying Explanatory Memorandum are enclosed at Annex 1. An electronic version of these documents and details of the Committee can be found on the Legislation pages of the Assembly's website: <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-legislative-competence-orders/bus-legislation-lco-2008-6.htm>

**In particular the Committee would like to receive evidence on the following:**

1. Would the terms of the proposed Order confer the appropriate powers on the National Assembly for Wales to allow for the implementation of the policy proposals outlined in the Explanatory Memorandum?
2. Is the scope of the proposed Order appropriate, too narrow or too broad to allow the Assembly to bring forward the Measures to address issues you believe should be addressed via legislation in the field of Mental Health in Wales? If necessary, how should the proposed Order be re-drafted and why?
3. The proposal is to impose duties on the Health Service to provide assessment of and treatment for mentally disordered persons. Should it cover duties on other bodies?
4. The parts of the proposed Matter which relate to assessment and treatment (paragraphs (a) and (b)) are limited to "the health service in Wales". Would this deal appropriately with any cross-border issues?
5. In relation to assessment of persons and advocacy services, the matter applies to persons "who are or may be mentally disordered". What are your views on this?
6. Is it appropriate to limit legislative competence to exclude persons detained under the Mental Health Act 1983?
7. Is the definition of "mentally disordered persons" in the proposed Order appropriate? If not, how should the definition be re-drafted and why?
8. Should the term "treatment" also be defined within the matter?

If you would like to respond to the consultation, please keep the following in mind:

- Your response should be as succinct as possible. Please reference your response using the title applied above.
- The National Assembly normally makes responses to public consultation available for public scrutiny, for example through the Assembly's website, and they may also be seen and discussed at Committee meetings. **If you do not want your response or name published it is important that you specify this at the end of your submission.**
- Please indicate whether you are responding on behalf of an organisation, or as an individual.
- Please indicate whether or not you would be prepared to give oral evidence to the Committee.

To submit evidence please send, preferably by email or on disk, otherwise in hard copy to Olga Lewis, Deputy Committee Clerk, Proposed Mental Health LCO Committee, National Assembly for Wales, Cardiff Bay CF99 1NA. The email address is [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk). Please entitle the email *Consultation MH LCO*.

**Submissions should be sent to arrive by Friday 25 April 2008. All submissions will be acknowledged. It may not be possible to take into account responses received after this date.**

The Committee will consider responses to the written consultation during April.

If you have any queries regarding the consultation, the Committee's work or about the Assembly's legislative process etc, please do not hesitate to contact the Clerk, Anna Daniel (tel: 029 2089 8144), or Olga Lewis, the Deputy Clerk (tel.: 029 2089 8154).

**David Melding AM  
Chair**

## Annex 3

### List of Consultation responses

MH 1 - Hafal

MH 2 - RC of Psychiatrists

MH 3 - WCVA

MH 4 - Cardiff Social Services

MH 5 - ADSS Cymru

MH 6 - Mind Cymru

MH 7 - Cymar

MH 8 - Cardiff Community Health Council

MH 9 - Dr Peter Lepping Mental Health Directorate

MH 10 - Rhymni Valley Mind

MH 11 - Brecon & Radnor Community Health Council

MH 12 - Royal College of Nursing Wales

MH 13 - The Law Society

MH 14 - Monmouthshire LHB/Social & Housing Services

MH 15 - Conwy Local Authority

MH 16 - Healthcare Inspectorate Wales

MH 17 - Denbighshire County Council

MH 18 - The Police Federation

MH 19 - Royal College Of Physicians

MH 20 - Gofal Cymru

MH 21 - Association of Chief Police Officers in Wales (WACPO)

MH 22 - Barnardo's Cymru

MH 23 - Caerphilly Teaching Local Health Board

MH 24 - Chartered Society of Physiotherapy (CSP)

MH 25 - Citizens' Advice Cymru

MH 26 - Claire Dicks, Cwm Taf Ymddiriedolaeth GIG

MH 27 - Age Concern Cymru

MH 28 - National Leadership and Innovation Agency for Healthcare

MH 29 - RNID Cymru

MH 30 - Powys Teaching Local Health Board

MH 31 - Mental Health Directorate North East Wales NHS Trust

MH 32 - Children's Commissioner for Wales

MH 33 - NSPCC Cymru/Wales

MH 34 - Abertawe Bro Morgannwg University NHS Trust

MH 35 - The Police Federation of England & Wales

Responses to the consultation can be found at:

