

Contents		Page
Committee Members		(i)
Summary		(ii)
1.Introduction		4
2.Principle of the Proposed Order		5
3.Scrutiny of the Proposed Order		
-Variation in Carer’s Assessments and Service Provision		10
-Multi-agency Working		12
4.Definitions and Terminology		15
-Carer		15
-Regular and Substantial		16
-Child with Physical or Mental Impairment		20
-Social Care Services		23
5.Other Issues		27
Annex 1	National Assembly for Wales (Legislative Competence) (Social Welfare) 2009 Proposal for a Legislative Competence Order relating to Carers and Explanatory Memorandum	
Annex 2	Consultation Letter	
Annex 3	List of Consultation Responses	
Annex 4	Schedule of Oral Evidence	
Annex 5	Letter from Gwenda Thomas AM, Deputy Minister for Social Care Services, 5 March 2009	

Legislation Committee No 3

Committee Membership

Peter Black	Welsh Liberal Democrats	South Wales West
Alun Cairns (9/12/08 - 3/03/09)	Welsh Conservative Party	South Wales West
Christine Chapman	Labour	Cynon Valley
William Graham (3/03/09 -)	Welsh conservative Party	South Wales East
Janice Gregory	Labour	Ogmore
Helen Mary Jones	Plaid Cymru	Llanelli
Dai Lloyd (Chair)	Plaid Cymru	South Wales West

Summary

The conclusions and recommendations of Legislation Committee 3 are as follows:

- 1) We agree, in principle that legislative competence in the area provided by Matter 15.9 should be conferred on the Assembly.
- 2) Having considered the concerns raised by those giving evidence and taking into account assurances from the Deputy Minister, we are satisfied that the proposed Order, as drafted, will provide a framework for enabling greater consistency and allowing unreasonable variations in carers assessments and service provision to be addressed. We also note the Deputy Ministers comments regarding the balance between national frameworks and local decisions in addressing local needs. We welcome that these are matters which stakeholders will be consulted on with regard to future proposed Measures, draft regulations and guidance.
- 3) We note the strength of evidence in support of the need for improved partnership working, particularly in terms of the delivery of care, support and advice for carers. We are assured by the Deputy Minister's evidence that legislative competence will enable the necessary improvements to be delivered.
- 4) We note that some witnesses have suggested the inclusion of a specific reference to young carers within the definition of the proposed Order. However, we are satisfied with the Deputy Minister's explanation that the breadth of the current definition ensures that carers under the age of 18 fall within the scope of the proposed Order. We also feel that the Deputy Minister's evidence reflects the intent of future proposed Measures in ensuring that all carers are fully embraced.
- 5) We note the concerns raised by witnesses regarding the inclusion of the terms 'regular' and 'substantial'. We are content with the use of the term 'substantial', given the assurances of the Deputy Minister, that every carer will be considered on an individual basis. Therefore we agree that it will not be assumed that what may be regarded as substantial for an adult carer would not be the same for a young carer.

However, we do have reservations regarding the term 'regular' as it could inadvertently narrow the scope of the proposed Order and exclude some patterns of caring, for example, the care of individuals with mental health problems, where care may be episodic. As such we ask that the Deputy Minister satisfies herself, that, inclusion of the term would not exclude some carers of people for whom the pattern of caring might be irregular and highly variable.

With regard to the issue of children and young carers who are looking after siblings who do not themselves have physical or mental impairments, we

agree with the views of both the Carers Alliance Wales and the Deputy Minister, that such children and young carers should not be covered by the proposed Order. We are satisfied that relevant cases will be covered by the powers provided through the Vulnerable Children Order.

6) We acknowledge the views of those giving evidence and note concerns regarding the inclusiveness of the phrase 'a child with a physical and mental impairment'. However, having considered the evidence from the Deputy Minister and the Carers Alliance Wales we are of the view the phrase is sufficiently broad to encompass all impairments.

7) We acknowledge the evidence presented by witnesses with regard to the meaning of social care services in the proposed Order, but are satisfied with the wording as currently drafted. However, we support the Deputy Ministers intention to consider more fully the alternative drafting proposed by the Down's Syndrome Association.

1. Introduction

Background

1. On 8 December 2008, the Deputy Minister for Social Services, Gwenda Thomas AM ("the Deputy Minister"), laid the proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 ("the proposed Order") and Explanatory Memorandum, in accordance with Standing Order 22.13 and 22.14. Copies of these documents are attached at **Annex 1**. The Deputy Minister made a statement about the proposed Order in Plenary on 9 December 2008¹.

2. On 9 December 2008, the Business Committee agreed to refer the proposed Order to a Committee for detailed consideration, in accordance with Standing Order 22.16, and subsequently agreed that the Committee must report on the proposed Order no later than 3 April 2009.

3. The proposed Order was referred to Legislative Committee No.3 for pre-legislative scrutiny on the 9 December 2008.

Terms of reference of the Committee's Scrutiny

4. At our meeting on 14 January 2009, we agreed the terms of reference of our work, as set out below:

(i) to consider the general principles of the proposed Order and whether legislative competence in the area identified in Matter 15.9 be conferred on the Assembly; and

(ii) to consider whether the terms of the proposed Order are too broadly or too narrowly defined.

Evidence

5. We issued a general call for evidence and invited key organisations from the field of social care to submit written evidence to inform our work. A copy of the consultation letter is attached at **Annex 2**. A list of written submissions is attached at **Annex 3**.

6. We took oral evidence from a number of witnesses, details of which are attached at **Annex 4**. Supplementary written evidence received from the Deputy Minister for Social Services is attached at **Annex 5**.

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

¹ Record of Proceedings (RoP), 9 December 2007, pages 63 - 82, (NB: unless otherwise stated, subsequent references in this report to RoP refer to the proceedings of the Legislation Committee No.3)

2. Principle of the Proposed Order

Background

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

9. The Explanatory Memorandum accompanying the proposed Order states that the conferral of legislative competence, as specified in Matter 15.9, will enable the Welsh Assembly Government (“the Assembly Government”) to address the gaps and inconsistencies that exist in terms of service provision for carers².

10. With regard the need for legislation the Explanatory Memorandum states that:

“This proposal for legislative competence derives from the need to support the provision of care by carers and to promote the well being of carers”³.

11. In providing further explanation of the need for legislation, the Explanatory Memorandum states that despite the existing framework of legislation and guidance, consultations with carers, carers’ organisations and others have identified gaps in service provision that cannot be currently addressed. It states that:

“the current framework of legislation and guidance in Wales has clearly proved insufficient to ensure the Welsh Assembly Government’s policy objectives with regard to carers are given the necessary priority so that these gaps and inconsistencies in service provision are tackled effectively”⁴.

12. In practical terms the Explanatory Memorandum identified that such gaps and inconsistencies include:

“concerns that carers’ assessments and services for carers are patchy across Wales, and that we have not yet achieved the joined up approach that is needed across social services and the NHS, the need for a renewed effort to identify carers; the need for the wider provision of information to carers and better engagement by the NHS with carers, as partners in the provision of care”⁵.

² Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers

³ *ibid*

⁴ *ibid*

⁵ *ibid*,

13. The Explanatory Memorandum also refers to the Assembly Government's "One Wales" programme of Government, which includes a commitment to prepare new legislation on carers rather than relying on existing reinforcement means alone such as performance measures and inspection, financial incentives or powers of direction⁶.

14. It also states that Matter 15.9 would enable the promotion of the provision of care by carers to be supported and their well-being promoted. It would, for example, allow for a requirement to be placed on relevant public sector agencies to develop carers information strategies along the lines of Scottish legislation in this area; for them to work together effectively to support the provision of care by carers and to promote their well being⁷.

Evidence from witnesses

15. There was widespread support amongst those giving evidence in favour of the principle of the proposed Order. In welcoming the Assembly Government's decision to bring forward the proposed Order, Carers Alliance Wales stated that:

"The Wales Carers Alliance and Carers Wales wholeheartedly support the general principle that legislative competence is conferred to the Assembly to support the provision of care by carers and promote the well being of carers⁸".

16. The Welsh Local Government Association (WLGA) and Association of Directors of Social Services (ADSS) were also supportive of the principle of the proposed Order and the:

"...need for continued improvement and an effective policy and legislative framework that provides responsive services and supports the needs of Wales 9,000 carers"⁹.

