

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

CONSTITUTIONAL LAW: DEVOLUTION, WALES

**The National Assembly for Wales (Legislative
Competence) (Social Welfare) Order 2008** (previously
entitled National Assembly for Wales (Legislative Competence) (No. 4) Order
2008

**Proposal for a Legislative Competence Order
relating to Charging for Non-Residential Social Care
Services**

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.32. It sets out the background to the provisions in the attached government draft Legislative Competence Order (LCO) which would confer additional legislative competence upon the National Assembly for Wales. The LCO is laid in accordance with SO 22.31.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy. The UK Government's White Paper "Better Governance for Wales" published in June 2005 set out the UK Government's commitment to enhance the legislative powers of the National Assembly for Wales, as a democratically elected institution with its own detailed scrutiny procedures.
3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.
4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or a Legislative Competence Order, approved by the Assembly and both Houses of Parliament. The

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

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

Background

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

11. Service users, carers and their representatives are concerned that charges are often set too high and that differing amounts can be charged by different local authorities for similar services resulting in inequities and uncertainties for these groups of people. There is also disparity in the way that benefits and/or disability related expenditure are treated in an individual's assessment.
12. This request for legislative competence is also made in the context of the limitations to the current settlement which, in some respects, restricts the Welsh Assembly Government from tackling Welsh priorities and issues. Whilst the Assembly Government can provide statutory guidance to local authorities under section 7 of the Local Authority Social Services Act 1970 on the exercise of their charging arrangements, this has been limited in its impact.
13. Using the powers in section 7 the Welsh Assembly Government issued "Fairer Charging" guidance to local authorities in 2002 in an attempt to address some of the problems with the wide variation in charging policies operated in Wales. It remains largely good practice except for four key elements which are statutory and which ensure service users are left with a guaranteed level of income after charging has been applied.
14. Section 7 therefore provides a vehicle for issuing general guidance in this area. However, if the Assembly Government were to issue further comprehensive guidance under section 7 in relation to charging for non-residential social care it would need to be sure that it did not fetter local authorities' fundamental discretion to charge for certain services and to recover such charges as they consider reasonable as set out in section 17 of HASSASSA. The Assembly Government can give guidance as to how an authority should set about exercising its discretion to charge, but that guidance cannot make it obligatory for local authorities to exercise their discretion in a particular way. Neither can we alter that discretionary power by limiting the power to charge. Any policy that sought to establish greater uniformity, for example by applying maximum charges or standard charges, could not therefore be achieved using section 7 powers. In this way the current executive powers of the Welsh Ministers are not sufficient to enable them to achieve a fairer and more consistent approach.
15. As well as issuing the "Fairer Charging" guidance, the former Minister for Health and Social Services announced, in February 2006, a package of measures aimed at reducing the impact of charging for non-residential social care for disabled and older people and a range of initiatives to improve the quality and quantity of those services for recipients and carers. He also announced an ongoing commitment to "keep the domiciliary care charging arrangements under review and to make reforms when there is an opportunity to do so".
16. Whilst the Assembly Government has therefore taken steps to ameliorate the impact of charging, other future developments suggest

that further action on charging will be necessary:

- a. Rising pressure on services, with budgets increasing more slowly than in recent years, is likely to mean that individual local authorities will increasingly feel compelled to put up charges in ways which are likely to extend the current disparities;
 - b. As a result of “Delivering Beyond Boundaries”, the Assembly Government’s framework for public services in Wales, there is likely to be a move towards more regionally commissioned and delivered services provided jointly by groupings of bodies. Again it will be important that the charging regimes are supportive of this.
17. New powers in this field would therefore enable the Welsh Assembly Government to bring forward coherent proposals for Measures, based on Welsh priorities and timescales that will allow us to achieve a fair and consistent approach to charging.