<http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-legislative-competence-orders/bus-legislation-lco-2008-6/bus-legislation-lco6-2008-writtenevidence.htm>

## Annex 4

### Schedule of Oral Evidence

Date	List of Witnesses
15 April 2008	<p>Hafal</p> <p>Bill Walden-Jones, Chief Executive Lee McCabe, Service User</p> <p>Royal College of Psychiatrists (Welsh Division)</p> <p>Dr Val Anness, Chair</p>
22 April 2008	<p>Association of Directors of Social Services</p> <p>Mr Stewart Greenwell, Vice-President of Association of Directors of Social Services, Chief Officer, Social Care and Housing, Torfaen County Borough Council</p> <p>Ms Liz Majer, Assistant Director of Social Services, Blaenau Gwent County Borough Council</p>
29 April 2008	<p>Mind Cymru</p> <p>Ruth Coombs, Manager for Influence and Change Clare*, Service User</p> <p>Cymar</p> <p>Peter Munn, Consultancy Director, Ffenics Ltd. Richard Cowley, Trustee of Mental Health Advocacy Pembrokeshire MAP</p> <p>Cardiff Community Health Council</p> <p>Martyn Jenkins, Chief Officer Mr Bob Woodward, Member of Cardiff Community Health Council</p>
6 May 2008	<p>Minister for Health and Social Services</p> <p>Edwina Hart MBE AM</p>



13 May 2008	<p data-bbox="566 230 754 264"><b>Gofal Cymru</b></p> <p data-bbox="616 304 1362 376">Alexandra McMillan, Policy and Information Officer, Ewan Hilton, Executive Director</p> <p data-bbox="566 416 1029 450"><b>Royal College of Nursing Wales</b></p> <p data-bbox="616 490 1211 562">Lisa Turnbull, RCN Wales Policy Advisor Ian Hulatt, RCN Advisor on Mental Health</p> <p data-bbox="566 602 815 636"><b>The Law Society</b></p> <p data-bbox="616 676 1386 860">Kay Powell, Solicitor and Policy Adviser, The Law Society Professor Phil Fennel, Cardiff Law School, Member of the Law Society Committee on Mental Health and Disability</p>
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Transcripts of oral evidence sessions can be found at:

<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-legislation-lco-2008-8/bus-committees-third-ac-agendas-4.htm>

**Edwina Hart AM MBE**

Y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol  
Minister for Health and Social Services

Our ref:  
Your ref:

David Melding AM  
Chair, Proposed Provision of Mental Health  
Services LCO Committee  
The National Assembly for Wales  
Cardiff Bay  
CF99 1NA



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

Cardiff Bay  
Cardiff CF99 1NA  
English Enquiry Line: 0845 010 3300  
Fax: 029 2089 8131  
E-Mail: Correspondence.Edwina.Hart@Wales.gsi.gov.uk

Bae Caerdydd  
Caerdydd CF99 1NA  
Llinell Ymholiadau Cymraeg: 0845 010 4400  
Ffacs: 029 2089 8131  
E-Bost: Correspondence.Edwina.Hart@Wales.gsi.gov.uk

May 2008

**NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (No. 6)  
ORDER 2008 (RELATING TO PROVISION OF MENTAL HEALTH SERVICES)**

Thank you for your letter of the 7<sup>th</sup> of May 2008, and for the opportunity to appear before the Committee on the 6<sup>th</sup> of May.

Whilst I set out my position on some of the aspects of the proposed Order in more detail below, as you have requested, I wish firstly to reiterate my support for the intentions behind this Order.

The principle of securing rights and obligations in respect of early intervention for people with mental health problems is very important, and an area which can make a real difference. In respect of advocacy, it is right that people who have a serious mental disorder have someone who can speak on their behalf and who can help them to make their own decisions about their care and treatment.

Securing legislative competence over assessment, treatment and advocacy for those who are or may be suffering from mental health problems is an appropriate and important area for the Assembly.

As I indicated in my evidence to the Committee there are, however, areas within the proposals that merit further attention.

## *Relationship with the Mental Health Act 1983*

The Committee will be aware that the Mental Health Act 1983 is being amended by the Mental Health Act 2007; whilst some amendments have already commenced, the majority will come into force on the 3<sup>rd</sup> of November 2008. Where I make reference to the 1983 Act, this should be read as taking account of the relevant amendments introduced by the 2007 Act.

