

MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT

CONSTITUTIONAL LAW: DEVOLUTION, WALES

National Assembly for Wales (Legislative Competence) (No.3) Order 2007

Proposal for a Legislative Competence Order Relating to Social Welfare

Vulnerable Children and Child Poverty

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached government proposed Legislative Competence Order (LCO), which would confer additional legislative competence upon the National Assembly for Wales. It is laid in accordance with SO 22.13 and explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy. The UK Government's White Paper "Better Governance for Wales" published in June 2005 set out the UK Government's commitment to enhance the legislative powers of the National Assembly for Wales, as a democratically elected institution with its own detailed scrutiny procedures.
3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.
4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or a Legislative Competence Order, approved by the Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, via a Legislative Competence Order.

5. The proposed Legislative Competence Order would confer further legislative competence on the National Assembly for Wales, in the field of Social welfare (field 15 , 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.

Background

7. The Welsh Ministers have wide ranging responsibilities relating to the field of Social Welfare. Local authorities and their statutory partners in Wales have a responsibility for promoting and securing the wellbeing of vulnerable children and young people, including those in need; children looked after and care leavers. The Welsh Assembly Government has sought, through specific provision for Wales in Parliamentary Bills and by using its subordinate legislation powers, to develop a distinct approach which responds to Welsh circumstances and the needs of children in Wales.

8. The Welsh Assembly Government policy for vulnerable children and young people, looked after children and child poverty is underpinned by four key publications outlined below, and a manifesto commitment to reform the law in relation to vulnerable and looked after children in Wales, including action on child poverty . The Welsh Assembly Government sees the Legislative Competence Order as a necessary vehicle to deliver these commitments.

9. *Rights to Action*¹ is the Welsh Assembly Government overarching policy for all Children and Young People. It is underpinned by seven core aims, that children and young people:

- have a flying start in life
- have a comprehensive range of education and learning opportunities
- enjoy the best possible health and are free from abuse, victimisation and exploitation
- have access to play, leisure, sporting and cultural activities
- are listened to, treated with respect, and have their race and cultural identity recognised
- have a safe home and a community which supports physical and emotional wellbeing
- are not disadvantaged by poverty.

These are based on a number of core themes:

- foundation of principle in the UN Convention on the Rights of the Child;
- entitlements to services based on the needs of the child or young person;
- listening to and acting on the views of children, young people and families;

¹ Right to Action, Welsh Assembly Government 2005

- giving the highest priority to those most in need, recognising that children in care as being a particularly disadvantaged group ; and
- a commitment to partnership working between different local organisations as the only way in which these aspirations can be achieved.

10. *Fulfilled Lives, Supportive Communities*², a ten year strategy for Social Services in Wales and *Towards A Stable Life and A Brighter Future*³, set out the Welsh Assembly Government policy intentions and early actions towards progressive reforms to modernise service delivery for vulnerable children and to accelerate improvements in policies and outcomes for looked after children.

11. The *Child Poverty Implementation Plan* and associated milestones and targets paper - *Eradicating Child Poverty in Wales – Measuring Success* - set out specific solutions and actions to integrate policies and programmes to eradicate child poverty in Wales by 2020, building on existing anti-poverty programmes such as Flying Start, Cymorth and Communities First. Tackling poverty and social exclusion among children and young people is central to the Welsh Assembly Government's broader strategy to improve quality of life, promote social inclusion and equality of opportunity for every community in Wales.

12. There is an increasing difference in approach between England and Wales in the policy, planning and delivery of services for children and young people. The Children Act 2004 marked a step change to a tailored approach in Wales to meet our distinct agenda for children and young people. There are no Children's Trusts in Wales, and Welsh local authorities have been required to create a single director for children's services. Instead, lead directors and members in local government and the NHS have responsibility for partnership working through the Children and Young people Partnerships. The welfare and provision of services to vulnerable children in Wales is the responsibility of 22 local authorities that work coterminously with 22 local health boards and 14 National Health Service (NHS) Trusts in the assessment and planning of local needs across their respective areas. The Directors of Social Services and Chief Education Officers are responsible for provision of service delivery in their areas. Children and Young Peoples Partnerships (22) are the main bodies responsible for coordinating and overseeing the development of a strategic single plan on how the wellbeing of children in their area will be improved to inform the delivery, commissioning, pooling of resources and services across the partnership. The Children & Young People Partnerships have no responsibility for the direct provision of services.