17. The Children's Commissioner for Wales informed the Committee that:

"The levels of disability and long term illness in Wales would suggest that a holistic and robust approach is needed to address the gaps in support for young carers"¹⁰.

18. The Commissioner for Older People in Wales reinforced these comments in stating that:

⁶ Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers, paragraph 13

⁷ Ibid, paragraph 16

⁸ CO3, Written Evidence

⁹ CO10, Written Evidence

¹⁰ CO16, Written Evidence

“It is evident that supporting the provision of care by carers and promoting the well-being of carers is a key area of need over which the Welsh Assembly Government should have legislative competence”¹¹.

19. Of the written consultation responses that commented on the principle of the proposed Order all were supportive. For example, the Association of Chief Police Officers Cymru agreed that “given the demographic information that supports the proposal”¹², legislative competence, identified in Matter 15.9, should be conferred on the Assembly.

20. Similarly, Barnardo’s Cymru believed that the conferral of competence “would facilitate a more effective response to local need”¹³.

21. There was strong evidence from witnesses in support of the need for the proposed Order, particularly as a means of addressing gaps in existing legislation. The WLGA told us that:

“The additional powers that an LCO would give would be able to reconcile the increasing gap of a lack of partnership and ownership regarding carers”¹⁴.

22. In commenting on the need for legislation the Children’s Commissioner for Wales informed us that:

“There is a real opportunity here for some consistency in how the needs of young carers are specifically met. It is proactive. It is responsive to the very strong need that I am hearing about”¹⁵.

23. These sentiments were echoed by the Commissioner for Older People in Wales who stated that the proposed Order:

“...will support the provision of information to carers, help identify carers, and also encourage, with the aid of a framework, effective working across health and social services”¹⁶.

24. Support for both the principle and need for legislation was also expressed in evidence from the Downs Syndrome Association, Hafal and National Federation of Women’s Institutes - Wales¹⁷.

25. However, there was also a view amongst some witnesses that legislative competence was not the only means by which the needs of carers

¹¹ CO9, Written Evidence

¹² CO1, Written Evidence

¹³ CO2, Written Evidence

¹⁴ RoP, paragraph 8, 04 February 2009

¹⁵ RoP, paragraph 11, 11 February 2009

¹⁶ *ibid*, paragraph 10

¹⁷ CO7, CO8 and CO14, Written Evidence

could be addressed. The Commissioner for Older People in Wales, in referring to legislative competence, informed the Committee that:

“I do not think that it is the only means. I think that the intention behind legislative competence, and the over arching direction of travel that this will encourage public organisations, the third sector and private partners to take, is an important principle”¹⁸.

26. The Children’s Commissioner for Wales shared this view and in reference to the relevant bodies, responsible for service provision and support for carers, stated that:

“I don’t know whether this is the only way in which we can get the type of consistency, that I mentioned earlier, but the issue for me about the LCO is that it should focus minds and that it should provide a real duty”¹⁹.

Evidence from the Deputy Minister

27. In giving evidence the Deputy Minister explained that the need for legislative competence derived from existing gaps and inconsistencies in service provision. She told us that existing legislation related mainly to the powers and duties of local authorities and local authorities’ power to request other agencies to cooperate²⁰. However, it does not place any duty on the NHS or other statutory agencies. She added that:

“The proposed LCO is not about enforcing existing legislation, but about addressing gaps in that legislation. More effective partnership working is one of the key areas that the evidence suggests we need to address in this way”²¹.

28. The Deputy Minister further explained that existing legislation was insufficient in terms of adequately supporting and promoting the well-being of carers. She stated that existing legislation, such as the *Carers and Disabled Children Act 2000*, is limited in that:

“...it gives local authorities considerable discretion. There is no explicit duty to provide services to carers, and the provisions of the Act do not apply to the National Health Service or the statutory agencies, and they do not embrace carers under the age of 16”²².

29. In addition, with regard to the existing *Carers (Equal Opportunities) Act 2004* the Deputy Minister stated that whilst it:

¹⁸ RoP, paragraph 14, 11 February 2009

¹⁹ *ibid*, paragraph 16

²⁰ RoP, paragraph 7, 25 February 2009

²¹ *ibid*

²² RoP, paragraph 15, 28 January 2009

“...empowers local authorities to ask other specified authorities for assistance in planning the provision of services to carers, it requires the other Authority to give due consideration to such a request. However, it does not address the limitations of the 2000 Act; for example, there is no statutory duty to co-operate”²³.

30. The Deputy Minister confirmed that consideration had also been given to whether improvements in the provision of services to carers could be achieved through further statutory guidance under section 7 (1) of the *Local Authority and Social Services Act 1970*, or through further best practice guidance. However she indicated that:

“Statutory guidance under section 7 (1) only applies to local authority social services functions, and does not have the same impact as a legal duty. Although it must be complied with in general terms, an authority has discretion to depart from such guidance if it believes there is good reason to do so”²⁴.

31. Finally, the Deputy Minister expressed a view that:

“Good practice guidance is weaker in status in those authorities as they only have to take it into account. Our judgment is that to provide a new impetus for further improvements to the arrangements to support carers and to promote their wellbeing, we now require new legislative powers”²⁵.

32. She added that this:

“...would create a more consistent approach to the needs of carers and how we attempt to meet them”²⁶.

Our view

33. 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 relation to carers. **We agree, in principle that legislative competence in the area provided by Matter 15.9 should be conferred on the Assembly.** We believe it will provide an opportunity for the Assembly Government to bring forward a Measure aimed at addressing gaps and inconsistencies in existing legislation and improving support to, and the well being of, carers.

²³ RoP, paragraph 15, 28 January 2009, paragraph 16

²⁴ *ibid*, paragraph 18

²⁵ *ibid*, paragraph 18

²⁶ *ibid*, paragraph 20

3. Scrutiny of the Proposed Order

34. The following section explores the key issues that emerged during our consideration of the proposed Order.

i) Variation in Carers Assessments and Service Provision

Background

35. The Assembly Government's Explanatory Memorandum states that there are concerns that carer assessments and services for carers vary greatly and are very patchy across Wales and that legislative competence, conferred on the Assembly, would enable such variations to be addressed²⁷.

Evidence from witnesses

36. The variation, in terms of carer's assessments and service provision, across Wales was confirmed by witnesses in their evidence. The Commissioner for Older People in Wales told us that:

"There is vast inconsistency across the country, which should not be the case. Access to information and services should be the same across the country"²⁸.

37. Such views were repeated by the Children's Commissioner for Wales who stated that there are "massive issues around inconsistency of approach"²⁹ and went on to explain that:

"In terms of the inconsistency, I am not clear whether those assessments are taking place or not. If adult services go into a family home and recognise that a child, who may not be the primary carer, has a significant caring responsibility to assist a primary carer, I do not know whether they would talk to children's services in the same local authority"³⁰.

38. He added that "there is a real issue for me about communication, which underpins the issues about inconsistency"³¹.

39. However, some arguments in defence of variation were presented to the Committee by the WLGA and ADSS who suggested that:

"Local Authorities are all different - different areas with different patches and different people. Most of us will be working with carers'

²⁷ Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers, paragraph 12 (a)

²⁸ RoP, paragraph 18, 11 February 2009

²⁹ *ibid*, paragraph 19

³⁰ *ibid*, paragraph 20

³¹ *ibid*

support groups on identifying their needs. It is not surprising that there will be different developments in different areas”³².

Evidence from the Deputy Minister

40. In giving evidence the Deputy Minister referred to the issue of significant variations in performance between individual local authorities in terms of assessing and addressing carer’s needs. She added that:

“...legislative competence would, obviously, allow us to introduce Measures to help address these matters”³³.

41. In responding to the issues raised by the WLGA/ADSS regarding acceptable variation, the Deputy Minister acknowledged the differences between local authorities and accepted that local authorities should have the discretion to set their own priorities, and to provide a range of different service responses to address the assessed needs of carers within their areas. However, she added that:

“It is also important that those variations are reasonable, that they are based on evidence of local needs and that they are developed and implemented within the context of a national framework. The proposed LCO does not directly address local variations, but will provide the powers to establish the necessary national framework for local decision making”³⁴.

42. The Deputy Minister also assured us that the balance between national frameworks and local decisions in addressing local needs will be matters upon which stakeholders will be consulted on with regard to future proposed Measures, draft regulations and guidance.

