

MEMORANDUM FROM JONATHAN MORGAN AM

CONSTITUTIONAL LAW: DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2010

Draft Legislative Competence Order Relating to Mental Health

Introduction

1. This Memorandum sets out the background to the provisions in the Member Draft Legislative Competence Order: the National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2010 (“the Draft LCO”) which confers additional legislative competence upon the National Assembly for Wales and which has been laid in accordance with SO 22.31. The Memorandum is laid in accordance with SO 22.32 and explains the scope of the power requested.
2. The constitutional context to the Draft LCO is set out by the Government of Wales Act (“the 2006 Act”) and the UK Government’s policy, contained in the White Paper *“Better Government for Wales”*. 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. Matters may be added to the fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament in relation to matters, subject to the limitations provided for in the 2006 Act. An Order in Council under section 95 of the 2006 Act is referred to as a Legislative Competence Order or LCO in this memorandum.
3. The Draft LCO confers further legislative competence on the National Assembly for Wales in the field of health and health services and in the field of social welfare (Field 9 and Field 15 respectively within Schedule 5 to the 2006 Act). New legislative competence in respect of the specified matters will enable the Welsh Ministers, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures. These Measures will be subject to thorough scrutiny and approval by the Assembly.

Context

4. Mental health problems are very common - about one in six adults suffer from mental health problems at any point in time. There are a wide range of mental health problems ranging from common disorders of depression and anxiety, with a prevalence of about 14% in the UK, to the less common psychotic illnesses such as schizophrenia with a prevalence of less than 0.5%. Over one million people each year seek specialist treatment for mental health problems.
5. Depression and dementia are the commonest mental health problems in older people, but older people can also experience those types of mental health problems outlined above. Under-detection of mental illness in older people is widespread, due to the nature of the symptoms and the fact that many older people live alone. Dementia can also occur before the age of 65; there are about 1000 people with dementia in younger age groups in Wales.

Current legislative framework

6. In general terms the provision of assessment and clinical treatment in respect of mental health is provided as part of the National Health Service under the National Health Service (Wales) Act 2006, both through general duties placed on Welsh Ministers and through the actual provision of services by Local Health Boards (LHBs). Local Authorities also have responsibility for the provision of assessment and services established in various provisions within social care legislation. Some of the legislative provision relates only to adults, while other elements relate to persons of all ages. For example:
 - § National Assistance Act 1948 – section 21 confers a duty to provide accommodation for persons aged 18 or over who are in need of care and attention; section 29 confers a duty to promote the welfare of, amongst others, mentally disordered persons aged 18 or over.
 - § National Health Service and Community Care Act 1990 – section 47 requires a local authority to carry out an assessment where it appears to them that any disabled person for whom they may provide or arrange for the provision of community care services may be in need of such services. Having regard to that assessment, the local authority must decide whether the need calls for the provision of such services by them. Where it would appear the services should be provided by an LHB, they must notify the appropriate trust or authority. Section 47 does not guarantee the actual provision of services.
7. The Mental Health Act 1983 (“the 1983 Act”) provides the statutory framework under which assessment and treatment are provided under compulsion. The 1983 Act deals with the manner by which patients may be compelled, amongst other matters, to receive assessments in hospital of their mental state and receive treatment for mental disorder. The 1983 Act does not deal with the actual provision of assessment or treatment.
8. The 1983 Act has recently been amended by the Mental Health Act 2007 and most significantly, in the context of this Draft LCO, now provides for advocacy services to be provided in certain circumstances in respect of patients subject to certain provisions of the 1983 Act (mainly compulsion). Such advocates are known as Independent Mental Health Advocates (“IMHAs”).
9. The Mental Capacity Act 2005 also provides for advocates in certain prescribed circumstances, known as Independent Mental Capacity Advocates (“IMCAs”). The role of IMCAs has recently been expanded under the deprivation of liberty safeguards of this Act.