I agree that it is appropriated that the proposed Order does not seek legislative competence over the assessment and treatment of persons who are subject to the 1983 Act. That Act makes provision in that regard, and the purpose of the Order is to help to ensure early intervention such that compulsion may not become necessary. However I believe that this should not be the case for advocacy; I believe legislative competence should be sought for all persons who are or may be mentally disordered, including those for whom the new Independent Mental Health Advocates (IMHAs) will be available by virtue of them being *qualifying patients* under the Mental Health Act 1983. My reasons for this are set out in more detail below.

I also raised with the Committee some concerns over the terminology employed to describe persons to whom the 1983 Act applies, and the risk that some groups may have been (perhaps unintentionally) missed – I cited the example of those who have been received into guardianship (sections 7 and 37 of the 1983 Act). Another would, potentially, be those on supervised community treatment (SCT).

Some of the phrases adopted in the exclusion of the proposed-Order are not defined in the 1983 Act, and I would not wish to see ambiguity in this area.

Given the need to ensure that there is absolute clarity on this, I have asked my legal advisors to find a form of words that will cover the groups of patients under the Act which I believe should not come under the competence over assessment and treatment. I will advise you of their findings shortly.

### *Advocacy*

The 1983 Act will, from 3<sup>rd</sup> November 2008, provide statutory advocacy (IMHA) to qualifying patients. The functions of the IMHA are set out in the Act, and are limited to matters relating to the detention of the patient – for example, supporting the patient to understand the provisions of the Act that apply to them, supporting them to exercise rights of appeal.

Such patients are likely to require the IMHA to support them in other matters as well, for example signposting to other services and support.

By seeking competence without excluding patients subject to the 1983 Act, this will allow maximum flexibility in making provisions in Measures. This should result in a more seamless approach within advocacy provision, and there will be less risk that detained patients are ultimately worse off because they have no rights to advocacy outside that relating to their detention.

To achieve this change, I consider that the exclusion provision with the proposed Order should be amended so as to remove the reference to advocacy. However, as I have already noted I have asked my legal advisors to consider this exclusion in respect of the earlier matter, and should they recommend an alternative approach that achieves the position I wish regarding advocacy, I will let you know.

I would wish to raise one other matter with you regarding advocacy, and that is the phrase that is adopted in the proposed Order – “independent mental health advocacy”. You will see from this letter, and indeed the evidence that I gave to the Committee, that this is the same phrase that is adopted in the 1983 Act to describe the statutory advocacy available in that legislation.

Whilst I accept fully that the intention is to ensure that advocacy is independent, and works within mental health (rather than more general areas), I believe that the wording needs further consideration. This will be particularly important if the Committee accepts my view that legislative competence should extend to those subject to the Act.

#### *Inclusion of local authorities*

The proposed Order places duties on the “*health service in Wales*” in respect of the assessment and treatment of mentally disordered persons. The Committee has received extensive evidence from stakeholders that this should be extended to include local authorities in Wales, and my own evidence concurs with this.

In light of your request for a specific drafting amendment to address this, I have asked my legal advisors to find a suitable approach that should be taken (including any necessary definitions). I will advise you of their findings shortly.

#### *Definition of ‘treatment’*

During my evidence to the Committee we touched upon the importance of clarity in definitions used, and particularly considered whether “treatment” should be defined.

I acknowledge that from the written and oral evidence already put before the Committee, there are a number of views on appropriate definitions. Also, that the

majority consider that any definition should be sufficiently broad to allow future Measures to prescribe the detail if necessary. I believe it is important that any definition used should reflect the range of treatments which such persons may stand in need.

The definition adopted in the *Mental Health (Care and Treatment) (Scotland) Act 2003* is very helpful, but is of course remarkably similar to that in the 1983 Act. The main difference being the expansion of what may be included in 'habilitation'.

Given the need to reduce confusion, and potentially affect the scope of the legislative competence, I would however prefer to adopt the definition established in section 145 of the 1983 Act:

*“medical treatment” includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care”*

Section 145(4) of the 1983 Act also sets out the purpose of such treatment, namely: *“...to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations.”* I have asked my legal advisors to confirm that adopting the same definition as in the 1983 Act is appropriate, but also that the purpose of treatment does not need to be set out in the Order. I will advise you of their findings shortly.

