

# **MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT**

## **CONSTITUTIONAL LAW: DEVOLUTION, WALES**

**The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008** (previously entitled National Assembly for Wales (Legislative Competence) (No. 3) Order 2007

### **Proposal for a Legislative Competence Order Relating to Vulnerable Children and Child Poverty**

#### **Introduction**

1. The Government of Wales Act 2006 (“the 2006 Act”) empowers Her Majesty, by Order in Council, to confer continuing legislative competence on the National Assembly for Wales (“the Assembly”) to legislate by Assembly Measure on specified matters. 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 accordance with the competence conferred on the Assembly and subject to the provisions of the 2006 Act.

2. The attached document is a proposed Order in Council. It sets out matters which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of a draft of the Order by the Assembly and by both Houses of Parliament.

3. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

#### **Background**

4. New legislative powers related to the specified “matters” will enable the Assembly to pass Measures, which are based on Welsh priorities and timescales. These Measures will be subject to thorough scrutiny and approval by the Assembly.

5. 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 to safeguard, promote and secure the wellbeing of all children and young people, including those who may be vulnerable - particularly 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.

6. The Welsh Assembly Government policy for all children and young people, including those who are vulnerable, and for tackling child poverty is underpinned by four key publications outlined below. The Welsh Assembly Government's programme of government includes a commitment to developing Wales-specific solutions to child poverty (and the poverty experienced by those families and communities within which poor children live); and to integrating strategies through reform and consolidation of the law in relation to the welfare of all children and young people, including vulnerable children. The Welsh Assembly Government sees the Legislative Competence Order as a necessary vehicle to deliver these commitments.

7. *Rights to Action*<sup>1</sup> 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;
- giving the highest priority to those most in need, recognising 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.

8. *Fulfilled Lives, Supportive Communities*<sup>2</sup>, a ten year strategy for Social Services in Wales and *Towards A Stable Life and A Brighter Future*<sup>3</sup>, set out the Welsh Assembly Government's 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.

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<sup>1</sup> Rights to Action, Welsh Assembly Government 2005

<sup>2</sup> Fulfilled Lives , Supportive Communities - A Strategy for Social Services in Wales Over the Next decade, WAG (2007)

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

9. 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.

10. 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 not 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's 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 People's 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's Partnerships have no responsibility for the direct provision of services.

11. 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 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.

12. The Order covers the welfare of all children and young people in Wales up to the age of 25 years old, with minor exceptions in relation to certain care leavers. Vulnerable children are defined within the Order which has broad scope to relate to the needs of a diverse range of children: any child in need (including disabled or very sick children), children on the periphery of care, in care, or who have left care. It is drafted so as to include support to parents who may need help for their mental health, substance misuse, learning disability, poverty or other problems that may affect a 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.

13. There now exists a large volume of legislation relating to the welfare of children and young people 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 the reform and 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 to promote social welfare for all children and young people, in particular the most vulnerable, including children in poverty.

14. Building on the Welsh Assembly Government's 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's Partnerships<sup>4</sup>. The Order 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.

15. 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 constraints have limited the development and improvement 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;*

*(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;*

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

*iii) take action to place duties on public bodies to demonstrate their contribution to ending child poverty; and*

*(iv) create a statutory right for free child care for two year olds in greatest need*

16. 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 underpin arrangements to provide a top-up payment to the Child Trust Fund accounts for certain categories of children and specific arrangements for Welsh local authorities to boost the savings of children in Wales.

## **Scope**

17. The Order seeks to confer powers on the National Assembly for Wales (NAfW) to make Assembly Measures in relation to the welfare of all children and young people including vulnerable children and to tackle child poverty in Wales, by adding matters to Schedule 5 of the 2006 Act. The scope of the Order is drawn so as to enable the Assembly to reform and 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 (up to 25 years of age), not just those who are categorised as “looked after” or “children in need”. It will, for example, cover any child and their carer (parent) who is in receipt of social care services and may range from childminding to parenting classes and all services provided under Flying Start and Cymorth. 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.

18. The matters set out in the Order would in the main cover services currently provided under Parts 2 and 3 and Schedule 2 of the Children Act 1989. They would also extend to local authorities’ responsibilities for pre-school and other child minding and childcare services currently provided under the Flying Start and Cymorth programmes. Other legislation relating to vulnerable children which is within the scope of these matters is the power to make grants for welfare purposes 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 these relate 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.