Rationale

10. Mental health has been identified as one of the Welsh Assembly Government’s health priorities. The Welsh Assembly Government’s strategy for mental health services for adults of working age in Wales was published in 2001, and set out the Assembly Government’s aspirations for a modern, community focussed mental health service which is based on the principles of equity, empowerment, effectiveness and efficiency. In April 2002 the National Service Framework (NSF) for Adult Mental Health Services was published, which set the standards and key actions necessary to drive up quality and reduce variations in health and social care policy.

11. In 2005 the Wales Audit Office published a baseline review of adult mental health service provision in Wales. This found that at that time services were not configured in an optimum way to support the delivery of the NSF standards and key actions. As a result *Raising the Standard*, the revised NSF for adult mental health services, was published in October 2005. This updated the original NSF, taking into account the structural changes that had been introduced and also reflected the baseline review and other key reviews into mental health services that had taken place.
12. The Strategy for Older People (2003), and the second phase of that Strategy (for 2008 to 2013), *Living Longer, Living Better*, recognises the social and economic determinants of health and well being and promotes active, healthy aging. The accompanying NSF for Older People (2006) aims to complement and dovetail with adult mental health policy.
13. *Everybody's Business*, the Child and Adolescent Mental Health Service strategy document (2001), sets out the Welsh Assembly Government's aims, objectives and underpinning principles for services for children and young people. This is supported by the NSF for Children, Young People and Maternity Services (2005).
14. During 2007 the Minister for Health and Social Services sought evidence on the possible future direction of mental health legislation in Wales. In response, a number of stakeholders spoke of the importance of improving service delivery, balancing the use of compulsory powers in mental health with improved rights for individuals, and developing legislation that is sensitive to the needs of people in Wales.
15. Organisations have reported the informed views of service users who have pointed to the importance of receiving early assessment and treatment for mental ill health: "...clients and carers know from experience that if a person receives early treatment for their mental illness they are much less likely to become so ill that they need compulsory treatment" (Hafal, 2007). Evidence shows that early intervention in psychosis - the detection and treatment of psychosis during the early phases of illness - can improve the long-term course of psychosis. Early intervention can lead to a faster, more complete recovery, a decrease in the frequency and severity of relapses, and an increase in time to first relapse.
16. Users of mental health services often experience difficulty negotiating with mental health professionals and ensuring that their own point of view is acknowledged. These difficulties apply both to the practical activities of daily life as well as help with their mental health problems. Users often have little information about their mental ill health and the various alternatives for treatment and care. Advocacy seeks to address this imbalance by ensuring that their voice is heard, their choice is real and their rights are safeguarded.
17. The Adult Mental Health Strategy (2001) states that: "*Every person who comes into contact with mental health services should have the right to an appropriate advocate.*" The baseline review of adult mental health services in 2005 identified that advocacy services in some parts of Wales were limited. A number of advocacy providers, service users and service providers have all expressed concerns that advocacy services will become focussed on the provision of statutory advocacy at the expense of meeting the wider strategic intention.
18. Despite the existing framework of legislation, guidance and NSFs, consultations with service users, service providers, mental health professionals and others, have identified gaps within the legislation and service provision that cannot be currently addressed in respect of assessment, treatment and advocacy. Namely:

- § the need for an improved focus on early intervention and treatment through statutory duties as regards the provision of assessment and treatment which is the preferred option of many service users and their families;
 - § the extant duties on local authorities to provide certain assessments do not translate into duties to provide services arising out of the assessments;
 - § also, the duties for assessment by local authorities are applicable only in respect of those who are mentally disordered, and not those who appear to be exhibiting symptoms or manifestations of such disorder. This can result in individuals having to reach a certain level of ill health before becoming eligible for assessment;
 - § a patchwork of obligations in respect of specialist mental health assessment and treatment within secondary services. In Wales such services are increasingly provided on a multidisciplinary basis, which involves a range of professionals and services. Those working within such services are keen to ensure, in line with the Welsh Assembly Government's strategies and service frameworks for mental health, that multidisciplinary working in this way should be strengthened. This would allow for a more seamless approach to service provision for the individual recipient, and for those services to be focussed on the needs of the individual in line with effective care planning;
 - § the existing legislative framework does not provide for a wide ranging and comprehensive advocacy service - the role of the IMHA is limited to specific functions in respect of qualifying patients in limited circumstances. There is a need to ensure advocacy is available for people at a time when their mental health and usual support mechanisms may be breaking down, leaving them vulnerable when key decisions about treatment and support may need to be made.
19. There are no suitable provisions within existing legislation that may be used to deliver a more comprehensive assessment, treatment and advocacy framework that is suitable for Wales.
20. Legislative competence is needed in respect of:
- § the assessment of an individual's mental health;
 - § the treatment of a person who is mentally disordered;
 - § advocacy services in respect of persons who are or may be mentally disordered.

