



Cynulliad National
Cenedlaethol Assembly for
Cymru Wales

Proposed Vulnerable Children LCO Committee

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

Committee Report
January 2008

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Committee Members

Karen Sinclair (Chair)	Labour	Clwyd South
Nerys Evans	Plaid Cymru	Mid and West Wales
Lesley Griffiths	Labour	Wrexham
David Melding	Welsh Conservative Party	South Wales Central
Kirsty Williams	Liberal Democrats	Brecon and Radnorshire

Summary

The conclusions and recommendations of the Proposed Vulnerable Children LCO Committee are as follows:

- We agree, in principle, that legislative competence in the areas identified within the proposed Order should be conferred on the Assembly.
- We seek assurances from the Assembly Government that the arrangements for the lines of accountability, functions and remit of the Children's Commissioner for Wales will be considered in a future Measure and we recommend that the Assembly Government introduce a proposed Measure on this matter at the earliest opportunity.
- We recommend that the Assembly Government amend Matter 15.7 to make specific reference to whistle-blowing and advocacy.
- In light of the evidence received and the importance attached to the concept of play in the United Nations Convention on the Rights of the Child and by the Assembly Government in their policy documents on this subject, we are persuaded of the case for including the word 'play' within paragraph (c) of the interpretation section relating to "well-being", and we so recommend.
- We are persuaded by the weight of evidence received that the United Nations Convention on the Rights of the Child, in particular, is of such importance as to merit inclusion on the face of the proposed Order, and we so recommend.
- We also strongly advocate the establishment of a statutory monitoring group to monitor the implementation of the United Nations Convention on the Rights of the Child within Wales, and report regularly to the Assembly. We suggest this could be considered by a Measure committee established to report on a proposed Measure arising out of the proposed Order.
- We note the evidence received from witnesses and the Deputy Minister that the upper age limit provided for in the interpretation of 'young persons' should be amended to 25 years, and we so recommend.
- We feel that the concept of 'child poverty' is so central a theme of the proposed Order that it should be recognised by the inclusion of the term on the face of the legislation, especially in light of the Assembly Government's target to eradicate child poverty in Wales by 2020. We therefore recommend that provision be made within the body of the proposed Order for 'child poverty', for example, by the addition of a further Matter relating expressly to this.

- We further recommend that corresponding provision be made in the Interpretation section of the proposed Order for 'child poverty'.
- We acknowledge the settled will of the Assembly to introduce a ban on the physical punishment of children. However, we are concerned that the Assembly Government has not made clear its intentions on this matter in respect of the proposed Order, and has not shared with us the legal advice it has received. On this basis, we do not feel able to make a recommendation on this point, and would instead call on the Assembly Government to clarify its position regarding the scope of the proposed Order in relation to the removal of the defence of reasonable punishment.
- We recommend that, if the legal advice received by the Deputy Minister suggests the proposed Order is not a suitable vehicle for the transfer of this competence, the Deputy Minister pursue the transfer of the appropriate powers to the Assembly by means of the *Children and Young Persons Bill*.

1. Introduction

Background

1. On 9 July 2007, the Deputy Minister for Social Services, Gwenda Thomas AM ('the Deputy Minister'), laid the proposed *National Assembly for Wales (Legislative Competence) (No. 3) Order 2007* ('the proposed Order') and Explanatory Memorandum, in accordance with Standing Orders 22.13 - 22.14. Copies of these documents are attached at Annex 1. This was accompanied by a statement by the Deputy Minister in plenary on 10 July.¹
2. Previously, on 3 July 2007, the Business Committee had agreed to refer the proposed Order, when laid, to a committee for detailed consideration, in accordance with Standing Order 22.16.
3. Following a resolution in plenary on 4 July 2007, the Proposed Vulnerable Children Legislative Competence Order Committee ('the Committee') was established, in accordance with Standing Order 21, to consider and report on the proposed Order no later than 25 January 2008.²

Scope of the Committee's Scrutiny

4. At our first meeting on 27 September 2007, we agreed the scope of our scrutiny, as set out below:
 - i. to decide whether the general principles of the proposed Order, i.e. that legislative competence as specified in Matters 15.1-15.8, should be conferred on the Assembly; and
 - ii. to decide whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on Vulnerable Children and Child Poverty. In particular, are the terms of the proposed Order too broadly or too narrowly defined.

Evidence

5. We issued a general call for evidence and invited key organisations within the fields of vulnerable children and child poverty to submit written evidence to inform our work. A copy of our consultation letter is attached at Annex 2. A list of consultation responses is attached at Annex 3.
6. We took oral evidence from a number of witnesses, details of which are attached at Annex 4. We also received letters of clarification on aspects of the proposed Order from the Deputy Minister, which are attached at Annex 5.

¹ Record of Proceedings (RoP), 10 July 2007, pages 39-42

² Reporting deadline set by the Business Committee at its meeting of 18 September 2007

7. Under Standing Order 22.21, in preparing our report we must, so far as is reasonable 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.

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

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

2. Principle of the proposed Order

Background

9. The purpose of the proposed Order is to amend Part 1 of Schedule 5 to the *Government of Wales Act 2006* ('the 2006 Act') to confer legislative competence on the Assembly in relation to vulnerable children and child poverty, by inserting 8 new matters into Field 15 (Social Welfare) of that Schedule:

Matter 15.1 Safeguarding children from harm and neglect.

Matter 15.2 Adoption and fostering.

Matter 15.3 Social care for children and the persons who care for them.

Matter 15.4 Social care for young persons.

Matter 15.5 Co-operation between persons who exercise functions or are engaged in activities relating to the well-being of children or young persons and arrangements to ensure that functions are discharged with regard to the need to safeguard and promote the well-being of children and young persons.

Matter 15.6 Strategic planning by local authorities for the discharge of functions relating to the well-being of children or young persons.

Matter 15.7 Continuance, dissolution or creation of, and conferral of functions on, an office or body concerned with safeguarding and promoting the well-being of children or young persons and, in particular—

- (a) reviewing the effect on children or young persons of the exercise by any person of functions related to their well-being,
- (b) reviewing and monitoring arrangements for dealing with complaints and representations made by, or on behalf of, children or young persons in respect of any services provided to them by persons with functions related to their well-being or by persons providing them with social care,
- (c) examining cases of particular children or young persons,

- (d) considering, and making representations about, any matter affecting the well-being of children or young persons.

Matter 15.8 Promotion of equality between children or young persons in relation to their well-being.

10. The competence to be conferred by Matters 15.1 - 15.8 is subject to a number of excepted matters which specify areas where legislative competence is not conferred on the Assembly.

11. The conferral of legislative competence on the Assembly by the proposed Order will enable the Assembly Government, Assembly Committees or Members to bring forward proposals for legislation, in the form of Assembly Measures, within the scope of Matters 15.1 - 15.8.