19. As outlined above, the principal enhancement is in the field of social welfare, although there are related matters in the fields of education and training, and sports and recreation which evidence shows are key components to a child and young person’s development and social wellbeing. Cross border duties in relation to England and Wales are preserved. When considering matters it is important to recognise that these matters are linked and must be considered in the round as services and functions relating to

vulnerable children and young people may be covered by one or more of the matters across the three fields.

### **Field 5 – Education and Training**

20. Matter 5.18 - This would enable the Assembly to legislate with regard to those aspects of the Flying Start and Cymorth schemes which involve the provision of facilities and activities which are educational in nature. It would also cover other linked schemes provided by local authorities and their partners to enhance the development and welfare of children and young people

### **Field 15 – Social Welfare**

21. Matters 15.2 and 15.6 relate to the general duties of safeguarding and promoting the well-being of all 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. 15.2 covers the functions of public authorities: this would include organisations or persons carrying out those functions directly or on behalf of a public authority (for example voluntary and independent sector) in discharging their functions to safeguard and promote the wellbeing of children and young people in their area. Matter 15.2 is confined to functions of public authorities. It has been made clear that this Order does not confer competence on the National Assembly for Wales to remove the defence of reasonable punishment in relation to the offence of common assault where the assault is against a child.

22. 15.2(c) relates specifically to the wellbeing of any child or young person that may require support necessary to ensure they are not disadvantaged by aspects of child poverty or inequality of different groups for example, services to a disabled child, support for 'independent living' for younger disabled persons.

23. The line after 15.2(c) makes clear that matter 15.2 does not extend to the functions of public bodies that are non-devolved for example: Youth Justice Board, Police and the Courts. Matter 15.6 however does cover in addition the non-devolved bodies specified in 15.6 (b) to (g), but only in relation to co-operation and arrangements to safeguard and promote the wellbeing of children and young people. The scope of Matter 15.6 is limited to co-operation and arrangements. It cannot impose any new functions outside the scope of the matter on the bodies listed; it does however provide scope to modify the arrangements for co-operation in consultation with them.

24. In addition to the above Matter 15.7 in particular, covers the duties on the local authority as lead agency in the Children and Young People's Partnership to ensure that strategic plans take into account their duties to

promote wellbeing and include 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 but provides sufficient flexibility for different support and other arrangements that the Welsh Assembly Government may want to bring forward in Wales.

25. Matter 15.3 - Adoption Services and Special Guardianship Support Services - includes all devolved functions in relation to adoption: public and private arrangements including regulation and inspection of services and individuals working in the service, post adoption support. It does not cover any change to the court process for adoption or the law in relation to placement for adoption. This is to ensure we preserve the unified concept and system for adoptions across England and Wales. It covers the full scope of the duties of local authorities in relation to support services to which those involved in the new Special Guardianship arrangements are entitled.

26. Matter 15.4 - Fostering - covers all functions in respect of public and private arrangements for fostering. This includes regulation and inspection of services and individuals working in the service including changing the way that foster carers are regulated and supported.

27. Matter 15.5 – Social Care Services - provides competence in relation to any service that comes within the definition and which is provided to the list of people set out in 15.5(a) to (d). This list of people includes:

- 15.5(a) and (c) all children and young people up to 25 years old
- 15.5(b) any persons who care, or are about to care, for children and young people for example parents, family member, prospective adopters, foster carers etc
- 15.5(d) Services to care leavers

28. Services provided to groups within the list are not limited to traditional functions performed by the local authority social service departments. Matter 15.5 covers broad social care provision across a range of public bodies or other providers who carry out functions on their behalf. More broadly matter 15.5 (b) relates to 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 15.5 (d) extends support beyond 25 years to care leavers in circumstances where they are undertaking a course of education or training. It 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.

29. Matter 15.5 taken with 15.2 and 15.6 also covers the duties of local authorities and their partners under section 24 of the Children Act 1989 to provide advice and assistance to a category 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.

30. The matters also extend to the regulation and inspection of services (existing or new) and the workforce in children's homes, foster services and other services whether provided by individuals or organisations. Coverage is given for the functions of ensuring safeguards and quality of care, i.e. functions of the Local Safeguarding Children's Board and those currently undertaken by the Care and Social Service Inspectorate for Wales and the Care Council for Wales as they apply to services for children and young people. Matter 15.5 (b) can include support to the wider family and friends who are carers (commonly known as kinship care) and foster carers. It also covers direct support to parents where the child may be at risk had the service not been provided; for example, reunification of a child in care with their birth family.