Scope

Matter 9.2

21. The draft LCO inserts Matter 9.2 under Field 9: Health and Health Services within Schedule 5 to the 2006 Act. This will enable the Assembly to legislate on the assessment of mental health and treatment of mental disorder by way of Assembly Measure. The competence will enable future legislation to be considered which would place duties on NHS bodies and social services providers to assess a person's mental health. The competence will allow such duties to be imposed in respect of individuals (of all ages) with a current or previous diagnosis of mental disorder, as well as those who are presenting with symptoms of mental ill health for the first time. In addition, it will enable duties to be placed on NHS bodies and social services providers in respect of the treatment of a person's assessed mental disorder.

22. Matter 9.2 will not allow the Assembly to legislate in respect of compelling individuals to be assessed, treated or supervised or subjecting persons to guardianship. In effect this means that there is no overlap between the main subject matter of the 1983 Act and the legislative competence of the National Assembly for Wales.
23. Similarly matters concerning consent to treatment, restraint or detention are specifically excepted from matter 9.2. Again this ensures that the legislative competence does not overlap with the 1983 Act or the common law in these areas.
24. For the purposes of the matter, treatment of mental disorder is defined in accordance with the definition of treatment within the 1983 Act; this includes provision excluding alcohol or drug dependence from the definition of mental disorder.

Matter 15.10

25. The draft LCO inserts Matter 15.10 under Field 15: Social Welfare in Schedule 5 to the Government of Wales Act 2006. Matter 15.10 extends legislative competence as regards the provision of social care services to the area of mental health. Other matters relating to social care services have been added under field 15 by the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008, by which social care services are defined as: *“any of the following provided in connection with the well being of any person: residential or non-residential care services; advice; counselling or advocacy services; financial or any other assistance.”*
26. In addition, Article 3(3) provides a definition of advocacy as *“services providing assistance (by way of representation or otherwise) in connection with the well-being of any person”*. Notwithstanding that this is in Field 15 (Social Welfare), this definition will encompass advocacy connected with health related matters as well as social services.
27. Matter 15.10 provides the National Assembly with competence in relation to advocacy, apart from IMCA services established under the Mental Capacity Act 2005 as these are specifically excepted. The competence conferred does however cover all other aspects of advocacy.

Exceptions

28. Each of the matters has specific exceptions that apply to each matter only, as described above. The Draft LCO does not add any new general exceptions that apply to all matters, since no additional exceptions of this kind are necessitated by the matters being added. The existing general exceptions will apply to the matters inserted by this Draft LCO. The ‘general exceptions’ referred to are the exceptions that were added by Article 2(9) of the National Assembly for Wales (Exceptions to Matters) Order 2009 as paragraph A1 of Part 2 of Schedule 5 to the 2006 Act.

Changes to the LCO following pre-legislative scrutiny

29. The *Proposed Provision of Mental Health Services LCO Committee of the National Assembly for Wales*, the *House of Commons Welsh Affairs Select Committee* and the *House of Lords Constitution Committee* undertook detailed and comprehensive pre-legislative scrutiny of the proposed LCO. The Committee of the National Assembly published its report in June 2008 and the Welsh Affairs Committee and the Constitution Committee published their reports in October 2009.
30. This LCO was the first to be laid before Parliament for scrutiny by a non-Government Assembly Member, a matter which the Welsh Affairs Committee commented on during

their deliberations in noting the level of co-operation between the Assembly Member, the Welsh Assembly Government and the Wales Office.