Our view

43. Having considered the concerns raised by those giving evidence and taking into account assurances from the Deputy Minister, we are satisfied that the proposed Order, as drafted, will provide a framework for enabling greater consistency and allowing unreasonable variations in carers assessments and service provision to be addressed. We also note the Deputy Ministers comments regarding the balance between national frameworks and local decisions in addressing local needs. We welcome that these are matters which stakeholders will be consulted on with regard to future proposed Measures, draft regulations and guidance.

³² RoP, paragraph 17, 04 February 2009

³³ RoP, paragraph 10, 28 January 2009

³⁴ RoP, paragraph 10, 25 February 2009

ii) Multi-agency Working

Background

44. The Assembly Government's Explanatory Memorandum states that one of the key issues not being addressed by existing legislation is the wider provision of information for carers, and better engagement by the NHS with carers as partners in the provision of care. Furthermore, the Explanatory Memorandum states that:

"legislative competence will ensure that statutory agencies (being those mentioned in 3(5) of the Carers (Equal Opportunities) Act 2004 (c.15) properly engage with carers as partners in the provision of care involving them at all levels in the assessment, delivery and evaluation of an individual's care arrangements"³⁵.

Evidence from witnesses

45. Carers Alliance Wales confirmed that:

"There is a lack of co-operation between different public bodies, but this chasm, despite all the rhetoric between health and social care, is the biggest barrier for most carers"³⁶.

46. They added that they are supportive of the proposed Order in that it would provide:

"...the power to impose duties on health and social care to get their acts together"³⁷.

47. In clarifying this point the Carers Alliance Wales informed us that:

"There need to be stronger duties on local government, but also, there need to be, as is mentioned in the LCO, stronger duties on other public bodies. Nearly all carers have contact with some other public body, particularly the health service. If we are being serious, about addressing the needs of the vast majority of carers, that will not be through social services, because that is not where most carers go"³⁸.

48. Such sentiments were shared by the Commissioner for Older People in Wales who emphasised that "the duty to co-operate is an important one"³⁹.

³⁵ Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers

³⁶ RoP, paragraph 45, 11 February 2009

³⁷ *ibid*

³⁸ *ibid*, paragraph 31

³⁹ RoP, paragraph 47, 11 February 2009

49. The WLGA also supported such principles in stating that:

“Increasingly care, support and advice to carers should be provided on a multi disciplinary and multi agency basis”.⁴⁰

50. On a similar note, the Children’s Commissioner for Wales suggested there was a lack of joint working within local authorities that needed to be addressed. He explained that:

“If adult services go into a family home and recognise that a child, who may not be the primary carer, has a significant caring responsibility to assist a primary carer, I do not know whether they would talk to children’s services in the same local authority and say, ‘Are you aware of these two children and what they are doing?’. So, there is a real issue for me about communication, which underpins the issue about inconsistency. The other issue for me, I suppose, is about basic sharing of information and making sure that children as young carers are not slipping through the net, as appears to be happening”⁴¹.

51. He also referred to the links between education services and young carers and highlighted that “co-operation is absolutely key”⁴².

52. All witnesses supported legislation as the best means of securing better co-operation between public bodies. The Children’s Commissioner for Wales suggested that “it is about focusing the minds. It has to be the way to go”⁴³. This was strongly supported by the Carers Alliance Wales who felt that “we have tried the softly, softly approach for quite a long time. It probably has to be something more structural”⁴⁴. Similar sentiments were also expressed by the Commissioner for Older People in Wales, who stated that “the current guidelines are not strong enough and they are not being implemented consistently”⁴⁵.

Evidence from the Deputy Minister

53. The Deputy Minister acknowledged that partnership working could be improved and that there was an existing gap between partnership working and ownership of responsibility. She added that legislative competence was needed to address this problem more effectively⁴⁶.

Our view

54. We note the strength of evidence in support of the need for improved partnership working, particularly in terms of the delivery of

⁴⁰ RoP, paragraph 7, 4 February 2009

⁴¹ RoP, paragraph 20, 11 February 2009

⁴² *ibid*, paragraph 48

⁴³ *ibid*, paragraph 51

⁴⁴ *ibid*, paragraph 52

⁴⁵ *Ibid*, paragraph 53

⁴⁶ RoP, paragraph 12, 25 February 2009

care, support and advice for carers. We are assured by the Deputy Minister's evidence that legislative competence will enable the necessary improvements to be delivered.

4. Definitions and Terminology

55. The following section outlines key issues identified in relation to definitions and terminology used within the proposed Order.

i) "Carer"

Background

56. The proposed Order states that:

"In this Matter "carers" means individuals who provide or intend to provide a substantial amount of care on a regular basis for-

- (a) a child with a physical or mental impairment, or
- (b) an individual aged 18 or over

57. The Assembly Government's Explanatory Memorandum states that the definition of carer in the proposed Order does not exactly mirror that given in the *Carers and Disabled Children Act 2000* in that it contains no age restriction. As such the generic term "carers" has been included in the proposed Order⁴⁷.

Evidence from witnesses

58. The Children's Commissioner for Wales stated that:

"Though we welcome the clear commitment made by the Deputy Minister both in the explanatory memorandum (para.15) and her Ministerial Statement regarding the LCO, we would look for clarification within the wording of Matter 15.9 to ensure that young carers are comprehensively provided for under this matter"⁴⁸.

59. Similar concerns were raised by the WLGA/ADSS, who stated that they would:

"...advocate that if the LCO were to proceed, young carers, as the most vulnerable group are explicitly referred to and thus the definition in the proposed Order be amended to read: In this matter 'carers' means individuals including those aged under 18 who provide or intend to provide a substantial amount of care on a regular basis"⁴⁹.

⁴⁷ Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers, paragraph 15

⁴⁸ CO16, Written Evidence

⁴⁹ CO10, Written Evidence

Evidence from the Deputy Minister

60. The Deputy Minister confirmed that “the proposed legislative competence Order will include young carers”⁵⁰. In referring specifically to young carers she noted that:

“The Carers and Disabled Children Act 2000 does not refer to young carers or carers under the age of 16, so carers under the age of 16 do not have an individual right to assessment or services. Therefore we must seriously consider how to include young carers”⁵¹.

61. In further evidence, the Deputy Minister assured us that:

“The current wording ensures that young carers under the age of 18 fall within the scope of the proposed LCO, and that there is therefore, no need to make a specific reference to them”⁵².

Our view

62. We note that some witnesses have suggested the inclusion of a specific reference to young carers within the definition of the proposed Order. However, we are satisfied with the Deputy Minister’s explanation that the breadth of the current definition ensures that carers under the age of 18 fall within the scope of the proposed Order. We also feel that the Deputy Minister’s evidence reflects the intent of future proposed Measures in ensuring that all carers are fully embraced.

ii) “Regular and Substantial”

Background

63. The proposed Order states that:

“In this matter “carers” means individuals who provide or intend to provide a substantial amount of care on a regular basis...”

Evidence from witnesses

64. Mixed views were expressed surrounding the use and definition of the terms ‘regular’ and ‘substantial’ in the proposed Order.

65. The WLGA suggested that it would be “prudent to define what is meant by substantial⁵³” and that “more clarity on this would reduce any

⁵⁰ RoP, paragraph 28, 28 January 2009

⁵¹ *ibid*

⁵² RoP, paragraph 26, 25 February 2009

⁵³ C10, Written Evidence

ambiguity or misinterpretation across the different public sector agencies involved in supporting carers”⁵⁴. However, they also agreed that any such definitions would be better placed in guidance rather than on the face of the proposed Order⁵⁵.

66. The Children’s Commissioner for Wales also raised concerns regarding the wording ‘substantial amount of care on a regular basis’ and felt that it did not recognise the unique model of care that some young carers provide. It was also suggested that the meaning of ‘*substantial amount*’ needed to be clarified.

67. The Children’s Commissioner for Wales also referred to the example of the non-designated carer, where it may be that the young carer is providing more infrequent care or respite periods for the primary adult carer⁵⁶. The evidence suggested that this could also be true of other young carers who often play a pivotal role in ensuring the family home functions but will not have necessarily been designated as a ‘carer’⁵⁷. It was stated that:

“It is paramount that the wording of the LCO guarantees the rights and welfare of all young carers and that the term ‘substantial amount’ does not prevent some young carers from being provided with greater support and information services”⁵⁸.

