

MRS Legislation Briefing

20 May 2008

Plenary Debate on the Draft National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008

This paper provides an overview of the draft National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008, formerly known as the proposed National Assembly for Wales (Legislative Competence) (No.4) Order 2008 (relating to charging for Non-Residential Social Care (Domiciliary Care)). It goes on to summarise the conclusions and recommendations made in the report of the Proposed Domiciliary Care LCO Committee and notes how key recommendations have been responded to in the draft Order.

Contents

1. The motion
2. List of key documents
3. Overview of the draft Order
4. The report of the Proposed Domiciliary Care LCO Committee and the Assembly Government response
5. Westminster Business

1. The motion

The Deputy Minister for Social Services, Gwenda Thomas AM (Neath)

To propose that the National Assembly for Wales in accordance with Standing Order 22.34:

Approves the draft The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008.

2. List of key documents

- The proposed [National Assembly for Wales \(Legislative Competence\)\(No.4\) Order 2008](#) and [Explanatory Memorandum](#) were laid on 26 November 2007.
- The [Proposed Domiciliary Care LCO Committee Report on the National Assembly for Wales \(Legislative Competence\) \(No.4\) Order 2008](#) was laid on 14 March 2008.
- Welsh Affairs Committee report, [The Proposed National Assembly for Wales \(Legislative Competence\) Order in the Field of Social Welfare 2008](#), was published on 5 March 2008.
- The draft [National Assembly for Wales \(Legislative Competence\) \(Social Welfare\) Order 2008](#) Order and [Explanatory Memorandum](#) were laid on 12 May 2008.

3. Overview of the draft Order

The draft Order inserts the following Matter¹ into Field 15 (social welfare) of schedule 5 to the *Government of Wales Act 2006*

Matter 15.1

Charges levied by local authorities for social care services provided or secured by them and payments in respect of individuals with needs relating to their well-being so that they, or persons looking after them, may secure social care services to meet those needs.

This matter does not include any of the following—

- (a) child support;
- (b) tax credits;
- (c) child benefit and guardian's allowance;
- (d) social security;
- (e) independent living funds;
- (f) motability.

The draft Order includes the following definitions of terms used within the Matter:

In this field—

“local authorities” means the councils of counties or county boroughs in Wales;

¹ The proposed LCO on Vulnerable Children currently inserts Matters 15.1 to 15.8 into Field 15 of schedule 5 to the *Government of Wales Act 2006*. The proposed Domiciliary Care LCO inserted Matter 15.9. However, since the LCO being debated today has been laid before the Assembly in advance of the draft Vulnerable Children LCO, it now inserts Matter 15.1 rather than 15.9 into Field 15 of schedule 5.

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

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

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

The Explanatory Memorandum that accompanies the draft Order states that the principle purpose of this LCO is to empower the Assembly to pass Assembly Measures under Part 3 of the *Government of Wales Act 2006* that will enable the Assembly Government to regulate the setting of charges for non-residential social care services and remove the wide disparities that currently exist between local authorities.

This excerpt from the Explanatory Memorandum provides further details about what the Assembly Government hopes to achieve in bring forward this LCO:

“The Matter would enable the Assembly to ensure that where a local authority decides to charge it does so in accordance with such requirements as may be specified by or under an Assembly Measure. The Assembly Government also wishes to have the flexibility to set the level of charging at nil for specific services or for specific client groups, should it conclude that this is appropriate, and the matter is drafted so as to enable such provision to be made by or under an Assembly Measure”. (Paragraph 19).

The draft Order only covers charges levied by local authorities in respect of non-residential social care and so would not, for example, enable the Assembly to legislate in respect of charges levied for non-residential social care by private care providers. It also encompasses the charging arrangements for those service users in receipt of any type of payment to enable them, or persons looking after them, to secure non-residential social care services to meet their needs. Currently, this would only capture a ‘Direct Payment’² as this is the only type of payment made directly to an individual for this purpose.

4. The report of the Proposed Domiciliary Care LCO Committee and the Assembly Government response

The Proposed Domiciliary Care LCO Committee was established in December 2007 to consider and report on the proposed Order. In doing so the Committee considered the general principles of the proposed Order and looked in detail at how it was drafted to ascertain whether its scope and terms were appropriately drawn.

² Direct payments are cash payments made to individuals who have been assessed as needing services, in lieu of social service provisions.

4.1. Overview of the Committee's conclusions

Principle of the proposed Order

The Committee agreed in principle that legislative competence in the area of charging for non-residential social care should be conferred on the Assembly. The Committee took evidence from a range of stakeholders and considered a number of specific issues in order to arrive at their conclusion, namely:

- levels and variation in charges across local authorities;
- the impact of the Welsh Assembly Government's existing '*Fairer Charging*' guidance;
- the use of alternative means to address the problem in variation in charges; and
- the timing of the request for legislative competence.

The Committee noted the reservations of the Welsh Local Government Association and Association of Directors of Social Services about conferral of legislative competence, which it took to be derived from a general concern about the funding of social care services in Wales in the main.

Notwithstanding this, the Committee accepted there was broad support for the proposed Order, which stemmed from the need to address the existing significant and widespread variations in charging for non-residential social care.

Scope, terms and definitions of the proposed Order

The Committee made a number of specific recommendations aimed at improving the proposed Order and accompanying Explanatory Memorandum, either by adding clarity or ensuring that the wording of the proposed Order allowed for the widest possible interpretation so as not to restrict its application in future. These are highlighted in the section below. The Committee was content that the scope of the proposed Order did not extend to residential care.

Excepted Matters

The Committee was content with the excepted matters as provided for in the proposed Order.