Scope

18. It is proposed that the matter be inserted under Field 15: Social Welfare in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to legislate on this issue by way of an Assembly Measure. The Order only covers charges levied by local authorities in respect of non-residential social care. It would not enable the Assembly to legislate in respect of charges levied for non-residential social care by private care providers. It also encompasses the charging arrangements for those service users in receipt of any type of payment to enable them, or persons looking after them, to secure non-residential social care services to meet their needs (this would currently only capture a Direct Payment as this is the only type of payment made directly to an individual for this purpose). The definitions of social care services, local authorities and well-being are set out in the draft Order.
19. The matter would enable the Assembly to ensure that where a local authority decides to charge it does so in accordance with such requirements as may be specified by or under an Assembly Measure. The Assembly Government also wishes to have the flexibility to set the level of charging at nil for specific services or for specific client groups, should it conclude that this is appropriate, and the matter is drafted so as to enable such provision to be made by or under an Assembly Measure.
20. The principle purpose of this LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act that will enable the Assembly Government to regulate the setting of charges and remove the wide disparities that currently exist.

Changes to the LCO following pre-legislative scrutiny

21. The proposed Order which was submitted for pre-legislative scrutiny was reliant on elements of the Vulnerable Children Order for definitions and exceptions. Because this draft Order will now be laid before the Assembly in advance of the Vulnerable Children Order, the following amendments have been made, many of which address recommendations made by the Assembly scrutiny Committee and the Welsh Affairs Committee in their reports:

- Re-numbering of the matter – 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 previous version of this LCO on charging for non-residential social care therefore inserted matter 15.9 into Field 15. As this LCO will now be laid before the Assembly in advance of the Vulnerable Children LCO the matter that it inserts is now matter 15.1.
- Inclusion of the definitions of social care services, local authorities and well-being – the definitions to be used in Field 15 which are relevant to this LCO (social care services, local authorities and well -being) have been moved into it with minor amendments to reflect the fact that for the time being, the definitions will apply to this LCO only. Both the Welsh Affairs Committee and the Assembly Scrutiny Committee recommended that the definitions which were relevant to this Order be included in the Explanatory Memoranda and the interaction between this LCO and the Vulnerable Children LCO explained. As they are now in the Order itself this is no longer necessary.
- Definition of social care – the term ‘social care’ which, as explained above, was previously included in the Vulnerable Children LCO, has been replaced in that Order by the term ‘social care services’. The wording of the matter in this LCO has therefore been amended to reflect that change. The Welsh Affairs Committee recommended that the definition of ‘social care’ in the proposed Order be amended to read “means” rather than “includes”. The revised definition of ‘social care services’ uses the term ‘means’ rather than ‘includes’ as suggested.

The term ‘residential care’ has also been specifically excluded from the definition of ‘social care’ for the purposes of this Order. Both Committees felt that this was required in order to provide clarity as to exactly what was included within the scope of the matter.

- Exceptions – When the LCO on Vulnerable Children is laid a table will be inserted at the end of Schedule 5 and the general exceptions will be moved to that table. In the meantime, the

exceptions that are relevant to this LCO have been listed within matter 15.1. This is a technical amendment that has no effect on the substance of the LCO.

22. The Welsh Affairs Committee and Assembly Scrutiny Committee recommended that the Order should refer to 'needs' rather than 'particular needs' as it was felt that this would make the term more wide-ranging. Whilst it is not clear how removing the word 'particular' would make the matter more wide-ranging, the phrase has been amended so as to simply refer to 'needs', on the grounds that the word 'particular' was not needed in the context of this Order.

Exceptions

23. As explained above, the matter covered in this Order will be subject to certain exceptions. The effect of the exceptions will be to exclude the following subjects from the legislative competence in the new matter: child support (i.e. arrangements for the provision of maintenance by both parents of a child); tax credits; child benefit and guardian's allowance; social security; Independent Living Funds; and Motability.

Geographical limits of any Assembly Measure

24. 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.
25. 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

26. This draft Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of 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

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

Gwenda Thomas
Deputy Minister for Health and Social Services

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