*Explanatory Memorandum*³

12. In the Explanatory Memorandum accompanying the proposed Order, the Assembly Government states that its "policy for vulnerable children and young people, looked after children and child poverty is underpinned by four key publications⁴ (...) and a manifesto commitment to reform the law in relation to vulnerable and looked after children in Wales (...)." ⁵ It goes on, "the Welsh Assembly Government sees the Legislative Competence Order as a necessary vehicle to deliver these commitments." ⁶

13. It asserts that the conferral of enhanced powers in this area is needed to overcome the current legislative restrictions and enable Welsh solutions to be brought forward to deliver on Assembly Government commitments. ⁷

14. The Explanatory Memorandum also states that the legislative competence sought would enable the Assembly to legislate to:

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

(ii) 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; and

³ Memorandum from the Welsh Assembly Government, National Assembly for Wales (Legislative Competence) (No. 3) Order 2007, Proposal for a Legislative Competence Order Relating to Social Welfare, GPO-03-EM

⁴ *Right to Action*, Welsh Assembly Government, (2005); *Fulfilled Lives, Supportive Communities - A Strategy for Social Service in Wales over the Next Decade*, Welsh Assembly Government (2007); *Towards a Stable Life and a Brighter Future*, Welsh Assembly Government (2007); *Child Poverty Implementation Plan*, Welsh Assembly Government

⁵ GPO-03-EM, Paragraph 8

⁶ GPO-03-EM, Paragraph 8

⁷ GPO-03-EM, Paragraph 17

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.”⁸

15. It goes on:

“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.”⁹

Evidence from consultees

16. There was broad support for the general principles of the proposed Order amongst those responding to the consultation exercise, with most respondents specifically welcoming it. In particular, Barnardo’s Cymru stated “we (...) support the broad approach taken by the LCO and believe that all of those who will need services and support would fall under its current remit.”¹⁰

17. Save the Children, in welcoming the proposed Order, stated they “wholeheartedly support the intention to develop made-in-Wales policies for Wales’ children and the need to consolidate the law as it relates to vulnerable children”.¹¹

18. Some respondents, however, expressed concern that past implementation of policies on the ground has been slow and resources limited. On this basis, these witnesses emphasised the need to fully resource any future legislative commitments arising from the proposed Order.¹²

Evidence from the Deputy Minister

19. In her introductory statement to plenary¹³, the Deputy Minister outlined the limitations on the Assembly Government’s current legislative powers in the area of vulnerable children and child poverty, stating:

“The current legislation on child welfare is fragmented. This creates inconsistencies, and results in different groups of children and young

⁸ GPO-03-EM, Paragraph 17

⁹ GPO-03-EM, Paragraph 18

¹⁰ Written evidence, VC3

¹¹ Written evidence, VC16

¹² Including Save the Children, British Association of Social Workers, Welsh Local Government Association, Equality and Human Rights Commission

¹³ RoP, 10 July 2007

people receiving different levels of services based on their status rather than their need.”¹⁴

20. In committee, she expanded on this point, stating:

“(…) the LCO does, of course, go wider than vulnerable children and children in poverty (…). The LCO has been drafted so that it will allow the Welsh Assembly Government to develop a Measure to consolidate and rationalise children’s legislation—mainly provisions in the Children Acts of 1989 and 2004—to deliver on the commitment in ‘One Wales’. The LCO has broad coverage to include the existing duties and functions of local authorities and their partners, general and specific, in relation to the safeguarding and promotion of the wellbeing of all children and young people in their communities—vulnerable children and others—and, of course, to support their families.”¹⁵

21. Responding to concerns relating to implementation and resources, the Deputy Minister argued that the proposed Order will not have any cost implications. She acknowledged that any future Measures or regulations made under the proposed Order would place burdens on local authorities, but gave a commitment that:

“The Assembly Government will cover the costs to comply with an agreement made with local government in Wales, by increasingly annually the sum available to local authorities.”¹⁶

Our view

22. We note the broad support that exists for the proposed Order and in particular that no organisation has opposed, in principle, the conferral of legislative competence in the areas identified within the proposed Order. We also note the reasons put forward by the Deputy Minister for seeking this legislative competence. **We agree, in principle, that legislative competence in the areas identified within the proposed Order should be conferred on the Assembly.**

23. We acknowledge the evidence received from organisations concerned with a lack of funding of policies in the past, and emphasise the need for any future Measure committee, established to report on a proposed Measure arising out of the proposed Order, to fully consider the financial implications of that proposed Measure.

24. In considering whether the proposed Order is too broadly or too narrowly drawn, we have highlighted some issues relating to the specific

¹⁴ RoP, 10 July 2007, pages 39-42

¹⁵ RoP, (Vulnerable Children LCO Committee), 25 October 2007, paragraph 6

¹⁶ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 37

drafting of certain Matters and some other issues. Paragraphs 25-109 of this report consider these issues.

3. Scrutiny of the Proposed Order

Matter 15.1 - 'Harm and Neglect'

Background

25. Matter 15.1 of the proposed Order makes provision for 'safeguarding children from harm and neglect'.

26. We sought clarification from the Deputy Minister as to whether the words 'harm and neglect' were mutually exclusive in this instance, or whether any test to demonstrate that both had occurred would be applied.

27. In answer, the Deputy Minister said:

"Harm and neglect are not mutually exclusive. Neglect is a causative factor of harm. The inclusion of the term 'neglect' emphasises that the matter is concerned with the harm that arises not only from positive actions, but from omissions on the part of those responsible." ¹⁷

28. She went on to say:

"I should point out that the words in the Legislative Competence Order are not tied to particular statutory definitions; they will bear their ordinary meaning in English." ¹⁸

29. In her letter of 5 November 2007, the Deputy Minister expanded on this point:

"(...) the expression is not intended to mean that both harm and neglect need to be demonstrated before the relevant provisions operate. (...) It is ... worth noting that the expression 'harm and neglect' is not tautologous. There is a purpose in mentioning both things."

Our view

30. We note the Deputy Minister's clarification of this point and are content with the wording of Matter 15.1.

¹⁷ RoP, (Vulnerable Children LCO Committee), 25 October 2007, paragraph 49

¹⁸ RoP, (Vulnerable Children LCO Committee), 25 October 2007, paragraph 49

Matter 15.7 - Relating to the Children's Commissioner for Wales - arrangements for accountability, functions and remit

Background

31. Matter 15.7 makes provision for the 'continuance, dissolution or creation of, and conferral of functions on, an office or body concerned with safeguarding and promoting the well-being of children or young persons.' This Matter relates primarily to the Children's Commissioner for Wales.

Evidence from consultees

32. The Acting Children's Commissioner for Wales raised concerns about the current accountability arrangements for the Office of Children's Commissioner. In written evidence, she said:

"We consider that an office or body concerned with safeguarding and promoting the well-being of children or young persons should be accountable to the National Assembly for Wales rather than to the Welsh Assembly Government (...) [as that office] would be able to carry out this role more effectively and independently if their budget is controlled by the National Assembly rather than a Government Department, as it is now by the Department for Children, Education, Lifelong Learning and Skills."¹⁹

33. This was a view supported by the British Association for Adoption and Fostering and Save the Children, who expressed concern that this accountability arrangement was out of line with the United Nations endorsed standards governing independent human rights institutions, known as the 'Paris Principles'.²⁰ This was a concern shared by Dr. Osian Rees of Bangor University.²¹

34. Both Save the Children and the Acting Children's Commissioner emphasised the importance of independence and transparency in these arrangements and questioned whether Matter 15.7 as currently drafted would allow for proposed Measures to be brought forward to enable comprehensive examination of the accountability arrangements, functions and remit of the Office of the Children's Commissioner.

Evidence from the Deputy Minister

35. In answer to the question as to whether Matter 15.7 as drafted would allow for a comprehensive examination of the accountability arrangements, functions and remit of the Office of Children's Commissioner, the Deputy Minister said:

¹⁹ Written evidence, VC7

²⁰ Written evidence, VC16

²¹ Written evidence, VC10

“The wording of Matter 15.7 is entirely open and neutral and builds in no presumption about to whom the Children’s Commissioner should be accountable. Therefore, it is entirely open for a future Measure to provide for the ... Commissioner to be accountable to the National Assembly for Wales.”²²

Our view

36. We note the volume of evidence received relating to the arrangements for the accountability, functions and remit of the Office of the Children’s Commissioner for Wales and the importance of independence and transparency in these arrangements, in line with international best practice.

37. We acknowledge that there was some concern amongst witnesses that the proposed Order, as drafted, would not allow changes to these arrangements to be made by the Assembly. However, we note and accept the Deputy Minister’s clarification that this would be permissible.