68. In questioning, the Children’s Commissioner for Wales expanded on the issue of non-designated carers. He illustrated the issue with the example of sibling care whereby an older child might be the primary carer, but this did not mean that siblings were not also responsible for regular care duties. The Children’s Commissioner for Wales felt that:

“We have to be clear that the wording does not prohibit any young carer from receiving support. That is the absolute principle”⁵⁹.

69. He added that from a child’s perspective any level of care could be regarded as substantial and it was important to ensure that the proposed Order did not limit the support for child carers⁶⁰.

70. The Children’s Commissioner for Wales also expressed reservations regarding the term ‘regular basis’. He referred to recent research undertaken by his team, which identified that 77% of young carers surveyed had felt stress during the week prior to the survey being undertaken⁶¹. He informed us that the caring responsibility of young carers was constant. He explained that:

⁵⁴ C10, Written Evidence

⁵⁵ RoP, paragraph 73, 4 February 2009

⁵⁶ CO16, Written Evidence

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ RoP, paragraph 120, 11 February 2009

⁶⁰ *ibid*

⁶¹ *ibid*

“They go to school and spend time with their friends in the park, but the stuff about their mum, dad or their caring responsibility is constantly around for them. In terms of regularity, the wording does not help the experience that the child is living, in a sense. Therefore, I do have a concern about that”⁶².

71. However, in contrast to these views, the Carers Alliance Wales in giving evidence suggested, that ‘substantial’ and ‘regular’ were terms used in existing carers legislation and therefore there was an argument for maintaining that. They added that existing Assembly Government guidance on the *Carers and Disabled Children Act 2000*, included a “very sensible model in that you always have to look at the impact”⁶³ of caring upon the carer.

72. The Down’s Syndrome Association presented a practical example of whereby the use of the phrase ‘regular and substantial’ could be problematic. Their evidence related to relationships, such as an adult with Down’s Syndrome living with an elderly parent, that are mutually caring and beneficial, i.e. where each undertakes some aspects of a caring role for the other and neither one individual could cope without the other⁶⁴.

73. They said that:

“Whilst it is possible that the proposed definition could encompass this group, it would be problematic to see the pair excluded from provision by reference to a ‘substantial’ amount of care. Some indication of ‘necessary’ care should be included”⁶⁵.

Evidence from the Deputy Minister

74. The Deputy Minister recognised the importance of the issues raised in evidence and agreed that:

“In developing our future draft Measure, draft regulations or draft guidance with stakeholders, we must ensure that the regular and substantial filters are appropriate to meet the needs and circumstances of young carers”.

75. The Deputy Minister added that guidance to local authorities on the *Carers and Disabled Children Act 2000*, from which the terms ‘regular’ and ‘substantial’ have been adopted, make it clear that young carers should not be expected to carry inappropriate levels of caring, which have an adverse effect on their development and life chances.

⁶² RoP, paragraph 123, 11 February 2009

⁶² *ibid*

⁶³ *ibid*, paragraph 125

⁶⁴ CO7, Written Evidence

⁶⁵ *ibid*

76. Furthermore, she stated that:

“It must not be assumed that children should take on similar levels of caring and responsibilities as adults”⁶⁶.

77. She continued by stating that:

“I do not consider that it would be helpful to define more narrowly what is meant by ‘regular’ and ‘substantial’ for young carers in our proposed LCO. I think that that could serve only to exclude many young carers. It is a matter that will need to be considered and addressed in the future development of Measures, draft regulations, or draft guidance”⁶⁷.

78. In explaining the use of the terms ‘regular’ and ‘substantial’ the Deputy Minister highlighted that these had been used in existing legislation and that:

“There is absolutely no evidence that leads me to think that definition has not worked in practice”⁶⁸.

79. In response to the specific issues raised by the Children’s Commissioner for Wales regarding non-designated carers, the Deputy Minister subsequently provided us with further written advice and information, which referred to the issue of whether the proposed Order, as drafted, covers children and young carers who are looking after siblings who do not themselves have a physical or mental impairment.

80. The Deputy Minister confirmed that these would not be covered by the proposed Order and that discussions with the Carers Alliance had identified that they were of the strong view that the proposed Order should not include children in this situation⁶⁹.

81. Furthermore, the Deputy Minister highlighted that children and young people who are caring for siblings in these circumstances, whilst not covered by our proposed Order, may fall within the definition of children in need and be embraced by the Vulnerable Children Order⁷⁰, if there is a risk that the level of care they are providing is adversely affecting their health or development⁷¹.

Our view

82. We note the concerns raised by witnesses regarding the inclusion of the terms ‘regular’ and ‘substantial’. We are content with the use of the term ‘substantial’, given the assurances of the Deputy Minister that

⁶⁶ RoP, paragraph 39, 25 February 2009

⁶⁷ *ibid*

⁶⁸ *ibid*, paragraph 42

⁶⁹ Letter from Gwenda Thomas AM, Deputy Minister for Social Services, 5 March 2009

⁷⁰ National Assembly for Wales (Legislative Competence) (No.3) Order 2007 (Relating to Vulnerable Children)

⁷¹ Letter from Gwenda Thomas AM, Deputy Minister for Social Services, 5 March 2009

every carer will be considered on an individual basis. Therefore we agree that it will not be assumed that what may be regarded as substantial for an adult carer would not be the same for a young carer.

83. However, we do have reservations regarding the term 'regular' as it could inadvertently narrow the scope of the proposed Order and exclude some patterns of caring, for example, the care of individuals with mental health problems, where care may be episodic. As such we ask that the Deputy Minister satisfies herself, that, inclusion of the term would not exclude some carers of people for whom the pattern of caring might be irregular and highly variable.

84. With regard to the issue of children and young carers who are looking after siblings who do not themselves have a physical or mental impairment, we agree with the views of both the Carers Alliance Wales and the Deputy Minister that such children and young carers should not be covered by the proposed Order. We are satisfied that relevant cases will be covered by the powers provided through the Vulnerable Children Order.

"Child with Physical or Mental Impairment"

Background

85. The proposed Order states that:

"In this matter "carers" means individuals who provide or intend to provide a substantial amount of care on a regular basis for—

- (a) a child with a physical or mental impairment, or
- (b) an individual aged 18 or over"

86. The Assembly Government's Explanatory Memorandum clarifies this in stating that carers, in the context of the proposed Order, "means carers of individuals cared for of any age, but in the case of individuals caring for children it covers only children with a physical or mental impairment"⁷².

Evidence from witnesses

87. A number of witnesses raised concerns regarding the definition of carers of children as carers of 'a child with a physical or mental impairment'. Views were expressed that this definition is too narrow and there is a risk that it could exclude the carers of children whose conditions are not defined as physical or mental impairments.

88. The Children's Commissioner for Wales stated:

⁷² Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers

“There are issues around substance misuse and behavioural issues. Behavioural issues in children that would not be categorised as constituting a mental impairment can still represent quite significant developmental issues. With regard to illness, there is still quite a significant gap in the definition. Therefore, I agree completely that this wording is just not helpful”⁷³.

89. The Carers Alliance Wales stated that:

“The current definition “creates the possibility of excluding a large number of children with particular disabilities”⁷⁴.

90. However, further to their oral evidence to us the Carers Alliance Wales submitted additional written evidence regarding the use of the phrase ‘child with a physical or mental impairment’ and stated that:

“For the purpose of the Carers LCO, we are agreed that the definition included in the LCO is sufficient to cover most situations for the carers of disabled children and the alliance supports it”⁷⁵.

91. They also emphasised that they want the definition of carer in the proposed Order to be as wide enough to include as many carers as possible⁷⁶. They stated that the definition in the proposed Order “fits with both earlier carers’ legislation and the Disability Discrimination Act 1995”⁷⁷.

92. Further to the concerns raised that the proposed Order may exclude some carers of children, the Carers Alliance Wales stated that:

“We confirm we believe that the definition of disability within the LCO is broad enough to encompass a very wide range of conditions and impairments affecting children, including ADHD and similar conditions”⁷⁸.

Evidence from the Deputy Minister

93. The Deputy Minister stated that:

“If we were to add any more specifics, we would be restricting rather than enhancing the scope of the LCO. I feel that relying on ‘physical and mental impairment’ to cover all impairments might be a better way of ensuring that we have as wide a scope as possible”⁷⁹.