13. The Welsh Assembly Government policy "Towards A Stable Life" implemented from this July is a unique policy for children in care in Wales tailored to reflect local circumstances and solutions. It further demonstrates

² Fulfilled Lives , Supportive Communities - A Strategy for Social Service in Wales Over the Next decade , WAG (2007)

³ Towards A Stable Life And a Brighter Future , Welsh Assembly Government (2007)

the need for Wales to acquire the powers to tackle Welsh priorities and issues. Limitations on the current settlement restrict our ability to bring forward the range of coherent provisions that we would like to see and that would make a difference for vulnerable children in Wales, based on a stronger focus on preventative action and on support for parents as well as children.

14. “Vulnerable children” has a broad definition. In the context of this Order it relates to the needs of a diverse range of children: any child in need, who is on the periphery of care, in care, or who has left care. The LCO is drafted so as to include support to parents who may need help for their mental health, substance misuse, learning disability, living in poverty or other problems that may affect the child’s opportunities and wellbeing. Local authorities currently provide direct services for around 24,000 children in need and other children and families are supported through area based programmes such as Flying Start and Cymorth. “Looked after children” includes children in local authority care in Wales (4,800) and care leavers (1,600) where the Assembly Government and local authorities have unique responsibilities as corporate parents of this particularly vulnerable group. Some 28% (170,000) of children in Wales live in poverty, in households with incomes below the 60% median.

15. There now exists a large volume of legislation relating to the welfare of vulnerable children that is fragmented and has been amended by many Acts of Parliament and various Orders and Regulations, made on an England and Wales or Wales only basis. There are also inconsistencies between areas of legislation, meaning that different groups of young people receive different levels of service based on their status rather than need. The Order will allow consolidation of existing legislation in relation to vulnerable children, bringing together and rationalising provisions made over the years. It will enable the Welsh Assembly Government to bring about greater clarity for local government and its partners as to their duties towards vulnerable children, young people and children in poverty

16. Building on the Welsh Assembly Government 10 year strategy for social services, the intention is to consult (in 2008) on proposals for legislation to implement a strategy for vulnerable children operating in the context of the new statutory Children and Young People Partnerships⁴. The LCO will enable the Welsh Assembly Government to bring forward coherent proposals for legislation in the knowledge that the Assembly will have the necessary powers to implement changes in the law relating to the welfare of children and young people, in particular so as to achieve the stronger focus on supporting families and on preventative action which has already been identified as a key theme.

17. Enhanced powers in this area are needed in order to overcome the current legislative restrictions and to enable Welsh solutions to be brought forward to deliver on the commitments set out above. Current legislative

⁴ Section 25 CA 2004 – Partnership Responsibilities to co-operate on the wellbeing of children and young people

constraints have limited the development and improvements of looked after children policies to meet Welsh needs; which has resulted in objectives not always being fully achieved. The Order will confer enhanced legislative competence for the Assembly to reform the law in relation to vulnerable children and child poverty to ;

(i) rationalise and consolidate existing provisions for vulnerable children; and

(i) reform the law to provide the legal framework for the implementation of key components of the Welsh Assembly Government's policies for vulnerable children in Wales.

iii) provide a top-up payment to the Child Trust Fund accounts, and if necessary create a statutory right for free child care for two year olds in greatest need

18. The Order will also provide a legal framework for the Welsh Assembly Government to take forward its proposals to tackle child poverty, in particular to take action to place duties on public bodies to demonstrate their contribution to ending child poverty and specific arrangements for Welsh local authorities to boost the savings of children in Wales.

Scope

19. The scope of the Order is drawn so as to enable the Assembly to consolidate existing legislation for children in need, including looked after children and care leavers. It would enable changes to support the welfare of broader groups of children, not just those who are categorised as “looked after” or “children in need”. It is also drawn so as to encompass support to families of children who would be at risk of becoming in need had they not had a service. It includes local authorities’ and their partners’ general duties for safeguarding and promoting the wellbeing of all children in their area including specific provisions and actions in relation to tackling child poverty.

20. The Order would in the main cover services currently provided by Parts 2 and 3 and Schedule 2 of the Children Act 1989. It would also extend to include local authorities’ responsibilities for pre-school and other child minding and child care services currently provided under the Flying Start and Cymorth programmes. Other vulnerable children’s legislation which could be included in the powers to make grants for welfare purpose under the Education Act 2002, the Adoption and Children Act 2002, Care Standards Act 2000, the Children Act 2004 and community care legislation in so far as this relates to the functions of local authorities in relation to disabled children and those caring for them and also to children who are themselves carers of disabled adults.