38. On this basis, and in light of the evidence we received, we seek assurances from the Assembly Government that the arrangements for the lines of accountability, functions and remit of the Children’s Commissioner for Wales will be considered in a future Measure and we recommend that the Assembly Government introduce a proposed Measure on this matter at the earliest opportunity.

Matter 15.7(b) - Children’s Commissioner for Wales - whistle-blowing and advocacy

Background

39. Matter 15.7(b) provides, in particular, for ‘reviewing and monitoring arrangements for dealing with complaints and representations made by or on behalf of, children or young persons in respect of any services provided to them by persons with functions related to their well-being or by persons providing them with social care.’

Evidence from consultees

40. The Acting Children’s Commissioner also raised concerns about a lack of provision within Matter 15.7(b) for reviewing and monitoring whistle-blowing and advocacy which, she argued, “are essential safeguards in promoting and safeguarding the rights and welfare of children.”²³

41. This was supported by the Equality and Human Rights Commission and MIND Cymru, who argued:

²² RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 103

²³ Written evidence, VC7

“To have an independent advocate is vitally important [for young people] ... to build [their] confidence and to give them credibility when they present their views to others. For that to be an independent person is as important for young people as it is for people who, for example, lack capacity or for adults with a mental health problem who need an advocate.”²⁴

42. When questioned about the lack of explicit reference within Matter 15.7 to whistle-blowing and advocacy, the Acting Children’s Commissioner responded:

“I do not understand why it is not there if the issue of complaints is. As we know, complaints, whistle-blowing and monitoring are the three pillars to safeguard vulnerable children in particular, as we saw with the Waterhouse inquiry and many other inquiries.”²⁵

Evidence from the Deputy Minister

43. When questioned as to why whistle-blowing and advocacy were not explicitly mentioned in the proposed Order, the Deputy Minister said:

“Matter 15.7 covers the review and monitoring of arrangements for dealing with complaints and representations made by or on behalf of children or young persons. This would cover the aspect of complaints made by employees who are whistleblowers. Changes to the law to offer protection to the whistleblower himself or herself, as opposed to the substance of the complaints, are matters of employment law and are therefore outside the scope of the devolution settlement. The LCO does provide for future Measures to legislate in relation to advocacy. This is the reason behind the inclusion of the wording ‘securing their rights’ in matter 15.8, in the definition of ‘well-being’.

44. When questioned further as to why, if whistle-blowing and advocacy are implicit within the terms of the proposed Order, they are not expressly provided for, the Deputy Minister’s legal adviser argued that in drafting the proposed Order, a ‘less is more’ approach was taken with regard to the wording used in order to avoid implicitly excluding something by failing to include all other things that could be in its class.²⁶

Our view

45. We note the strength of evidence provided on this matter and do not consider the current wording of Matter 15.7(b) to be explicit enough in its reference to whistle-blowing and advocacy.

²⁴ RoP, (Vulnerable Children LCO Committee), 15 November 2007, paragraph 118 & 120

²⁵ RoP, (Vulnerable Children LCO Committee), 6 November 2007, paragraph 78

²⁶ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 138

46. We remain unconvinced by the reasons put forward by the Deputy Minister for not including these matters on the face of the proposed Order. Therefore, we recommend that the Assembly Government amend Matter 15.7 to make specific reference to whistle-blowing and advocacy.

Interpretation of 'Well-being' - 'Sensory / Communication Impairments'

Background

47. Paragraph (a) of the interpretation of 'well-being' within Field 15 relates to 'physical and mental health and emotional well-being'.

Evidence from consultees

48. We received evidence from the National Deaf Children's Society (NDCS) stating that legislation, in both principle and practice, has not responded adequately to the needs of children with sensory or communication impairments.²⁷

49. The NDCS acknowledged that the proposed Order as drafted encompassed children considered to be vulnerable, but questioned whether paragraph (a) of the interpretation of 'well-being' provided for in the proposed Order extended to those children with sensory or communication impairments.

Evidence from the Deputy Minister

50. In response to this question, the Deputy Minister confirmed that the proposed Order extends to children with sensory or communication impairments and support for families and carers of a child in need, including disabled children and those with a sensory impairment. She stated:

"The LCO is drafted in a way that covers the definition of 'disabled' as it appears in section 17 of the Children Act 1989. This expressly covers those with sensory impairments."²⁸

Our view

51. We note and welcome the clarification from the Deputy Minister on this point and are content that the proposed Order, as drafted, makes provision for children with communication or sensory impairments.

²⁷ Written evidence, VC2

²⁸ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 49

Interpretation of 'Well-being' - 'Fear'

Background

52. Paragraph (b) of the interpretation of 'well-being' within Field 15 relates to 'safety from harm and neglect'.

Evidence from consultees

53. We received evidence from the British Association for Adoption and Fostering advocating the inclusion of the word 'fear' in paragraph (b) of the interpretation of 'well-being',

"because (...) one of the most dreadful things that can happen to a child is to be afraid. Recognising how significant that is for an individual child in a definition feels to us to be very child-focused."²⁹

Evidence from the Deputy Minister

54. Responding to this proposal, the Deputy Minister acknowledged that fear may be a cause or effect that could lead to concern for the safety of a child, but argued that the addition of the word 'fear' would not add any value to the definition. Her legal adviser expanded upon this, explaining that fear is a part of the broader definition of well-being, harm and neglect provided for in the *Children Act 2004* and other guidance.³⁰

Our view

55. We note, and are sympathetic to, the evidence received from the British Association for Adoption and Fostering, but accept the Deputy Minister's argument that the wording of paragraph (b) of the interpretation of 'well-being' encompasses fear and that the addition of the word 'fear' would not add any value to the definition.

Interpretation of 'Well-being' - 'Play'

Background

56. Paragraph (c) of the interpretation of 'well-being' within Field 15 relates to 'education, training and recreation'.

Evidence from consultees

57. In their written evidence, Play Wales strongly advocated the inclusion of the word 'play' in paragraph (c) of the interpretation of 'well-being'.³¹

²⁹ RoP, (Vulnerable Children LCO Committee), 20 November 2007, paragraph 87

³⁰ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 72

³¹ Written evidence, VC9

They argued that play is a vital component in the positive development of a child, and that its importance is underpinned by an Assembly Government Play Policy³² which states:

“Play is so critically importance to all children in the development of their physical, social, mental, emotional and creative skills that society should seek every opportunity to support it and create and environment that fosters it.”

58. They further argue that whilst recreation is important in society, ‘recreation’ as a term is considered to encompass pastimes and can be described as an indulgence, and does not adequately represent the importance of the concept of play. Expanding on this, they argue:

“... if there were a scale of importance for factors relating to children’s well-being, recreation would feature after play.”³³

Evidence from the Deputy Minister

59. In response, the Deputy Minister argued that ‘recreation’ has a broader meaning than ‘play’, and that the inclusion of the word ‘play’ in the interpretation of well-being would not add anything to the definition.³⁴

60. She did, however, express some sympathy with the points raised by Play Wales and acknowledged that the United Nations Convention on the Rights of the Child refers specifically to the right of a child to play, conceding that she did not see any reason why the word ‘play’ could not be inserted into the proposed Order provided it was in addition to the term ‘recreation’.³⁵

Our view

61. We note the Deputy Minister’s points, but do not consider that the term ‘recreation’ adequately provides for the concept of play.

62. In light of the evidence received and the importance attached to the concept of play in the United Nations Convention on the Rights of the Child and by the Assembly Government in their policy documents on this subject, we are persuaded of the case for including the word ‘play’ within paragraph (c) of the interpretation section relating to “well-being”, and we so recommend.