94. In seeking further clarification, we questioned the Deputy Minister as to whether caring for someone who had a progressive health condition that

⁷³ RoP, paragraph 152, 11 February 2009

⁷⁴ *ibid*, paragraph 151

⁷⁵ CO3 (Annex 1), Written Evidence

⁷⁶ *ibid*

⁷⁷ *ibid*

⁷⁸ *ibid*

⁷⁹ RoP, paragraph 80, 28 January 2009

had not reached the stage of physical or mental impairment, would be covered by this LCO.

95. The Deputy Minister told us that:

“I would have thought that somebody with a progressive illness who needs care will be covered by it”⁸⁰.

96. In further evidence, the Deputy Minister stated that:

“It would be counterproductive to try to draw up a list of eligible health or other conditions, to be listed specifically in the proposed LCO, because the risk of leaving something out”⁸¹.

Our view

97. We acknowledge the views of those giving evidence and note concerns regarding the inclusiveness of the phrase ‘a child with a physical and mental impairment’. However, having considered the evidence from the Deputy Minister and the Carers Alliance Wales we are of the view the phrase is sufficiently broad to encompass all impairments.

⁸⁰ RoP, paragraph 105, 28 January 2009

⁸¹ RoP, paragraph 55, 25 February 2009

“Social Care Services”

Background

98. The proposed Order states Article (2(2)) that;

“This matter includes, in particular, social care services to help carers”

99. The Assembly Government’s Explanatory Memorandum states that future Measures could make provision, for example, to ensure that health bodies take the interests of carers into account (paragraph 16), for example in making arrangements for appointments, discharge arrangements and collection of prescriptions for the person being cared for. It also states that the proposed Order defines Social Care Services as:

“Any of the following provided in connection with the well-being of any person: non-residential care services; information, advice, counselling or advocacy services; or any other assistance”⁸².

Evidence from witnesses

100. The WLGA/ADSS indicated that they would like to see the definition of ‘social care services’ widened to include NHS organisations⁸³. With regard to the wider issue of partnership working they stated that:

“It is in the context of trying to change the profile that suggests that this is just for local authorities so that it is seen as a partnership in which, increasingly, a range of services is delivered by a multi-agency approach”⁸⁴.

101. They added that:

“Where drafting needs to refer specifically to social services, as appropriate, then it should, but our fundamental aim is for this to be seen as a partnership for carers and not just a social services responsibility”⁸⁵.

102. Overall the WLGA/ADSS felt that ‘social care services’ was such a ‘blunt definition’ that it could mean that some organisations did not put some of the identified needs of carers on their agenda⁸⁶.

⁸² Welsh Assembly Government, *Memorandum from the Deputy Minister for Health and Social Services, Constitutional Law: Devolution, Wales, The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009*, Proposal for a Legislative Competence Order relating to Carers

⁸³ RoP, paragraph 93, 4 February 2009

⁸⁴ *ibid*, paragraph 95

⁸⁵ *ibid*, paragraph 96

⁸⁶ RoP, paragraph 98, 4 February 2009

103. Similar concerns were raised by the Children's Commissioner for Wales who felt that "it would be preferable to remove the words 'in particular'"⁸⁷.

104. The Children's Commissioner for Wales told the Committee that:

"I do not really follow the logic of having that wording, given the helpful memorandum from the Minister. They seem to be slightly at odds, and confusion will result"⁸⁸.

105. He added that "including those words, in this instance, would mean that a couple of agencies in particular would need to be involved, and furthermore, "specifically pointing out one or two agencies could leave others off the hook"⁸⁹.

106. On similar note, the Downs Syndrome Association stated that they would like to see the terms of the proposed Order "expressly extended to refer to other services" and suggested that the proposed Order be redrafted as:

"This matter includes, but is not limited to, social care services to help carers"⁹⁰

107. However, there was general agreement amongst witnesses that listing all the agencies, that should have a duty to co-operate, would not be a viable alternative option. It was agreed that this would cause confusion, narrow the scope of the proposed Order and could potentially exclude some relevant agencies.

108. The Carers Alliance Wales told us that they would prefer:

"...a short list and a catch-all phrase such as, "and other appropriate bodies"⁹¹.

109. They added that the drafting needed:

"...to be broad enough to include all the public bodies on which the Assembly has the power to impose duties because, over time, it may become apparent that a body that we have not thought about at this point might be relevant"⁹².

Evidence from the Deputy Minister

⁸⁷ CO16, Written Evidence

⁸⁸ RoP, paragraph 58, 11 February 2009

⁸⁹ RoP, paragraph 58, 11 February 2009

⁹⁰ CO7, Written Evidence

⁹¹ RoP, paragraph 63, 11 February 2009

⁹² *ibid*

110. In her evidence the Deputy Minister clarified the range of bodies that might have duties imposed upon them if the Assembly were to gain the powers sought by the proposed Order. She stated that:

“It is envisaged that the bodies that would have duties imposed upon them by a future measure made under this proposed LCO would include local authorities, local education authorities, local housing authorities, and NHS trusts or bodies”⁹³.

111. In response to the concerns raised by the Children’s Commissioner for Wales the Deputy Minister informed us that the objective of the drafting was for “greater precision” rather than to cause confusion⁹⁴. She added that “there is no question that the matter includes things other than social services to help carers”⁹⁵.

112. The Deputy Minister also reiterated the need for a specific reference to “social care” otherwise questions may be raised regarding the breadth of the proposed Order. She explained that the intention of specifically referring to ‘social care services’ is “not to restrict the provision – it is rather to ensure that it is wide enough”⁹⁶.

113. However, the Deputy Minister further explained that listing organisations specifically would pose the risk of omitting some. She stated that:

“I am happy that the proposed LCO as drafted embraces a sufficiently wide range of bodies, and not just that of a social care nature. The detail is best left to be covered in the development of any future measures”⁹⁷.

114. With regard to the Children’s Commissioner for Wales’ suggestion on the removal of the phrase “in particular” the Deputy Minister stated that “I do not think that would be helpful”⁹⁸. She also informed us that:

“We believe that a specific reference to social care services is required here, otherwise, this might raise questions about the breadth of the proposed LCO. Matter 15.5 in Schedule 5 to the Government of Wales Act 2006 refers specifically to “social care services”, but the intent is not to restrict the provision, rather to ensure that it is wide enough”⁹⁹.

115. In relation to the suggested redrafting proposed by the Down’s Syndrome Association, the Deputy Minister provided us with additional information and advice. She informed us that the suggested drafting change

⁹³ RoP, paragraph 35, 28 January 2009

⁹⁴ RoP, paragraph 14, 25 February 2009

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ *ibid*, paragraph 24

⁹⁸ *ibid*, paragraph 19

⁹⁹ *ibid*, paragraph 14

would achieve the same effect as the current wording and agreed “that it is a more accessible form of words”¹⁰⁰. She added that:

“If we are to make this change, then we shall also need to amend the existing Matters in Schedule 5 to ensure consistency and to avoid any suggestion that something different is meant in those other matters where “in particular” has already been used. Although “in particular” has continued to be used in the newly proposed LCOs to ensure consistency with existing provisions, those provisions in other proposed LCOs could also be amended to fit with this different approach”¹⁰¹.

116. The Deputy Minister indicated that she would need to take further advice on the feasibility of making the necessary changes and may need to discuss the merits of this possible change with Ministerial colleagues.

Our view

117. We acknowledge the evidence presented by witnesses with regard to the meaning of social care services in the proposed Order, but are satisfied with the wording as currently drafted. However, we support the Deputy Ministers intention to consider more fully the alternative drafting proposed by the Downs Syndrome Association.

¹⁰⁰ Letter from Gwenda Thomas AM, Deputy Minister for Social Services, 5 March 2009

¹⁰¹ *ibid*

4. Other Issues

i) Pre-legislative scrutiny by committees of the House of Commons and House of Lords

118. In preparing its report on the proposed Order, in accordance with Standing Order 22.21, the Committee must, as far as is reasonably practicable take account of any recommendation on the proposed Order that has been made by any committee of the House of Commons or the House of Lords or any joint committee of both Houses of Parliament.

119. We understand that the Welsh Affairs Committee of the House of Commons is currently undertaking pre legislative scrutiny of the proposed Order and has not yet reported.

120. However, whilst we have been unable to take into account their findings, we have maintained regular contact with the work and progress of the Welsh Affairs Committee.

Proposed Order for pre-legislative scrutiny.