31. 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.

32. Matter 15.7 covers any planning by local authorities for all children and young people in relation to discharging their wellbeing functions. In particular the 'single plan for children and young people' in relation to their wellbeing under the Children Act 2004. Matter 15.7 will draw heavily on 15.6 duties of local authorities and their partners to co-operate and to contribute to the plan to ensure the wellbeing of children and young people. It also gives scope for legislation about child poverty proofing plans.

33. Matter 15.8 covers the functions of the Children's Commissioner for Wales including their office's specific role in relation to reviewing and monitoring of complaints, advocacy and whistleblowing arrangements of public bodies in Wales, largely local authorities but also the NHS and Local Health Boards. It covers the Commissioner's broad responsibility to all

children and young people's welfare and individual cases that may be considered by the Commissioner.

## **Field 16 – Sports and Recreation**

34. Matter 16.1 taken with Matter 5.18 will enable the Assembly to legislate with regard to those aspects of the Flying Start and Cymorth schemes which extend to recreational and sport facilities and activities aimed at tackling social disadvantage among children and young people .

## **Interpretation**

35 These are self-explanatory. The definition of “well-being” is taken from the Children Act 2004 as stated law that is well understood by public authorities, practitioners and the courts. It has however been extended at (f) to include securing the rights, this is to place greater emphasis on the voice on the child as paramount to his/ her well-being and recognises the important concept of rights in the United Nations Convention of the Rights of a Child on which all the Assembly Government's policies and programmes for children and young people are underpinned. The term “vulnerable children” has broad scope to cover those children who may require additional support to ensure their welfare needs are met. It draws a clear distinction between public authorities' responsibility to the wider population of children and young people and the added role they will have in supporting the welfare needs of vulnerable groups such as those in need, in care, leaving care and disabled children. A new addition to the Order is the inclusion of the definition of public authorities which makes clear that the reference point in understanding the extent of the term is in the Human Rights Act 1998.

## **Exceptions Tables – Highway and Transport / Social Welfare**

36. Where a matter could otherwise be construed as covering a topic in relation to which it is not intended that the Assembly should have legislative competence, it is necessary to define the matter so as to exclude that topic. One way to do this is by listing those topics as exceptions. The first column of the tables at paragraph 5 sets out exceptions from the matters listed in the second column. The table on Highways and Transport restates exceptions that currently exist in Schedule 5 to the 2006 Act as amended. Matter 5.18 has been added as a Matter to which the transport exceptions apply, to clarify that although transport arrangements may be reasonably incidental to the matter it does not extend to the express matter.

37. The table of exceptions for **Social Welfare** clarifies what is not included in the matters listed in this Order. These exceptions include; child support (i.e. arrangements for the provision of maintenance by both parents of a child), tax credits, child benefit, guardian's allowance, social security, Motability, Vaccine Damage Payments, Independent Living Funds and Welfare Foods. Matters 15.2. 15.4.and 15.5 do not include the general scheme of child trust funds but they do include the making of payments into

Child Trust Fund accounts by Welsh Ministers or local authorities in Wales. 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 in relation to child poverty.

### **Changes to the LCO following pre-legislative scrutiny**

38. Only minor changes have been made in this draft Order compared with the proposed Order laid before the Assembly and presented to Parliament for pre-legislative scrutiny in March / April 2008. The changes take account of recommendations made following pre-legislative scrutiny by the Welsh Affairs Committee and the National Assembly for Wales Committee.

39. The main effect of the changes is to define more precisely on the face of the Order the matters in relation to which the National Assembly for Wales will have enhanced competence and clarify their application as far as non-devolved bodies are concerned. The minor technical changes include renumbering of the Matters. The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008, relating to charges for domiciliary care services, inserts Matter 15.1 into Field 15 of Schedule 5 to the Government of Wales Act 2006. As a consequence the Vulnerable Children Order has been renumbered.

40. In those instances where recommendations were made which have not been incorporated into the draft Order, careful consideration was given to each one. In certain cases, such as the proposals for reference to play, whistleblowing and child poverty, the conclusion was that to include such specific references could have had the effect of narrowing or creating uncertainty about the interpretation of the Matters in the Order.

### **Effect of other provisions in the 2006 Act**

41. The effect of this Order needs to be considered in the context of the overall provisions of the 2006 Act.

### **Geographical Limits of any Assembly Measure**

42. 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.

43. 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**

44. 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**

45. 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 draft Order attached.

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**8 July 2008**