³² Welsh Assembly Government Play Policy, October 2002

³³ Written evidence, VC9

³⁴ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraphs 80-81

³⁵ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraphs 80 & 85

Interpretation of 'Well-being' - the United Nations Convention on the Rights of the Child (UNCRC)

Background

63. Paragraph (f) of the interpretation of 'well-being' within Field 15 relates to 'securing the rights' of individuals.

Evidence from consultees

64. We received evidence from a number of respondents calling strongly for the proposed Order to contain a reference to the UNCRC.

65. Children in Wales said there was a need for:

"... a systematic incorporation either of each of the Articles of the United Nations Convention on the Rights of the Child into domestic law or better still the inclusion of the whole of the UNCRC in an overarching piece of legislation."³⁶

66. This view was supported by Save the Children, who were hopeful that the proposed Order would enable the Assembly to incorporate more comprehensively, in law, requirements on public bodies to comply with the UNCRC via new Measures.³⁷

67. Similarly, the British Association for Adoption and Fostering (BAAF) suggested that the proposed Order should enable the policy agenda to incorporate a core set of entitlements / rights for children in Wales and that this might be secured by incorporating a reference to the UNCRC in the proposed Order.³⁸

68. When questioned as to why the UNCRC should be included in the proposed Order to the exclusion of other relevant international treaties or to a general reference to rights, BAAF said it was because of the convention's huge significance globally in terms of defining the essential rights of the child.³⁹

69. Further to this, Save the Children highlighted the importance of referring to the UNCRC in the proposed Order as one means of raising general awareness of the rights and entitlements of children and young people.⁴⁰

³⁶ Written evidence, VC22

³⁷ Written evidence, VC16

³⁸ Written evidence, VC23

³⁹ RoP, (Vulnerable Children LCO Committee), 20 November 2007, paragraph 20

⁴⁰ RoP, (Vulnerable Children LCO Committee), 20 November 2007, paragraph 22

70. They, and others, did however acknowledge that inserting particular reference to the UNCRC into the proposed Order may inadvertently limit the scope of the proposed Order.

Evidence from the Deputy Minister

71. Responding to these points, the Deputy Minister said:

“We have taken an important step in enshrining the rights of the child in legislation and the definition of wellbeing, securing the rights in Matter 15.8”⁴¹

72. Further to this, her legal adviser informed us that:

“... there is difficulty about expressly including reference to the convention, in that the convention is an international treaty, to which the UK is signed up and is a state signatory (...). It would be constitutionally difficult for a constituent part of the United Kingdom to incorporate the convention into its law (...).”⁴²

73. The Deputy Minister expanded on this point in writing, stating:

“Express reference to the UNCRC and its broad sweep of entitlements for children and young persons in an Order which is seeking to express in clear language the extent of the Assembly’s legislative power is likely to lead to uncertainty both for the Assembly, the Welsh Assembly Government and the UK Government.”⁴³

Our view

74. We note the Deputy Minister’s response, but we are persuaded by the weight of evidence received that the United Nations Convention on the Rights of the Child, in particular, is of such importance as to merit inclusion on the face of the proposed Order, and we so recommend.

75. We also strongly advocate the establishment of a statutory monitoring group to monitor the implementation of the United Nations Convention on the Rights of the Child within Wales, and report regularly to the Assembly. We suggest this could be considered by a Measure committee established to report on a proposed Measure arising out of the proposed Order.

⁴¹ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 57

⁴² RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 61

⁴³ Letter from the Deputy Minister, 17 December 2007

Interpretation of ‘Young Persons’

Background

76. The interpretation of ‘young persons’ in the proposed Order provides for individuals who have not attained the age of 24.

Evidence from consultees

77. When questioned about the interpretation in the proposed Order of ‘young persons’ as meaning ‘persons who have attained the age of 18 but not the age of 24’, all respondents said this provision should be amended to extend this provision to 25 years of age, in line with existing legislation and policy in this area.

Evidence from the Deputy Minister

78. The Deputy Minister conceded that the definition of young persons should be amended in this way, and in addition, confirmed that there is an amendment relating to care leavers in the current *Children and Young Persons Bill* before Parliament that raises the upper age to which duties are owed to 25 years.

Our view

79. We note the evidence received from witnesses and the Deputy Minister that the upper age limit provided for in the interpretation of ‘young persons’ should be amended to 25 years, and we so recommend.

Interpretation of ‘Child Poverty’, ‘Vulnerable Children’ and ‘Family’

80. There is no provision made in the proposed Order for an interpretation of ‘child poverty’, ‘vulnerable children’ or ‘family’.

Evidence from consultees

81. We have received conflicting evidence as to whether interpretations of ‘child poverty’, ‘vulnerable children’ and ‘family’ should be provided for in the proposed Order or whether that should remain a matter for future Measures.

82. Some respondents felt that a clear definition of these terms on the face of the proposed Order would give clarity of meaning and intention, whereas other respondents were wary of inadvertently limiting the scope of future Measures by including too many definitions in the enabling Order⁴⁴.

⁴⁴ Including the Equality and Human Rights Commission and MIND Cymru

83. On the issue of child poverty in particular, the WLGA argued that the inclusion of this term in the proposed Order was an important part of “ensuring that the commitment to the eradication of child poverty has the necessary profile in the LCO.”⁴⁵

84. They went on to say:

“Social and economic wellbeing covers it, but this is partly to do with the messages that the LCO provides about the importance of that issue. (...) Having [a reference to child poverty] within the LCO would ensure that the focus is there; rather than implying that it is there through social and economic wellbeing, it would be clear, and specific action would be needed to deliver it.”

Evidence from the Deputy Minister

85. Responding to the question as to why there is no reference to ‘child poverty’, ‘vulnerability’ or ‘family’ in the proposed Order, the Deputy Minister, in her letter of 5 November 2007, stated:

“The LCO covers all children and their families who need help of some kind to ensure the well-being of those children (...). The drafting approach in the LCO is to describe the types of things needed to provide help to those children and families that require assistance of some kind, rather than to describe the type of child or family. (...) Including definitions of the types of child and family covered would add nothing other than a further definitional task.”

86. She expanded on this in her oral evidence, arguing that:

“[although]... vulnerable children and child poverty are the main focus of the new legislative competence (...), the title of the LCO merely provides a convenient label to describe the main thrust of the proposals...”⁴⁶

Our view

87. We note the evidence suggesting that the proposed Order should provide for an interpretation of ‘vulnerable children’ and ‘family’, but are not persuaded that their inclusion would add any value to the proposed Order.

88. However, we feel that the concept of ‘child poverty’ is so central a theme of the proposed Order that it should be recognised by the inclusion of the term on the face of the legislation, especially in light of the Assembly Government’s target to eradicate child poverty in Wales by

⁴⁵ RoP (Proposed Vulnerable Children LCO Committee), 20 November 2007, paragraph 137

⁴⁶ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 6

2020.⁴⁷ We therefore recommend that provision be made within the body of the proposed Order for 'child poverty', for example, by the addition of a further Matter relating expressly to this.

89. We further recommend that corresponding provision be made in the Interpretation section of the proposed Order for 'child poverty'.

⁴⁷ GPO-03-EM, paragraph 11

4. Other issues

Reasonable Punishment

Background

90. Under section 58 of the *Children Act 2004* ('the 2004 Act'), the defence of reasonable punishment (formerly reasonable chastisement) of a child exists for parents and those acting in *loco parentis* when charged with common assault or battery under the *Criminal Justice Act 1988*.⁴⁸

Evidence from consultees

91. We received a substantial amount of evidence advocating strongly the removal of the defence of reasonable punishment that exists under the 2004 Act, and questioning whether this would be possible under the proposed Order.