4.2. Key recommendations and the Assembly Government's response

The Committee made 23 conclusions and recommendations which are presented in the summary section of its report.

The key recommendations made by the Committee relate to:

- A. The use of the term 'non-residential social care'
- B. The use of the terms 'payments' and 'direct payments'
- C. The definition of 'well-being'
- D. The use of the term 'particular needs'
- E. Interaction with other proposed Legislative Competence Orders and the inclusion of definitions in the Order

Further details are provided below.

A. Use of the term 'non-residential social care'

The Committee acknowledged the views of the Deputy Minister that the term 'non-residential social care' as used in the proposed Order encompasses all elements of the definition of 'social care' to be inserted in Field 15 (social welfare) other than residential care. However, it was not convinced that the wording used in the Matter made this intention clear and expressed concerns that it could result in future proposed Measures being restricted to one element of 'social care', i.e. 'non-residential', excluding other elements within the definition, i.e. support, financial or any other assistance, advice or counselling.

In view of this, it recommended that the Matter be amended to refer to 'social care', while specifically excluding residential care.

Assembly Governments response

The draft Order (an amended version of the original proposed Order) uses the term 'social care services', rather than 'non-residential social care' within the Matter. The following interpretation of 'social care' is included in the draft Order:

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

B. Use of the terms 'payments' and 'direct payments'

Although the Matter contained in the proposed Order refers to 'payments', the Explanatory Note refers specifically to 'direct payments.' The draft Order encompasses the charging arrangements for those service users in receipt of any type of payment to enable them, or persons looking after them, to secure non-residential social care services to meet their needs. Currently, this would only capture a 'Direct Payment' as this is the only type of payment made directly to an individual for this purpose. The Deputy Minister argued that it would not be wise to only talk about direct payments when there is a possibility that other policies will develop that create other charges. The Committee was content with the use of the term 'payments' in the Matter itself but expressed concern that the reference to

'direct payments' in the Explanatory Note had the potential to cause confusion. The Committee therefore recommended that the wording of the Explanatory Note be amended in line with the wording of the Matter to ensure clarity and consistency.

Assembly Government response

The wording of the Explanatory Note remains as 'direct payments.' There is no reference made to this recommendation or an explanation of why the Deputy Minister has chosen not to accept it in the Explanatory Memorandum which accompanies the draft Order.

However, the Explanatory Memorandum has been amended to make it clear that the Matter 'also encompasses the charging arrangements for those service users in receipt of any type of payment'.

C. The definition of 'well-being'

The Committee heard evidence about the importance attached to the concepts of 'participation' and 'dignity' in the United Nations Principles on Older Persons and recommended that they be included in the definition of 'well-being' to emphasise their importance.

Assembly Government response

The recommendation has not been accepted and no explanation for this is provided in the Explanatory Memorandum accompanying the draft Order.

The draft Order does now include the following interpretation of the term 'well-being' (the definition to be used in Field 15 (social welfare)), which it didn't previously:

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

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

D. Use of the term 'particular needs'

The Committee recommended that the proposed Order be amended to refer to 'needs' as opposed to 'particular needs' in the belief that the term 'needs', not qualified by the word 'particular', is more wide-ranging and that it would therefore provide for the widest possible interpretation.

Assembly Government response

The draft Order no longer refers to 'particular needs' but simply to 'needs'.

E. Interaction with other proposed Legislative Competence Orders and the inclusion of definitions in the Order

Definitions of 'social care' and 'well-being' used in the proposed Order were imported from the 'Interpretation of Field' to be inserted in Part 1 of Schedule 5 to the *Government of Wales Act 2006* ('the 2006 Act') by the proposed *National Assembly for Wales (Legislative Competence) (No.3) Order 2007* relating to Vulnerable Children and Child Poverty ('the No.3 Order'). Similarly, the inclusion in the proposed Order of the excepted matters is by way of amendment to the table to be inserted into Schedule 5 of the 2006 Act by the *National Assembly for Wales (Legislative Competence)(No.2) Order 2007* relating to *Environmental Protection and Waste Management* ('the No. 2 Order').

The Committee recommended that the implications of the progress of other LCOs for this LCO, for example in terms of the ordering of Matters, should be explained in the Explanatory Memorandum and that definitions should be included in Explanatory Memoranda from the outset in future.

Assembly Government Response

The draft Order now includes definitions of social care services, local authorities and well-being – the definitions to be used in Field 15 which are relevant to this LCO. The Explanatory Memorandum which accompanies the draft Order states that for the time being, the definitions will apply to this LCO only. It also states that, since the definitions in question have been included in the Order itself, it is no longer necessary for the interaction between this LCO and the Vulnerable Children LCO to be explained.

5. Westminster Business

A [joint scrutiny meeting](#) between the Welsh Affairs Committee and the Proposed Domiciliary Care LCO Committee (the first of its kind) was held on 17 January 2008 in Cardiff.

The Welsh Affairs Committee published its [report](#) on the proposed Order on 5 March 2008. In it, the Committee state that it:

“agree[s] that the proposed Order is consistent with existing Welsh Assembly Government policy and priorities, and that the use of the Legislative Competence Order in Council procedure is the most appropriate route for this to be pursued.” (p129).

The Welsh Affairs Committee recommendations were broadly in line with those of the Proposed Domiciliary Care LCO Committee. The Welsh Affairs Committee also noted that the House of Lords Select Committee on the Constitution has examined the proposed Order, and has concluded that it “does not raise any matters of constitutional principle”. (Letter from Rt Hon Lord Goodland to the Secretary of State for Wales, 22 January 2008, unpublished)