In addition to addressing the specific points of your letter of the 7<sup>th</sup> of May, I also wanted to confirm my position regarding the groups of people to whom future Measures will apply.

I appreciate that you have received evidence from some quarters which would indicate that the Order should only relate to those who have previously had an episode of mental ill-health. This is not a position which I support, I do not consider this is a matter which is appropriate for the Order – instead this will need to be considered in relation to the development of the future Measures.

In my evidence I indicated that I believe that it is important to take an approach to developing the way forward which is inclusive, and in that regard I believe there is much to commend the approach taken in Scotland. Without prejudging this work, and the involvement of stakeholder groups, I would anticipate that Measures will need to be 'staged' so that rights and obligations around assessment, treatment and advocacy are conferred for particular groups at particular times.

As Bill Walden-Jones, Chief Executive of Hafal, highlighted during his evidence to the Committee, the key is to *“identify that much smaller group of patients, and then*

*to build modest but practical and valuable rights for them*". I believe that we will be able to find a way to identify the particular groups, and build incrementally to a position when such rights are afforded to a greater number of people. To exclude a particular group unnecessarily at this stage – such as those who have not previously had an episode of severe mental illness – would undermine this approach.

Similarly, I believe that the proposed Order should be "age blind", in that it should not be limited only to those aged 18 years or over. I do not consider this is a matter that requires the Order to be amended, but it may be helpful for the Explanatory Memorandum to set this out.

Given the tight timescales that Committee is working to, I will write to you again shortly on the points which I have asked my legal advisors to comment upon.

As requested I am copying this letter to the clerk of the Committee, Anna Daniel.

**Edwina Hart AM MBE**

Y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol  
Minister for Health and Social Services

Our ref: MB/EH/0637/08

Your ref:

David Melding AM  
Chair, Proposed Provision of Mental  
Health Services LCO Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

Cardiff Bay  
Cardiff CF99 1NA  
English Enquiry Line: 0845 010 3300  
Fax: 029 2089 8131  
E-Mail: Correspondence.Edwina.Hart@Wales.gsi.gov.uk

Bae Caerdydd  
Caerdydd CF99 1NA  
Linell Ymholiadau Cymraeg: 0845 010 4400  
Ffacs: 029 2089 8131  
E-Bost: Correspondence.Edwina.Hart@Wales.gsi.gov.uk

3 June 2008

Dear David

**NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (No. 6)  
ORDER 2008 (RELATING TO PROVISION OF MENTAL HEALTH SERVICES)**

Thank you for your letter of the 21<sup>st</sup> of May 2008, I am pleased that you have found the information that I have given you so far to be of assistance in the Committee's deliberations.

When I wrote to you on the 14<sup>th</sup> of May, I undertook to come back to you on a number of points following legal advice I had requested, more particularly setting out areas which would need to be addressed. I am now in a position to answer those points more fully.

Whilst I set out below issues which I consider any legislative competence order should cover, these are suggestions and I will want to have the opportunity of reconsidering these issues both once the Committee has reported and set out its recommendations in the light of the comprehensive evidence given to it and once Jonathan Morgan has responded to that report. I am therefore seeking to support the Committee's work by indicating particular issues that you may wish to cover in that report, rather than seeking to pre-empt the work of the Committee.

*Relationship with the Mental Health Act 1983*

In my letter of the 14<sup>th</sup> of May, I set out my views regarding the exclusion from legislative competence over assessment and treatment for those subject to the Mental Health Act 1983. I understand that Jonathan Morgan has subsequently

undertaken to consider again the position in respect of patients received into guardianship.

From the legal advice I have received, it is apparent that the current drafting of the Order would require further refinement. This would be to set out the relevant terms used within the 1983 Act as being ones excluded from legislative competence in so far as relating to assessment and care or treatment. More particularly, this would encompass persons liable to be detained, persons in respect of whom community treatment orders are in force, and persons subject to guardianship.

### Other Exclusions

Consideration will also need to be given to excluding other patients required to submit to treatment by virtue of enactments other than the 1983 Act, for example legislation relating to unfitness to plead and community sentences.

Similarly, it will be important to take account of whether or not it is necessary to specify persons subject to relevant enactments of other administrations, more particularly Scotland, Northern Ireland, the Isle of Man and any one of the Channel Islands, as being excluded from the provisions of the LCO as relating to assessment, care or treatment.