92. Children in Wales and Barnardo's Cymru, supported by the British Association of Social Workers and British Association for Adoption and Fostering, both argued for the removal of the defence, stating that it is a child's right to have at least the same protection as an adult under the law:

"It is a 'legal, ethical and practical nonsense that, in the UK, we allow things to be done to children under the defence of reasonable chastisement that would count as assault, were they done to an adult."⁴⁹

93. Children Are Unbeatable! and the Acting Children's Commissioner noted in their evidence that many European countries have now taken steps to ban the corporal punishment of children in the home and bring their laws in line with international human rights obligations towards children.⁵⁰

94. They, along with Save the Children, drew attention to the strong cross party support that exists within the Assembly for legal reform in this area, and noted that successive Assembly Governments have set out a principled opposition to the current law and have made several representations, unsuccessfully, to the UK Government to amend the law on corporal punishment as it affects children in Wales.⁵¹

95. Save the Children, Children Are Unbeatable! and Barnardo's Cymru all expressed their disappointment with the UK Government's recent decision not to amend the law in this area and with the fact that the Assembly

⁴⁸ Section 39

⁴⁹ RoP, (Vulnerable Children LCO Committee), 15 November 2007, paragraph 15

⁵⁰ Written evidence, VC13 & RoP (Vulnerable Children LCO Committee), 6 November 2007, paragraph 56

⁵¹ Written evidence, VC13 & VC16

Government remains unable to pursue their commitment with regard to this.⁵²

96. All witnesses questioned on this matter strongly argued for the proposed Order to be drafted so as to enable the Assembly to legislate in this policy area.

97. We received our own legal advice on this point, which acknowledged the complexity of the issue and stated:

“In the absence of a definition of harm in the LCO, it could be argued that this LCO could be the gateway to legislation which makes all smacking of children in Wales unlawful and illegal. (...)

However, there is a strong contrary argument, namely that the removal of the defence of reasonable chastisement generally, irrespective of the situation in which the force is administered, would relate to the general criminal law rather than to the field of social welfare.”⁵³

Evidence from the Deputy Minister

98. At the meeting of 25 October 2007, the Deputy Minister undertook to seek legal advice to confirm the position relating to reasonable punishment and to write to the committee clarifying this.⁵⁴

99. At the meeting of 29 November 2007, the Deputy Minister stated that it would be inappropriate for her to disclose the legal advice she had received, saying, instead, that:

“The issue concerns the interface between child welfare, criminal offences and criminal justice, and is a complex one that could ultimately only be decided by the courts in the light of a specific Measure.”⁵⁵

100. She noted that the proposed Order had been broadly supported by stakeholders and argued that the focus of the proposed Order should not be distracted from by matters not expressly included in ‘One Wales’, but went on to say that:

“... given the views expressed on many sides in the Assembly that it should be able to legislate on this issue, I have no reason at this stage to rule it out expressly.”⁵⁶

⁵² Written evidence, VC3, VC13 & VC16

⁵³ Legal advice provided by APS lawyers on behalf of the National Assembly for Wales.

⁵⁴ RoP, (Vulnerable Children LCO Committee), 25 October 2007, paragraph 23

⁵⁵ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 18

⁵⁶ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 18

Our view

101. We acknowledge the settled will of the Assembly to introduce a ban on the physical punishment of children. However, we are concerned that the Assembly Government has not made clear its intentions on this matter in respect of the proposed Order, and has not shared with us the legal advice it has received. On this basis, we do not feel able to make a recommendation on this point, and would instead call on the Assembly Government to clarify its position regarding the scope of the proposed Order in relation to the removal of the defence of reasonable punishment.

102. Whilst we remain unclear as to whether the scope of the proposed Order makes it a suitable vehicle for the transfer of competence to the Assembly to enable it to remove the defence of reasonable punishment, we are aware of the Children and Young Persons Bill currently in Parliament which may present an opportunity for the transfer of competence in this area to the Assembly. Therefore, **we recommend that, if the legal advice received by the Deputy Minister suggests the proposed Order is not a suitable vehicle for the transfer of this competence, the Deputy Minister pursue the transfer of the appropriate powers to the Assembly by means of the Children and Young Persons Bill.**

Excepted Matters

Background

103. The proposed Order seeks to amend the table of excepted matters provided for at the end of Part 1 of Schedule 5 to the *Government of Wales Act 2006*, by inserting a number of additional excepted matters.

Evidence from consultees

104. Most respondents were content with the table of excepted matters 19 - 28, provided for under the proposed Order.

105. We noted that excepted matters 19-23 and 26-28 were taken directly from paragraph 15 of Schedule 7 to the *Government of Wales Act 2006*, but that excepted matters 24 (independent living funds) and 25 (motability) were not provided for in the Act.

106. We also received evidence questioning the extent of the exception relating to 'family law and proceedings', and its potential for significant limitation of the proposed Order.⁵⁷

⁵⁷ Written evidence, VC10

Evidence from the Deputy Minister

107. Responding to the question about excepted matters 24 and 25, the Deputy Minister explained that Schedule 7 to the 2006 Act was amended by Order in Council in 2007 to add independent living allowance and motability as further exceptions to the social welfare subject in that schedule.

108. In relation to the exception for 'family law and proceedings', the Deputy Minister's legal adviser explained that:

"Matter 28 (...) is an exception and then an exception to the exception. What is excepted is family law and proceedings (...). However, what has been carved out of that area are those listed under subheadings (a), welfare advice to the courts, and (b), Welsh family proceedings officers."⁵⁸

Our view

109. We note the clarification received from the Deputy Minister relating to excepted matters 24, 25 and 28 and are content with the excepted matters as provided for in the proposed Order.

⁵⁸ RoP, (Vulnerable Children LCO Committee), 29 November 2007, paragraph 158



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.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2007 No.

CONSTITUTIONAL LAW

DEVOLUTION, WALES

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

Made - - - - - ***

Coming into force in accordance with Article 1(1)

At the Court at Buckingham Palace, the *** day *** of *** 2007

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, 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, commencement and interpretation

1.—(1) This Order may be cited as the National Assembly for Wales (Legislative Competence) (No.3) Order 2007 and it comes into force on the day after the day on which it is made.

(2) In this order “the 2006 Act” means the Government of Wales Act 2006.

Amendments to Schedule 5 to the Government of Wales Act 2006

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

(2) In field 15 (social welfare), insert—

(a) c.32.

“Matter 15.1

Safeguarding children from harm and neglect.

Matter 15.2

Adoption and fostering.

Matter 15.3

Social care for children and the persons who care for them.

Matter 15.4

Social care for young persons.

Matter 15.5

Co-operation between persons who exercise functions or are engaged in activities relating to the well-being of children or young persons and arrangements to ensure that functions are discharged with regard to the need to safeguard and promote the well-being of children and young persons.

Matter 15.6

Strategic planning by local authorities for the discharge of functions relating to the well-being of children or young persons.

Matter 15.7

Continuance, dissolution or creation of, and conferral of functions on, an office or body concerned with safeguarding and promoting the well-being of children or young persons and, in particular—

- (a) reviewing the effect on children or young persons of the exercise by any person of functions related to their well-being,
- (b) reviewing and monitoring arrangements for dealing with complaints and representations made by, or on behalf of, children or young persons in respect of any services provided to them by persons with functions related to their well-being or by persons providing them with social care,
- (c) examining cases of particular children or young persons,
- (d) considering, and making representations about, any matter affecting the well-being of children or young persons.

Matter 15.8

Promotion of equality between children or young persons in relation to their well-being.

Interpretation of this field

In this field—

“children” means persons who have not attained the age of 18;

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

“social care” includes the provision by any person of residential care, non-residential care, support, financial or any other assistance, advice or counselling in connection with the well-being of any person;

“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) safety 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.