DRAFT STATUTORY INSTRUMENTS

2009 No.

CONSTITUTIONAL LAW

DEVOLUTION, WALES

**The National Assembly for Wales (Legislative Competence)
(Social Welfare) Order 2009**

*Made - - - - ***

Coming into force in accordance with Article 1

At the Court at Buckingham Palace, the *** day *** of *** 2009

Present

The Queen's Most Excellent Majesty in Council

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

Accordingly, Her Majesty, in pursuance of sections 95(1) and (3) of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order as follows:-

Citation and commencement

1. This Order may be cited as the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 and it comes into force on the day after the day on which it is made.

Amendments to Part 1 of Schedule 5 to the Government of Wales Act 2006

2.—(1) Field 15 (social welfare) of Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.

(2) After matter 15.8 insert—

(a) 2006 c.32.

“Matter 15.9

Supporting the provision of care by carers and promoting the well-being of carers.

This matter includes, in particular, social care services to help carers.

In this matter “carers” means individuals who provide or intend to provide a substantial amount of care on a regular basis for—

- (a) a child with a physical or mental impairment, or
- (b) an individual aged 18 or over,

but it does not include individuals who provide or intend to provide care—

- (a) by virtue of a contract of employment or other contract with any person, or
- (b) as a volunteer for any body (whether or not incorporated).”.

(3) Under the heading “*Interpretation of this field*”, in the definition of “social care services”, after “non-residential social care services;” insert “information.”.

Exceptions to matters in Part 1 of Schedule 5 to the 2006 Act

3.—(1) Section 94 of the 2006 Act is amended in accordance with paragraphs (2) to (4).

(2) In subsection (4)(a), after “Schedule 5” insert “and does not fall within any of the exceptions specified in paragraph A1 of Part 2 of that Schedule (whether or not the exception is under a heading corresponding to the field which includes the matter)”.

(3) In subsection (6)(a), after “restrictions in” insert “paragraphs 1 to 6 of”.

(4) In subsection (7), after “Schedule 5” insert “(or falls within any of the exceptions specified in paragraph A1 of Part 2 of that Schedule)”.

(5) In section 101(1)(a), after “Schedule 5” insert “(or falls within any of the exceptions specified in paragraph A1 of Part 2 of that Schedule)”.

(6) Schedule 5 to the 2006 Act is amended in accordance with paragraphs (7) to (12).

(7) In Part 1 of Schedule 5—

- (a) in matter 10.1 omit the words from “This does not include” to the end of that matter;
- (b) omit the words and tables from “EXCEPTIONS TO MATTERS” to the end of that part.

(8) For the heading of Part 2 of Schedule 5 substitute “EXCEPTIONS TO MATTERS AND GENERAL RESTRICTIONS”

(9) After the heading of Part 2 of Schedule 5 insert—

“Exceptions to matters

A1 These are the exceptions mentioned in section 94(4)(a) and (7)—

Highways and transport (field 10 of Part 1)

- (1) Registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

- (2) Regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used.
- (3) Road traffic offences.
- (4) Driver licensing.
- (5) Driving instruction.
- (6) Insurance of motor vehicles.
- (7) Drivers' hours.
- (8) Traffic regulation on special roads, pedestrian crossings, traffic signs (apart from the placing and maintenance of traffic signs within the meaning of section 177 of the Transport Act 2000 for the purposes of matter 10.1) and speed limits.
- (9) Public service vehicle operator licensing.
- (10) Provision and regulation of railway services, apart from financial assistance which—
 - (a) does not relate to the carriage of goods,
 - (b) is not made in connection with a railway administration order, and
 - (c) is not made in connection with Council Regulation (EEC) 1191/69 as amended by Council Regulation (EEC) No. 1893/91 on public service obligations in transport.
- (11) Transport security.
- (12) Shipping, apart from financial assistance for shipping services to, from or within Wales.
- (13) Navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation.
- (14) Technical and safety standards of vessels.
- (15) Harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for communications between places in Wales.

Social welfare (field 15 of Part 1)

- (1) Child support.
- (2) Child trust funds, apart from subscriptions to such funds by—
 - (a) a county council or county borough council in Wales, or
 - (b) the Welsh Ministers.
- (3) Tax credits.
- (4) Child benefit and guardian's allowance.
- (5) Social security.
- (6) Independent living funds.
- (7) Motability.
- (8) Vaccine damage payments.
- (9) 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.

- (10) The Children’s Commissioner established under the Children Act 2004.
- (11) 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.
- (12) Welfare foods.

General restrictions”

(10) For the heading of Part 3 of Schedule 5 substitute “EXCEPTIONS FROM GENERAL RESTRICTIONS IN PART 2”.

(11) After the heading of Part 3 of Schedule 5, insert—

“Interpretation

6Z In this Part “general restrictions in Part 2” means paragraphs 1 to 6 of Part 2.”

(12) In Part 3 of Schedule 5, for “Part 2 does not” (in each place) substitute “The general restrictions in Part 2 do not”.

Name

Clerk of the Privy Council

GPO – 09 3-II-08 4

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”) and other provisions of the 2006 Act relating to the legislative competence of the National Assembly for Wales. The Order extends the legislative competence of the National Assembly for Wales to make laws known as Measures of the National Assembly for Wales (referred to in the 2006 Act as “Assembly Measures”). The legislative competence conferred by this Order is subject to general limitations on the exercise of that legislative competence, which apply by virtue of section 94 of, and Schedule 5 to, the 2006 Act (as amended by this Order).

Article 2 inserts matter 15.9 into field 15 (social welfare) of Part 1 of Schedule 5 to the 2006 Act. The matter is about supporting the provision of care by carers and promoting the well-being of carers.

Article 3 amends section 94 of the 2006 Act and Part 2 of Schedule 5 to that Act to make provision for exceptions that apply to all matters in Part 1 of Schedule 5. It also makes consequential amendments to Part 3 of Schedule 5 and other provisions of the 2006 Act.

A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

MEMORANDUM FROM THE DEPUTY MINISTER FOR HEALTH AND SOCIAL SERVICES

CONSTITUTIONAL LAW: DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009

Proposal for a Legislative Competence Order relating to Carers

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 within Schedule 5 to the 2006 Act).

Background

6. Carers are at the heart of 21st Century families and communities. In a changing society most people are living longer, many are developing long-term conditions and the vast majority have rising aspirations about their

quality of life. Consequently, an increasing number of people will find themselves fulfilling caring responsibilities.

7. Many people, mainly women, are now balancing work, childcare and caring for an ageing parent. Increasing numbers of older people often care for their partner while providing childcare for grandchildren and parents of children with complex needs know they will be “lifetime” carers. The positive shift to independent living and care at home, away from institutionalisation, will continue to require a greater contribution from carers. At the same time families are now frequently scattered across the world, couples are struggling to retain a positive work life balance and in an ageing society some older people are left isolated with little or no support from family or friends.

8. Unpaid carers currently provide around 70% of care in the community and forecast demographic changes suggest that the pool of potential carers relative to numbers needing care is likely to decrease over the medium term. With an increasing life expectancy for those in need of care, it cannot be assumed that their carers will be able and willing to sustain their caring role over a longer period without help and support. There are also clear signs that informal care to older people by their adult children is unlikely to keep pace with demand, due to underlying demographic trends, a trend that is reflected across the UK (see for example “Informal Care for Older People Provided by Their Adult Children: Projections of Supply and Demand to 2041 in England, PSSRU Discussion Paper 2515) but is likely to be particularly acute in those parts of Wales where present reliance on informal carers is highest.

9. Many of the issues affecting carers and carers’ services in Wales are common across the UK, and in putting together this proposal the Assembly Government has taken note of the extensive consultations undertaken across the UK as part of the development of the UK Government’s strategy “Carers at the heart of 21st century families and communities” and the evidence and analysis reflected in this report. However, the 2001 Census across England and Wales shows that Wales has a higher proportion of carers than any English region (11.7 per cent or 341,000 carers), the highest proportion of people with limiting long-term illness (23.3 per cent) and a level of permanent sickness and disability in the economically inactive population aged 16-74, which is higher than any region of England at 9.2 per cent. These figures alone suggest that a single holistic approach may be necessary and appropriate to tackling the intensity of these issues in Wales.