31. In light of the helpful and considered recommendations of the Committee of the National Assembly for Wales and the Welsh Affairs Committee, a number of changes have been made to both the LCO and the Explanatory Memorandum.
32. The Constitution Committee of the House of Lords considered the proposed LCO raised no matters of constitutional principle.

Changes to the LCO

33. The proposed LCO was significantly revised following the recommendations made by the Committee of the National Assembly for Wales and before it was laid before Parliament for pre-legislative scrutiny. An alternative drafting approach was adopted, moving to competence in relation to the substantive issues of assessment of mental health and treatment of mental disorder. The earlier draft provided for these matters but by reference to individuals.
34. The Committee of the National Assembly for Wales were concerned about the relationship between the LCO and the 1983 Act, and the revised proposed LCO took account of this by excluding the substantive matters of the 1983 Act rather than individuals subject to the 1983 Act.
35. In evidence to both Committees the importance of the delivery of mental health services by both health and social care agencies was emphasised, and was specifically acknowledged in the recommendations of the Committee of the National Assembly for Wales. The revised proposed LCO took account of this by creating a new Matter within Field 15 which provides for competence in relation to social care services connected to mental health.
36. The Welsh Affairs Select Committee took evidence from a number of witnesses regarding the importance and value of independent mental health advocacy. The Committee correctly noted that it was not the intention to disapply in Wales the right to an IMHA for those subject to compulsory powers under the 1983 Act. The Committee thereby suggested that given this position, the drafting of the LCO should be reconsidered.
37. Following the evidence given to the Welsh Affairs Committee and in light of the constructive comments made within the report, the drafting of the LCO has been carefully reconsidered on this point. As stated in the evidence sessions, the intention is very much to support the development of independent mental health advocacy in Wales, including for patients subject to compulsion under the 1983 Act. The LCO therefore includes competence for the National Assembly to repeal the provisions in the 1983 Act related to advocacy to support the future development of advocacy in Wales.
38. The IMHA scheme under the 1983 Act has been operational in Wales since November 2008, and it is anticipated that this will develop and grow, providing an important safeguard for patients. However, were the LCO to be re-drafted to exclude competence to repeal provision in the 1983 Act from competence it would have the unintended consequence of limiting the National Assembly's flexibility to further improve and develop the advocacy scheme in Wales. In contrast, the competence as defined would enable the National Assembly to update the IMHA scheme over time and enable it to potentially replace it with an improved and expanded scheme to deliver specialist mental health advocacy to patients subject to compulsion or otherwise. It is for this

reason therefore the competence has been preserved within the LCO.

Changes to the Explanatory Memorandum

39. Both Committees requested that this Memorandum make clear to whom any new duties created by future Assembly Measures and imposed on the NHS and local authorities would apply. Whilst both Committees were satisfied that the LCO extended competence in relation to persons with a current or previous diagnosis of mental disorder as well as those without such a diagnosis, this Memorandum now confirms that position (at paragraph 21 above). Similarly both Committees were satisfied that the LCO extended competence in relation to persons of all ages (including children and young people). This Memorandum also confirms that position (at paragraph 21 above).

Effect of other provisions in the 2006 Act

40. The effect of the Draft LCO needs to be considered in the context of the overall provisions of the 2006 Act.

Geographical limits of any Assembly Measure

41. 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 powers to do so). There are limited exceptions to certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the Measure to be enforced and to make consequential amendments to other legislation.
42. 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

43. The Draft LCO 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 to 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 modify or remove these functions.

Conclusion

44. For the reasons outlined in this Explanatory Memorandum, it is proposed that legislative competence of the National Assembly for Wales should be extended in accordance with the provisions of the draft National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2010.

November 2009