21. The Legislative Competence Order seeks to confer powers on the Assembly to make Assembly Measures in relation to vulnerable children and young people and tackling child poverty in Wales, by adding matters to

Schedule 5 of the 2006 Act under the field of social welfare, while ensuring that any cross border duties in relation to England and Wales are preserved.
Matters 15.1, 15.3, 15.5, 15.6 and 15.8

22. These relate to the general duties of safeguarding and promoting the well-being of children and young persons and support to their families. This will cover local authorities' and statutory partners' (and individuals') broad and specific responsibilities and duties of co-operation (on individuals and bodies) for **safeguarding, and promoting the welfare of all children in Wales and reducing inequality** to ensure they are safe and have optimum life chances. In particular, duties on the statutory Children and Young People Partnership to ensure that strategic plans take into account their duties in promoting wellbeing and including any new arrangements for Child Poverty proofing. This includes provision of services such as child minding and day care and specific duties in relation to vulnerable children in care including education and health. The matters also extend to the regulation and inspection of services (existing or new) in children's homes, foster services and other services whether provided by , individuals and organisations, to ensure safeguards and quality of care, i.e. functions of the Local Safeguarding Vulnerable Children's Board and those currently undertaken by the Care and Social Service Inspectorate Wales and the Care Council for Wales .

23. These matters also cover broad welfare support to children and families under the preventative and poverty reduction agenda, where the child would potentially be deemed to be in need had the service not been provided to the family or sibling/s. They embrace local authorities' support for pre-school child minding, childcare and services currently provided under Flying Start and Cymorth. They also provide scope for local authorities to make financial assistance including contributions to Child Trust Fund accounts and free childcare places for all, or for prescribed categories of children in Wales.

Matter 15.2

24. This covers all functions in respect of public and private arrangements for fostering and adoption services including regulation and inspection of services and individuals working in the service.

25. Matters 15.1, 15.2, 15.3 and 15.4 cover local authorities' duties to those who are in care or who have been cared for (including children temporarily accommodated under youth justice arrangements) and/or who are provided with accommodation (not necessarily by local authorities: this extends to private arrangements), in foster, residential care (children homes, schools etc), secure care and other settings, including those in care under a court order and / or voluntary arrangements. Matter 15.4 also covers local authorities' duties to provide a range of support and services (including accommodation) to care leavers including financial assistance and living costs for care leavers seeking employment or engaged in education and training. Services for care leavers include access to a personal advisor to maintain a pathway plan and wider support in relation to contributions towards expenses

and accommodation for those who are undertaking education or training.

26. Matters 15.3 and 15.4 also cover the duties of local authorities under section 24 of the Children Act 1989 to provide advice and assistance to a class of children and young people, which overlaps with those who have been looked after but which is broader, including those who have been in local authority accommodation but for an insufficiently long period, those who have been looked after by or on behalf of voluntary organisations, those who have been cared for by one of a number of different health bodies for a period of more than three months, those who have been subject to a special Guardianship order and those who have been privately fostered.

Matter 15.7

27. Matter 15.7 covers the functions of the Children's Commissioner for Wales.

Exceptions

28. The table deals with those functions that are not devolved to the Assembly. The definition of these matters includes certain exceptions, set out in the table in paragraph 3. These clarify that the matters do not include child support (ie arrangements for the provision of maintenance by both parents of a child), tax credits, child benefit, guardian's allowance, social security, Motability or Independent Living Funds. Neither do they include the general scheme of child trust funds but they do include the making of payments into Child Trust Fund accounts. This will enable the Welsh Assembly Government to deliver a pre-election commitment to make the payment of contributions by Welsh local authorities into the Child Trust Fund accounts of looked-after children a statutory duty (it is currently in operation as a voluntary scheme, funded by the Welsh Assembly Government); and will also cover the arrangements necessary to deliver a manifesto commitment relating to contributions to long-term savings for children.

Geographical Limits of any Assembly Measure

29. Section 93 of the 2006 Act provides that no Assembly Measure will be law 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.

30. 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 that do not relate to Wales.

Minister of the Crown Functions

31. There are a number of areas of legislation relating to the welfare of vulnerable children that remain the responsibility of UK Ministers, such as the requirements for those deemed unfit to work with children to go on a list maintained by the Secretary of State under the Protection of Children Act 1999. By virtue of part 2 of Schedule 5 to the 2006 Act, the Assembly may not by Measure alter any function of a Minister of the Crown without the consent of the Secretary of State. Therefore even where they do not fall within the exceptions listed above, the Assembly will still not be able to legislate so as to alter those functions without the consent of the UK Government.

Conclusion

32. For the reasons outlined above, the Welsh Assembly Government wishes to propose that legislative competence should be conferred on the National Assembly for Wales in relation to vulnerable children, in the terms of the proposed draft Order attached.

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