10. The Welsh Assembly Government’s *Carers Strategy for Wales Action Plan 2007*, recognised the need to mitigate the effects of these demographic changes, and foresaw that these changes including trends towards more dispersed families could require a range of measures

designed to support carers in their caring role and help them maintain their own health and well being. The 2007 Action Plan will be reviewed in 2009. Detailed proposals for measures will be informed by the outcomes of this review of the Wales strategy.

11. The current legislative framework in relation to carers focuses mainly on statutory authorities' powers and duties. It includes:

- **Disabled Persons (Services, Consultation and Representation) Act 1986**

This requires local authorities to have regard to the ability of the carer to provide or continue to provide care when deciding what services to provide to the disabled person.

- **Carers (Recognition and Services) Act 1995**

This contains the core statutory responsibilities and requires local authorities to carry out an assessment of a carer's ability to provide and to continue to provide care, if the carer requests this, at the time of the assessment of the person they care for.

- **Carers and Disabled Children Act 2000**

This extends the provisions of the 1995 Act to enable a local authority to undertake a separate assessment of a carer's needs and to supply services (or direct payments) directly to carers following assessment.

- **Carers (Equal Opportunities) Act 2004**

This places a duty on local authorities to inform carers of their right to an assessment, and requires carers' assessments to consider whether the carer works or is undertaking education, training or any leisure activity. It also provides for better co-operation between statutory agencies in the planning and provision of services for carers.

- **The Work and Families Act 2006**

This came into force in Wales in April 2007. It requires employers to consider requests from people with caring responsibilities to work flexibly.

- **The Children and Young Persons Act 2008**

This will require local authorities to make adequate arrangements for short break provision for Disabled Children.

In addition the Welsh Assembly Government has a range of powers to inspect, regulate and issue statutory guidance in respect of local authority services under the Local Authority Social Services Act 1970, the Care

Standards Act 2000 and the Health and Social Care (Community Health and Standards) Act 2003. It also has powers to direct the NHS under the National Health Services (Wales) Act 2006.

12. Despite this existing framework of legislation and guidance consultations with carers, carers' organisations and others have identified gaps in service provision that cannot currently be addressed. These include:

a. concerns that carers' assessment and services for carers vary greatly and are very patchy across Wales. This concern was highlighted in a report produced by the Care and Social Services Inspectorate for Wales (CSSIW) in June 2008 [On the way up? Adult Social Care Performance Indicators in Wales 2006-07]. The kind of services provided to carers include, but are not limited to, respite care, peer support networks, support to access social, leisure and education activities, day centres, awareness raising with professionals; information, training and outreach services, direct payments and advocacy services.

b. the need for renewed effort to identify carers, the wider provision of information for carers, and better engagement by the NHS with carers as partners in the provision of care [Carers Summit Conference Report April 2005]

c. evidence that the presence of an unpaid carer in a household may reduce the likelihood of the carer being assessed for priority services by the local authority. Paradoxically, this reduces both the availability of services for the cared for person, (thereby increasing the burden on the carer), and the availability of compensatory services, such as respite, which benefit the carer. [See for example "Analysis of the Costs of Domiciliary and Personal Care in Wales: Some Direct Evidence": Bell & Dawson: March 2008]

d. indications that many young carers are still carrying an inappropriate burden of care, which has a measurable impact on their health as they grow into young adulthood [see for example Welsh Health Survey 2005/06: Health of Carers, 15/05/08]. Welsh Assembly Government guidance on the Carers and Disabled Children's Act 2000 advised that "...support for young carers should be aimed primarily at helping any disabled or other adults with parental responsibility to carry out their parental role and to remove inappropriate responsibilities from young children." And ".....any such services provided will be designed not to support them in their caring role but rather to ensure that they do not undertake a caring role that is inappropriate." However the continuing emphasis on services to support young carers in their caring role, although welcomed by young carers themselves, suggests that we have not yet achieved the joined-up approach that is needed across social services for adults and for children, and the NHS.

13. The current framework of legislation and guidance in Wales has clearly proved insufficient to ensure that the Welsh Assembly Government's policy objectives with regard to carers are given the necessary priority, so that these gaps and inconsistencies in service provision are tackled effectively. The Assembly Government's "One Wales" programme of Government therefore included a commitment to prepare new legislation on carers rather than rely on existing reinforcement means alone such as performance measures and inspection, financial incentives or powers of direction. This proposal for legislative competence derives from the need to support the provision of care by carers and to promote the well-being of carers as noted above. In particular we envisage the need to improve the lives of carers in the following key areas:
- a. to ensure that carers have the right information at the right time to support them in their caring role. The *Carers' Strategy Implementation Plan in Wales 2000* highlighted a need for the provision of easily accessible, relevant and factually correct information for carers, as well as acknowledging the need for a longer term view of the information needs of carers. The kind of information carers may need from time to time would include information about financial benefits, employment provisions including flexible working, rights to a needs assessment, social services functions available to them, care planning for the person cared for, medicines management, safe handling and lifting and other matters related to the care of the person cared for.
 - b. to ensure that timely and appropriate practical and emotional help and support is provided to carers both to sustain them in their caring role and also to help them attain their personal ambitions for accessing education, training and employment opportunities. This would include giving them a right to appropriate breaks from caring responsibilities.
 - c. to ensure that statutory agencies (being those agencies mentioned in section 3(5) of the Carers (Equal Opportunities) Act 2004 (c.15) properly engage with carers as partners in the provision of care involving them at all levels in the assessment, delivery and evaluation of an individual's care arrangements.

Scope

14. It is proposed that the Matter be inserted under Field 15: Social Welfare in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to legislate on these issues by way of an Assembly Measure. Carers in this context means carers of individuals cared for of any age, but in the case of individuals caring for children it covers only children with a physical or mental impairment. The Order would not allow the Assembly to legislate in respect of persons who provide care by virtue of a contract of employment or other contract or as a volunteer, neither would the Order confer power on the Assembly to alter the employment rights of carers.

15. The definition of carer in this matter does not exactly mirror that given in the Carers and Disabled Children Act 2000 in that it contains no age restriction. This will ensure that the Assembly is able to legislate to promote the well-being of children and young people who are carrying out caring responsibilities, as well as older carers. The National Assembly already has competence in relation to social care services for children; persons who care for, or who are about to care for, children; and young persons. This matter will enable a Measure to broaden provision beyond that relating only to social care services and provide a single framework for a range of services to support carers.
16. The Matter would enable the Assembly to ensure that the provision of care by carers is supported and that their well-being is promoted. It would, for example, allow for a requirement to be placed on relevant public sector agencies to develop carers information strategies along the lines of the Scottish legislation in this area; for them to work together effectively to support the provision of care by carers and to promote their well-being (particularly the well-being of young carers); and also for improvements to be made to carers' access to replacement care (respite care) with provision for an entitlement to respite for defined groups. The matter specifies that it includes, "in particular", the provision of social care services. This means that Assembly Measures made in reliance on this matter could make provision which, in promoting the well-being of carers and supporting the provision of care by them, was not exclusively confined to social care services: such as, provision to ensure that health bodies take the interests of carers into account, for example in making arrangements for appointments, discharge arrangements and collection of prescriptions for the person being cared for.
17. The definition of "well-being" to be used in relation to the matter is as set out in the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008. The definition of "social care services" in that Order is to be amended by virtue of this Order so as to include the provision of "information". For ease of reference, the definitions can also be found at Annex A.
18. The principal purpose of this LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the 2006 Act that will enable the Assembly Government to improve services for carers and fulfil the commitment given in "One Wales".

Exceptions

19. The proposed Order also makes technical amendments to Section 94 and Schedule 5 of the 2006 Act. The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 lists exceptions to matters in a table, with the matters to which each exception relates being identified against each one. The effect of the technical amendments to Schedule 5 which are set out in paragraph 3 of the proposed Order is to apply those same exceptions to all matters in Part 1 of Schedule 5. The table of exceptions is replaced by a list of exceptions,

- set out in a new paragraph A1 in Part 2 of Schedule 5. Section 94 of the 2006 Act is amended to make it clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph. This achieves more surely the objective that these exceptions should apply in all cases where they are relevant and makes Schedule 5 clearer and easier to understand by applying these exceptions to all matters listed in it.
20. It will be possible to add new exceptions to the list (including under other fields) when new matters are added which make further exceptions necessary and where it is intended that those further exceptions should apply across the board. It will also still be possible to specify an exception to an individual matter in future, where it is required only as part of the definition of that matter.
 21. The proposed Order does not add any new exceptions, since no additional exceptions are required by the matter being added. However the existing exceptions, including those relating to social security and other benefit payments, will apply to the matter inserted by Article 2 of the proposed Order.