In addition, I believe that the areas of consent to treatment and of restraint or detention should be expressly excluded from the legislative competence being sought.

### Assessment and treatment

The proposed LCO currently sets out the persons in respect of whom assessment and treatment should be made available. In this regard, I believe that such wording is not required. The LCO can simply refer to assessment of mental health and care or treatment (which I deal with below) in relation to mental disorder. There is, I consider, no need to refer to "persons who are or may be [appear to be] mentally disordered" and that reference simply to assessment and care or treatment (as outlined above) will allow subsequent measures to identify the groups of people or conditions of mental disorder that would be encompassed by any specific duties.

### Definition of treatment

Whilst I consider that a suitable definition of treatment within the context of mental health will need to be spelt out at some point, I am conscious that the term "treatment" is already used in the list of defined expressions in Field 9 of Part 1 of Schedule 5 to the 2006 Act, as regards NHS Redress. In that context it clearly



relates to treatment as provided by or for NHS bodies and is narrower in scope than that contemplated in relation to the mental health LCO. But I am sure the Committee would wish to ensure that nothing within the mental health LCO should cast doubt on the breadth of the other meaning of treatment.

Given too the concerns that treatment in the context of this LCO will need to be wider than the provision of medical services, and further given the interface between health, community health and social care services in the provision of mental health services, I consider that reference to “care or treatment” would be more appropriate. The term “care or treatment” itself could be defined more specifically in subsequent measures.

### Definition of mental disorder

As with the Mental Health Act 1983, I believe that dependence on alcohol or drugs should be expressly excluded from the definition of mental disorder. Whilst such dependency may constitute a mental disorder, it is the mental disorders (including certain forms of dementia) arising as a result of such dependency which constitute mental disorder for the purposes of the Mental Health Act and, I consider, should also constitute mental disorder for the purposes of the LCO.

### Inclusion of local authorities

There has been much discussion within the evidence sessions of the Committee over the inclusion or otherwise of local authorities, in order to ensure that the provision of social care are covered.

Having now received advice on this, and also spoken further with Jonathan Morgan, I remain of the opinion we should seek to include social care within any legislative competence order.

In terms of a suitable approach for achieving this, it may well be that the Committee would consider that a matter providing for competence over social care services would need to be inserted into field 15 (social welfare) of Part 1 of Schedule 5 to the 2006 Act, in order to cover social care services for persons who have, or have had, a mental disorder.

There would be a further benefit in taking this approach. By having two general matters, one within Field 9 and one within Field 15 to provide, respectively, care and treatment and social care services, I consider that there would be no need to specify in the LCO the bodies on whom the functions of providing such services would fall, as is currently the case with references to “the health service in Wales”. Instead any subsequent measures could specify the bodies upon whom duties would be placed, more particularly NHS bodies and local authorities.

I also believe that there would need to be exceptions to the social care matter, given a number of related areas are non-devolved, including areas relating to child support, child trust funds, tax credits, tax benefits, social security and independent living funds.

Another matter related to social care, but again one more probably for drafting lawyers to consider, is the relationship of this LCO and other LCOs currently being considered by the Assembly – for example, the one covering vulnerable children.

### Advocacy

Having now received further advice on this matter, I am confident that a suitable form of wording could be found that would reduce the likelihood of confusion in terminology. You will recall that I was keen to ensure that the legislative competence over advocacy was not misunderstood as referring to the Independent Mental Health Advocates (or IMHAs) of the 1983 Act. I believe that this could be achieved by having a separate matter referring to advocacy services in connection with the assessment of mental health and care and treatment in relation to mental disorder.

In such a way this would enable any subsequent measures to specify the nature and type of the advocacy and to define more precisely the nature of advocacy services to be provided.

In addition, in terms of ensuring that legislative competence in relation to advocacy extends to patients subject to the 1983 Act, then it may be more preferable for the Order to insert two matters into Field 9. The first relating to assessment and treatment, and showing the relevant exclusions, with the second relating to advocacy and being silent on such exclusions.

I hope that this further information will assist the work of the Committee, and I look forward to receiving your report shortly in order that I may consider the drafting of legislative competence from a Government perspective.

I have copied this letter, as requested, to Anna Daniel as the Clerk of the Committee.

A handwritten signature in black ink, appearing to be 'A. Daniel', written in a cursive style.