“young persons” means

- (a) persons who have attained the age of 18 but not the age of 24,
- (b) persons who have attained the age of 24 and who are continuing a programme of education or training they were undertaking at the age of 21.”

3.—(1) The table at the end of Part 1 of Schedule 5 to the 2006 Act (excepted matters) is amended in accordance with this article.

(2) After excepted matter 18 insert the following rows—

“

19. Child support.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
20. Child trust funds, apart from payments into such funds by— (a) the council of a county or county borough council in Wales, or (b) the Welsh Ministers.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
21. Tax credits.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
22. Child benefit and guardian’s allowance.	Matter 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
23. Social security.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
24. Independent living funds.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
25. Motability.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8
26. Intercountry adoption, apart from adoption agencies and their functions, and functions of the “Central Authority” under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.	Matters 15.2, 15.7
27. The Children’s Commissioner established under the Children Act 2004.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8
28. Family law and proceedings apart from— (a) welfare advice to courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and (b) Welsh family proceedings officers.	Matters 15.1, 15.2, 15.3, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8

”.

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 of Wales to make new laws for Wales by Measure under section 93 of the 2006 Act.

The amendments relate to field 15 (social welfare) in Part 1 of Schedule 5. They are concerned with the well-being of children and their families and young persons.

Article 2 inserts new matters 15.1 to 15.8 and interpretation provisions for field 15. The new matters include the following—

- safeguarding children from harm and neglect (matter 15.1);
- adoption and fostering (matter 15.2);
- social care for children and the persons who care for them (matter 15.3);
- social care for young persons (matter 15.4);
- co-operation between persons with functions or engaged in activities relating to the well-being of children and young persons and arrangements connected with promoting the well-being of children and young persons (matter 15.5);
- strategic planning by local authorities (matter 15.6);
- the continuance, dissolution, creation and functions of an office or body concerned with safeguarding and promoting the well-being of children and young persons (this matter includes the role and functions of the Children’s Commissioner for Wales) (matter 15.7);
- promotion of equality between children and young persons in relation to their well-being (matter 15.8).

Any provision of an Assembly Measure relating to the new matters 15.1 to 15.8 will be within the legislative competence of the Assembly by virtue of the terms of those matters and section 94(4) of the 2006 Act.

Article 3 adds further excepted matters into the table in Part 1 of Schedule 5 to the 2006 Act. The table has effect so that the matters specified in the first column (“excepted matters”) are not included in the matters in the fields identified in the second column. The Assembly will not be able to make provision in an Assembly Measure under section 94(4) of the 2006 Act about anything in the first column, even if it would otherwise relate to the matters in the fields specified in the second column. The excepted matters in the first column will be outside the scope of the matters specified in the corresponding entry in the second column.

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.

Gwenda Thomas
Deputy Minister for Health and Social Services

July 2007

Pwyllgor ar y Gorchymyn ynghylch Plant
sy'n Agored i Niwed

The Proposed Vulnerable Children LCO
Committee



Cynulliad National
Cenedlaethol Assembly for
Cymru Wales

Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff CF99 1NA

28 September 2007

Dear Colleague

Consultation - The Proposed Vulnerable Children LCO Committee

The Proposed Vulnerable Children LCO Committee was established on 4 July 2007 to consider and report on the proposed National Assembly for Wales (Legislative Competence) (No.3) Order 2007.

The Committee has agreed the scope of its scrutiny as follows:

- the general principles of the proposed Order, i.e. that legislative competence, as specified in 'Matters 15.1 - 15.8', be conferred on the Assembly; and
- whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on vulnerable children and child poverty, in particular whether the terms of the proposed Order are too broadly or too narrowly defined.

The purpose of the committee's work is to scrutinise the drafting of the proposed Order and, as such, the committee will avoid engaging in detailed discussions on proposed Measures which could be brought forward as a result of the conferral of legislative competence, reviewing existing policies in this area or replicating work already undertaken by former subject committees.

Further information on the proposed Order, its Explanatory Memorandum and details of the committee, together with a Guide to the legislative process can be found at <http://www.assemblywales.org/bus-home/buslegislation.htm>

I am writing to invite you to submit evidence to the Committee.

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

1. Would the terms of the proposed Order allow for the implementation of the policy agenda on vulnerable children and child poverty by means of Measures? If not, how would the proposed Order need to be re-drafted and why?

Ffon / Tel: 029 2089 8032
Ffacs / Fax: 029 2089 8021
Minicom: 029 2082 3280

2. Are the terms of the proposed Order drafted appropriately, too narrowly or too broadly. If necessary how should the proposed Order be re-drafted and why?
3. Are the definitions of 'well-being' and 'social care' in the proposed Order appropriate? If not, how should they be re-drafted and why?
4. The proposed Order includes a table setting out certain exceptions from the scope of Matters 15.1-15.8. Are these exceptions appropriate? If not, how should they be re-drafted and why?

The Committee is very interested in the views of children and young people, and would be grateful if this could be reflected in any evidence submitted, where applicable.

If you wish to contribute to the committee's work, submissions should be sent, preferably by email or on disc, or otherwise in hard copy to:

Lewis McNaughton, Deputy Committee Clerk, Legislation Office, National Assembly for Wales, Cardiff Bay, CF99 1NA.

Email: legislationoffice@wales.gsi.gov.uk. (Please title the email '*Consultation Vulnerable Children LCO Committee*'.)

Submissions should arrive in the Assembly by 2 November 2007. It may not be possible to take into account responses received after this date.

When putting together your submission, 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 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 clearly specify this in 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.

The Committee welcomes contributions in English and Welsh and will consider responses to the written consultation during the autumn term.

If you are interested in being contacted as part of any future consultation in this area, please indicate this in your response.

If you have any queries, please contact the Clerks, Siân Wilkins (029 2089 8224), Sarah Beasley (029 2089 8032) or Lewis McNaughton, the Deputy Clerk (029 2089 8146).



Karen Sinclair AM
Chair

Ffon / Tel: 029 2089 8032
Ffacs / Fax: 029 2089 8021
Minicom: 029 2082 3280

Proposed Vulnerable Children LCO Committee

Consultation responses

<u>Reference</u>	<u>Name/ Organisation</u>
VC1	Gofal Cymru
VC2	National Deaf Children's Society
VC3	Barnardo's Cymru
VC4	British Association of Social Workers
VC5	Care Co-ordination Network UK
VC6	Care Council for Wales
VC7	Children's Commissioner for Wales
VC8	North West Wales NHS Trust
VC9	Play Wales
VC10	Dr Osian Dafydd Rees
VC11	Caerphilly Local Health Board
VC12	Ceredigion & Mid Wales NHS Trust
VC13	Children are Unbeatable
VC14	The Fostering Network Wales
VC15	Family Health Directorate, West Wales General Hospital
VC16	Save the Children
VC17	Welsh Association of Chief Police Officers
VC18	Equality and Human Rights Commission
VC19	MIND Cymru
VC20	Association of Directors of Social Services Wales
VC21	Welsh Local Government Association
VC22	Children in Wales
VC23	British Association for Adoption and Fostering

Proposed Vulnerable Children LCO Committee

Schedule of oral evidence

Date	Witnesses
25 October 2007	Deputy Minister for Social Services <ul style="list-style-type: none"> • Gwenda Thomas AM
6 November 2007	British Association of Social Workers <ul style="list-style-type: none"> • Penny Lloyd, Professional Officer • Emyr Owen, Professional Officer, North Wales Children's Commissioner for Wales <ul style="list-style-type: none"> • Maria Battle, Acting Children's Commissioner for Wales • Gareth Jones, Policy Officer
15 November 2007	Children in Wales <ul style="list-style-type: none"> • Dr Mike Shooter, Chair • Catriona Williams, Chief Executive Barnardo's Cymru <ul style="list-style-type: none"> • Raymond Ciborowski, Director Equality and Human Rights Commission <ul style="list-style-type: none"> • Alun Thomas, Head of Political & Voluntary Sector Strategy • Sophie Howe, Senior Political Officer MIND Cymru <ul style="list-style-type: none"> • Ruth Coombs, Manager for Influence and Change