Geographical limits of any Assembly Measure

22. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly's legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.
23. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales.

Minister of the Crown functions

24. This proposed Order in itself does not seek to modify or remove any functions of a Minister of the Crown. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of a Minister of the Crown without the consent of the Secretary of State. In relation to any future proposals that may impact on Minister of the Crown functions the appropriate UK Government Department will be consulted and agreement sought to any proposals to remove or modify these functions.

Conclusion

25. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should

be extended in accordance with the provisions of the Government proposed Order to which this Explanatory Memorandum relates.

Gwenda Thomas
Deputy Minister for Health and Social Services
December 2008

Annex A

Interpretations

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

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

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

Pwyllgor Deddfwriaeth Rhif. 3
Legislation Committee No. 3

Annex 2



Cynulliad National
Cenedlaethol Assembly for
Cymru Wales

Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff CF99 1NA

19 January 2009

Dear Colleague

Consultation - Permanent Legislation Committee 3 - *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009* relating to Carers

On the 8 December 2008, the Deputy Minister for Social Services laid before the Assembly the proposed National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009 ('the proposed Order') and Explanatory Memorandum, in accordance with Standing Order 22.13 and 22.14.

The proposed Order was subsequently referred to Permanent Legislation Committee 3 for detailed consideration. At its meeting held on 14 January 2009 the Committee agreed the following terms of reference-

To consider:

- the general principles of the proposed Order and whether legislative competence in the area identified in '*Matter 15.9*' should be conferred on the Assembly; and
- the terms of the proposed Order, and in particular whether they are too broadly or too narrowly defined.

The Committee's primary purpose is to consider whether the Assembly should have the power, in principle, to legislate by Measure in the area identified in the proposed Order, i.e. supporting the provision of care by carers and promoting the well-being of carers. However, it is not within the remit of the Committee to consider the specific way in which that power, if conferred, should be exercised. As such, the Committee will avoid engaging in detailed discussions on proposed future Measures, reviewing existing policies in this area or replicating work already undertaken by former subject committees.

A copy of the proposed Order and its accompanying Explanatory Memorandum are enclosed at **Annex 1**. An electronic version of these documents along with information on the legislative process and details of the Committee can be found at

<http://www.assemblywales.org/bus-home/bus-legislation.htm>

I am writing to invite you to submit evidence to the Committee to help inform its work. In preparing your submission it would be helpful if you could address the following:

1. What are your views on the general principle that legislative competence in the area identified in Matter 15.9 be conferred on the Assembly?
2. What are your views on the terms of the proposed Order e.g. are they too narrowly or broadly drawn?
3. Is the definition of carer in the proposed Order appropriate? If not, how should the proposed Order be re-drafted and why?
4. Do you consider that the excepted Matters, relating to field 15, would have implications for the effectiveness of any future proposed Measures brought forward under Matter 15.9? If so, please explain why.

(Please Note: The excepted Matters are referred to under the heading 'Social Welfare (field 15 of Part 1) on page 3 of the proposed Order. The Assembly has no power to legislate in relation to excepted Matters).

If you wish to submit evidence please send an electronic copy of your submission to legislationoffice@wales.gsi.gov.uk and entitle the e-mail *Consultation Carers LCO*. If you would prefer to send your submission in hard copy, please send it to Ruth Hatton, Deputy Committee Clerk, Legislation Office, National Assembly for Wales, Cardiff Bay CF99 1NA.

The closing date for submissions is Friday 13 February. It will not be possible to take into account responses received after this date. However, I would ask that submissions be forwarded as earlier in advance of this deadline as conveniently possible, in order to enable the Committee to progress its scrutiny of the proposed Order.

When preparing 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 specify this at the end of your submission.**
- Please indicate whether you are responding on behalf of an organisation, or as an individual.
- Please indicate whether or not you would be prepared to give oral evidence to the Committee.

If you have any queries please contact the Clerk, Fay Bowen (tel: 029 2089 8041) or Ruth Hatton, the Deputy Clerk (tel 029 2089 8019).



Dr. Dai Lloyd AM
Committee Chair

Reference	Organisation
C01	Association of Chief Police Officers
C02	Barnardos Cymru
C03	Wales Carers Alliance, Annex 1
C04	Chartered Society of Physiotherapy
C05	Crossroads Cymru and the Princes Trust for Carers
C06	Care and Social Services Inspectorate Wales
C07	Down's Syndrome Association
C08	Hafal
C09	Older Peoples Commissioner for Wales
C10	Welsh Local Government Association and Association of Directors of Social Services in Wales
C11	Denbighshire County Council
C12	Local Health Board-Ceredigion
C13	Welsh Language Board
C14	National Federation of Women's Institutes Wales
C15	The Institute of Local Government Studies
C16	The Children's Commissioner for Wales

Responses to the consultation can be found at:

http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-legislative-competence-orders/bus-leg-lco-no9-social_welfare/lc_3_-_socwelfare_consultationletter/lc3_c_list_of_responses.htm

Schedule of Oral Evidence

Date:	Witnesses:
28 th January 2009	Gwenda Thomas AM Deputy Minister for Social Services
4 th February 2009	Welsh Local Government Association Association of Directors of Social Services Cymru
11 th February 2009	Commissioner for Older People in Wales Children's Commissioner for Wales Wales Carers Alliance
25 th February 2009	Gwenda Thomas AM Deputy Minister for Social Services

Transcripts of oral evidence sessions can be found at:

<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-lc3-agendas.htm>

Gwenda Thomas AC/AM
Y Dirprwy Weinidog dros Wasanaethau Cymdeithasol
Deputy Minister for Social Services
Oddiwrth yr Ysgrifennydd Dyddiadur
From the Diary Secretary



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref
LF/GT/0009/09

Dr Dai Lloyd AM
Committee Chair
Legislation Committee No. 3
National Assembly for Wales,
Cardiff Bay
CF99 1NA.

5 March 2009

Dear Dai

The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 relating to Carers

At the Committee meeting on 25 February I agreed to write to the Committee with additional advice and information on a few matters:

1. The suggestion by the Down's Syndrome Association that in Article 2 of the proposed Order:

"This matter includes, in particular, social care services to help carers"

be replaced by:

"This matter includes, but is not limited to, social care services to help carers"

I have been advised that the suggested drafting change does achieve the same effect as the current wording. I agree that it is a more accessible form of words.

If we are to make this change, then we shall also need to amend existing matters in Schedule 5 to ensure consistency and to avoid any suggestion that something different is meant in those other matters where "in particular" has already been used. Although "in particular" has continued to be used in the newly proposed LCOs to ensure consistency with existing provisions, those provisions in other proposed LCOs could also be amended to fit with this different approach.

I need to take further advice on the feasibility of making all these changes and then I may have to discuss the merits of this possible change with Ministerial colleagues.

Bae Caerdydd • Cardiff Bay
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2. Questions raised by Committee members in relation to young carers:

- patterns of care for young carers in relation to the terms 'regular and substantial' especially in relation to sibling care, and,
- support for a child caring for a sibling because a parent is unable to provide care

The issues we discussed related to whether the LCO as drafted covers children and young people who are looking after siblings who do not themselves have a physical or mental impairment. These children are not covered by the proposed LCO as it is presently drafted. I have taken the opportunity to discuss this further with the Carers Alliance, whom I met on 26 February. The Alliance's strong view was that the proposed order should not include children in this situation. Children and young people who are caring for siblings in these circumstances, whilst not covered by our proposed Carers LCO, may fall within the definition of children in need and be embraced by our Vulnerable Children Order if there is a risk that the level of care they are providing is adversely affecting their health or development. The Alliance's views coincide with mine and I am therefore not considering making any amendments to the proposed Carers LCO in this respect.

On the question of whether care shared between children in a household is "regular" and "substantial", this has to be determined on the facts of individual cases taking into account the age, circumstances and impact on the children concerned. Again, if there is a risk that the care they provide is adversely affecting their health and development then they may be regarded as children in need irrespective of the outcomes of any assessment about the "regular" and "substantial" criteria.



GWENDA THOMAS AM
Deputy Minister for Social Services