Date	Witnesses
20 November 2007	<p>British Association of Adoption and Fostering (BAAF)</p> <ul style="list-style-type: none"> • Mary Romaine, Director, BAAF Cymru • David Holmes, Chief Executive, BAAF UK • Non Davies, BAAF Cymru Consultant <p>Save the Children</p> <ul style="list-style-type: none"> • Keith Towler, Programme Director <p>Welsh Local Government Association (WLGA)</p> <ul style="list-style-type: none"> • Naomi Alleyne, Director of Social Justice and Equalities • Phil Hodgson, Professional Adviser to the WLGA <p>Association of Directors of Social Services (ADSS)</p> <ul style="list-style-type: none"> • Phil Hodgson, Corporate Director, Blaenau Gwent ADSS
29 November 2007	<p>Deputy Minister for Social Services</p> <ul style="list-style-type: none"> • Gwenda Thomas AM • Donna Davies, Acting Head of Vulnerable Children Branch, Welsh Assembly Government • Michael Lubienski, Social Care Team Lawyer, Welsh Assembly Government

Gwenda Thomas AC/AM
Y Dirprwy Weinidog dros Wasanaethau Cymdeithasol
Deputy Minister for Social Services

Annex 5



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref: LF/GT/0007/07
Karen Sinclair
Chair, Vulnerable Children and
Child Poverty LCO Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

5 November 2007

Dear Karen,

The Proposed Legislative Competence Order (LCO) Vulnerable Children and Child Poverty

At the meeting of the LCO Committee on the proposed LCO for Vulnerable Children and Child Poverty, I undertook to write to you to clarify a number of technical points that required further legal clarification.

I attach a list of the issues raised and my response. I have also provided examples of elements not covered by the LCO, which I trust members will find helpful. I am afraid that at this point I am unable to clarify the position regarding the scope of the LCO in respect of reasonable chastisement. I hope to be in a position to confirm this shortly and will write separately.

At the committee meeting David Melding suggested that the Chair might wish to consider the potential for officials, or lawyers to support me at future meetings where questions have a legal or technical nature. I feel this would be practical and assist the process and I should therefore be grateful if you would confirm your preferred arrangements on this.

I would like to thank you and other Committee members for providing me with an opportunity to come and clarify issues on the LCO and look forward to attending future meetings. I am committed to ensure that the whole process is transparent and helpful and appreciate member's contributions to ensure thorough scrutiny and commitment to this very important agenda. I believe that the LCO for Vulnerable Children and Child Poverty will be central to providing the National Assembly for Wales with broad powers to deliver a distinct agenda for vulnerable children in Wales and to meeting Welsh priorities and timescales.

Yours sincerely

Gwenda Thomas

cc. Sarah Beasley Committee Clerk

The Proposed Vulnerable Children LCO Committee

The Deputy Minister for Health and Social Services - clarification of questions raised at the Committee on 25 October 2007

Wales's provisions in the Department for Education, Schools & Families – Children and Young Persons Bill 2007

Point 36 Will we have framework power in the DCSF Bill?

1. The Bill does not contain framework powers for Wales. The powers we are seeking in the Bill will be joint provisions for England and Wales that will give Welsh Ministers (with very limited exception in areas that are non-devolved) powers to commence the provisions in Wales. Under the powers Welsh Ministers will also be able to make regulations to bring the provisions into effect.

Definitions

Point 43-59 - 'Harm and Neglect'

2. As I stated at Committee *harm and neglect* are not mutually exclusive, and below I have set out why we have chosen to use the term.

3. The word pair 'harm and neglect' with 'and' is used in other enactments. For example the word pair in this form appears in the following provisions:

- section 1 of the Children Act 2006 (general duties of a local authority in England in relation to the well-being of children);
- Section 10 of the Children Act 2006 (co-operation to improve the well-being of children in England)
- section 25 of the Children Act 2006 (co-operation to improve the well-being of children in Wales);
- Section 507B of the Education Act 1996 (functions of LEAs in England in respect of leisure time activities).

4. In each of these cases the expression is not intended to mean that both harm and neglect need to be demonstrated before the relevant provisions operate. The expression is used as a portmanteau term in respect of a multiple subject, and this linguistic and legislative context to the expression indicates that both terms do not need to be satisfied in order for the connected provisions to have effect.

5. In the case of section 25 of the Children Act 2004 the subject is the arrangements that must be made to further the object of improving the well-being of children in a local authority area. It would not really make sense if only arrangements in respect of children who have suffered both harm and neglect were to be covered, albeit that in many cases both will be present. The provision is intended to cover many types of arrangement, and so in this sense the arrangements are a multiple subject.
6. In the case of the LCO matter 'safeguarding children from harm and neglect' it is specifying a broad topic about which the Assembly may make laws. It could not reasonably be interpreted as meaning that the Assembly could only make laws about safeguarding children who suffer, or might suffer, both harm and neglect. It will be able to make laws safeguarding children from both or either. The multiple subject here is the range of provisions the Assembly could make by way of Measure.
7. It is also worth noting that the expression 'harm and neglect' is not tautologous. There is a purpose in mentioning both things. Not all harm is caused by neglect and not all neglect leads to harm. They are partially overlapping concepts that together describe the totality of things we wish to be within the Assembly's competence.
8. Both of the words 'and' and 'or' may be used conjunctively or disjunctively. In the case of partially overlapping concepts of the kind under consideration here we think it is better to use 'and'. Although this may be more a matter of taste when looking purely at the syntactic merits, we think there should be a strong case for departing from the use of 'and' in this word pairing given its use in current enactments on the same topic.

Point 85

Can a Measure Provision change a definition in the LCO?

9. No, this would not be possible. The LCO sets the limits of the Assembly's power to make laws by Measure so provisions in a Measure cannot those change limits. Where the provisions of a future proposed measure were drafted to fall some way within the broad scope offered by the "Matters" as inserted into the Government of Wales Act 2006 by this LCO, then the breadth of the terms of the LCO would set the limits of any proposed amendment to the proposed measure, in the course of its passage through the Assembly.

Point 89

Why have we not mentioned or defined "vulnerable children" or "child poverty"?

10. Vulnerable children and child poverty are the main focus of the new legislative competence, but they are not the only things that intend to be

covered. They merely provide convenient labels for describing the main thrust of the proposals in discussion and explanatory material.

11. The LCO covers all children and their families who need help of some kind to ensure the well-being of those children. This help could take the form of grant funding, provision of care and other types of service, regulation of services and care providers, or advocacy and systems for dealing with complaints. The LCO includes children and families in poverty and those who are otherwise vulnerable. It also includes any family that needs the help or protection of the state, for example through the regulation of child-minding and day care; to this extent it includes all families who use such facilities in the public or private sectors.

12. The drafting approach in the LCO is to describe the types of things needed to provide help to those children and families that require assistance of some kind, rather than to describe the type of child or family. We think this better reflects to breadth of competence intended since there are many types of child and family who need help from time to time: not just those who might ordinarily be thought of as in need, vulnerable or in poverty. Including definitions of the types of child and family covered would add nothing other than a further definitional task; a task to no end since nothing really turns on the particular status of the child or family as far as the intended breadth of the LCO is concerned.

13. For the same reasons we do not think a definition of "family" is required. Nothing turns on the word or its definition and the word is not used in the LCO.

Point 99

Social Care Includes

Why have we used "includes" and not "means" in the definition of social care ?

14. "Includes" was deployed because it seemed the natural word to precede a list of things included within the defined term. It is a general practice in current legislative drafting to insert the words "in particular" after "includes" where a list of this kind is not intended to be an exhaustive list. The list of things in the definition of "social care" is intended to be exhaustive and we consider the courts would interpret it in that way.

15. "Includes" is also used in other circumstances where it is not intended to be exhaustive, such as in an expanding definition where something that would not ordinarily be thought of as included within the defined term is intended to be included; e.g., "cattle includes horses". In these cases the intended meaning is usually clear from the words in context.

16. We do not think there is any legal doubt about the intended meaning of the definition of "social care" as currently drafted, but we also do not think that

the meaning would change by the use of the word "means". We would therefore be prepared to look at this phrasing again in the light of any comments about this in the Committee's final report.

Additional Information - What the LCO can't cover

17. The meeting focused on the scope of what the LCO can cover. I though it may be helpful to Committee members if I provided examples to what the LCO **does not cover**. For example areas of children related issues **not** intended to be included are;

- court related matters in parts 4 and 5 of the Children Act 1989, for example in relation to care and supervision proceedings, care and supervision orders, emergency protection orders and powers of police protection. With the exception of the Welsh Ministers' functions in relation to Welsh family proceedings officers and welfare advice to courts, representation and provision of information, advice and other support for children ordinarily resident in Wales and their families, currently undertaken by CAF/CASS CYMRU, family law and proceedings are specifically excluded matters.

Gwenda Thomas
Deputy Minister for Health & Social Services

Gwenda Thomas AC/AM
Dirprwy Weinidog/Deputy Minister

Annex 5



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref: LF/GT/0012/07

Karen Sinclair
Chair of the Committee on
the proposed LCO
Vulnerable Children and
Child Poverty Committee

17 December 2007

Dear Karen

The Proposed Legislative Competence Order (LCO) Vulnerable Children and Child Poverty - Clarification of points from 29 November meeting.

There are number of outstanding points from the 29 November meeting that I promised to write to you on.

These are on the attached schedule that you and Committee Members will find helpful in your final considerations of the above Legislative Competence Order.

I would like to thank you and other Committee Members for your work in this area and look forward to seeing the final report with any recommendations in late January 2008. If there are any areas that you or Members feel you need further clarification on, I will be happy to assist.

Yours sincerely

A handwritten signature in cursive script that reads "Gwenda Thomas".

Gwenda Thomas
Deputy Minister for Health and Social Services

cc. Sarah Beasley Committee Clerk

Proposed Vulnerable Children LCO Committee

Deputy Minister for Health and Social Service clarification of outstanding points from 29 November meeting

Why it is constitutionally difficult to expressly refer to the UN Convention on the Rights of the Child in the LCO.

The UN Convention on the Rights of the Child ("UNCRC") is open for signature to states who are members of the UN. As such the UK government has signed and ratified the convention albeit with certain declarations about the way that the convention is interpreted and certain reservations from full compliance. The treaty deals with a range of rights applying to children and young people not all of which come within the National Assembly's devolved competence. Examples of rights outside competence are rights in relation to imprisonment, access to legal assistance when accused, immigration and the age at which young persons are recruited to the armed forces. To include reference to the UNCRC in an order conferring legislative competence on the National Assembly would be confusing in relation both to those aspects which are outside competence and also to those aspects where the UK government has made reservations. It might give rise to a call from the UK government for further exceptions to be included in the order.

The National Assembly has already acknowledged the significance of the UNCRC in policy making in the plenary debate in 14 January 2004. This is an appropriate way to ensure that the values of the UNCRC are observed in policy making in this area by reinforcing its standing as a universal reference point. Express reference to UNCRC and its broad sweep of entitlements for children and young persons in an order which is seeking to express in clear language the extent of the Assembly's legislative power is likely to lead to uncertainty both for the Assembly, the Welsh Assembly Government and the UK government.

Inform the Committee whether it would be necessary to make a Measure to increase the powers of the Children's Commissioner or whether it would be possible to amend the original legislation that created the role to achieve this.

The committee raised the question and used the example of CAF/CASS Cymru as an example of a body whose functions are not subject to scrutiny by the Children's Commissioner. CAF/CASS Cymru is excluded by virtue of wording in the Children's Commissioner for Wales Regulations 2001 (as amended). These are regulations made by the Assembly and could be amended by the Welsh Ministers without the need to draw on competence conferred by this LCO. However, in general, the bodies and functions which the Children's Commissioner is able to review are set out in the Act so a

measure would be required to amend the powers. However, even a measure would not enable the Assembly to add to the Children's Commissioner's powers so as to take them outside the Assembly's devolved competence.

Definition of Wellbeing – Matter 15.8

The possible insertion of 'play' (in addition to recreation) in the definition of well-being in 15.8

The concept of play as currently defined is not solely connected to recreation. For example, a child's play is connected to his or her physical, mental health and emotional wellbeing, education and recreation. It is in the same conceptual category as something like reading or exercise, that is, something that is inherently relevant to "well being".

As such the view is that there is no added value or reason to include the work play that there is for exercise. Indeed if we add the work "play" the courts may seek to attach meaning to it. This may be problematic in the contrast with the use of the defined term "well-being" in other related enactments and may for example create unnecessary questions or doubt about the breadth of well being as it is used currently in section 25(2) of the Children Act 2004 where play does not feature in the similar definition of wellbeing.



Eich cyf/Your ref
Ein cyf/Our ref

Karen Sinclair
Chair of the Committee on
the proposed LCO
Vulnerable Children and
Child Poverty Committee

January 2008

cc. Sarah Beasley
Committee Clerk

Dear Karen

The Proposed Legislative Competence Order (LCO) Vulnerable Children and Child Poverty

The Committee clerk has brought to our attention an outstanding area that needs clarification. This is in respect of whether the definition of wellbeing should include **“fear”**. Please see below the technical view;

Should the definition of well-being, in addition to safety “from harm and neglect” include reference to “fear”?

The definition of well-being is closely based on the definition of well-being in the Children Act 2004, with the addition of paragraph (f) “securing the rights” and the use of the word “safety” from harm and neglect rather than the word “protection” from harm and neglect. The aim is to use a definition that maps the definition of wellbeing in the Children Act to convey as clearly as possible that the scope of “wellbeing” in the LCO is the same as the scope in the Children Act 2004. The intention therefore is to avoid minor differences which may call into question and generate uncertainty about exactly how our “wellbeing” differs from the “wellbeing” in the Act.

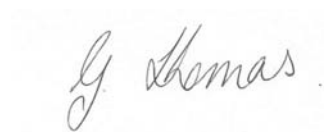
It is acknowledged that the wellbeing of children can be compromised by fear and that living in fear can be harmful. It is also acknowledged that the word “fear” has been used in other statutory contexts such as the Protection from Harassment Act 1997 as cited in the Committee where the fear referred to is fear of violence.

In the context of the upbringing of children we would have to acknowledge that not all fear is harmful and that it is an essential part of learning for children to develop a sense of fear in appropriate contexts such as fear of fire, fast-moving cars etc. What we would want is safety or protection from harm, which is excessive or harmful, and this brings us back to the word “harm” which is within the definition. When considering this alongside the rationale of

staying as close as possible to the existing statutory definition, our judgement would be against amending the definition in this way.

I trust the above clarifies the position. I understand that the Committee will report it's finding shortly and look forward to seeing this. I would also like to thank the Committee members for their thoroughness in their work in considering this very important area, which aims to provide the legislative framework for the future welfare of vulnerable children in Wales.

Yours sincerely

A handwritten signature in cursive script that reads "G. Thomas". The signature is written in black ink on a light-colored background.

Gwenda Thomas
Deputy Minister for Social Services