



House of Commons
Welsh Affairs Committee

The proposed National Assembly for Wales (Legislative Competence) Order in the Field of social welfare 2008

Fourth Report of Session 2007–08

*Report, together with formal minutes, oral and
written evidence*

*Ordered by The House of Commons
to be printed 26 February 2008*

HC 257
Published on 5 March 2008
by authority of the House of Commons
London: The Stationery Office Limited
£13.50

The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

Current membership

Dr Hywel Francis MP (*Labour, Aberavon*) (Chairman)
Mr David T.C. Davies MP (*Conservative, Monmouth*)
Ms Nia Griffith MP (*Labour, Llanelli*)
Mrs Siân C. James MP (*Labour, Swansea East*)
Mr David Jones MP (*Conservative, Clwyd West*)
Mr Martyn Jones MP (*Labour, Clwyd South*)
Rt Hon Alun Michael MP (*Labour, Cardiff South and Penarth*)
Mr Albert Owen MP (*Labour, Ynys Môn*)
Mr Mark Pritchard MP (*Conservative, The Wrekin*)
Mr Mark Williams MP (*Liberal Democrat, Ceredigion*)
Mr Hywel Williams MP (*Plaid Cymru, Caernarfon*)

Powers

The committee is one of the Departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publications

The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm.

Committee staff

The current staff of the Committee is Nick Wright (Clerk), Llinos Madeley (Committee Specialist), Christine Randall (Committee Assistant), Annabel Goddard (Secretary), Jim Lawford (Chief Office Clerk) and Rebecca Jones (Media Officer).

Contacts

All correspondence should be addressed to the Clerk of the Welsh Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 6189 and the Committee's email address is welshcom@parliament.uk.

Contents

Report	<i>Page</i>
Introduction	3
Background	3
Introduction of the proposed Order	3
House of Lords Select Committee on the Constitution	4
The Welsh Affairs Committee’s inquiry and joint working	4
1 The proposed Order on charging for non-residential social care	7
Purpose	7
The proposed Order and existing Welsh Assembly Government policy	9
The devolution settlement	9
Use of the Legislative Competence Order in Council procedure	10
The timing of the proposed Order’s introduction	12
The scope of the proposed Order: the exclusion of residential care	13
Respite services	13
The power to abolish charging	14
A requirement to charge	15
Non-residential social care services for children	15
Variation in assessments for charging	17
The relation between Field 15 (social welfare) and Field 12 (local government)	18
Reimbursement to local authorities	18
Cross-border issues	20
Divergence of policy	20
Provision of services	21
2 Definitions of the terms used in the proposed Order	22
The location of definitions	22
The definition of social care	23
The definition of well-being	24
The definition of particular needs	25
Clarification of other terms contained in the proposed Order	26
“Individuals” and “persons”	26
“Payments” and “direct payments”	26
Conclusion	27
Conclusions and recommendations	28
Formal Minutes	31
Witnesses	32
List of written evidence	32
List of Reports from the Committee during the current Parliament	33

Introduction

Background

1. The Government of Wales Act 2006 introduced a new procedure whereby the National Assembly for Wales can bring forward proposals which would extend the Assembly's law-making powers by way of Legislative Competence Orders in Council. The Orders do not themselves change the general law for Wales – they pave the way to subsequent changes in the law applying to Wales within the devolved areas of legislative competence. They do this by adding new “Matters” to the “Fields” of legislative competence set out in Schedule 5 of the Government of Wales Act 2006.

2. These proposals for draft Orders may be introduced by the Welsh Assembly Government, by committees of the National Assembly, or by individual Assembly Members.¹ They are subject to pre-legislative scrutiny by committees of the Assembly appointed for this purpose and, potentially, by committees of the House of Commons and the House of Lords. Whitehall agreement (“clearance”) is a necessary pre-requisite before a proposed Order is referred by the Secretary of State for Wales to each House at this pre-legislative scrutiny stage.

3. Following the pre-legislative scrutiny stage, the National Assembly may agree an actual draft Order. This may take account of committee recommendations (from either its own committees or Westminster) following pre-legislative scrutiny. The draft Order must then be laid before Parliament by the Secretary of State for Wales – and he or she may still decline to do so at this stage. If the draft Order is laid, it is considered by both Houses of Parliament, and may be debated by them. Draft Orders at this stage are not amendable and can only be approved or rejected. If approved by both Houses, and once it is given the royal assent in the Privy Council, direct law-making powers are devolved to the Assembly within the scope of the Order in Council. The Assembly then makes those laws in the form of Assembly Measures, which must be passed by the National Assembly but which require no further approval by either Whitehall or the UK Parliament.

Introduction of the proposed Order

4. The proposed Order on charging for non-residential social care was introduced by the Welsh Assembly Government and laid before the Assembly by the Deputy Minister for Social Services on 26 November 2007.²

5. If adopted, the proposed Order would expand Field 15 of Schedule 5 of the Government of Wales Act 2006 by adding a new matter, Matter 15.9, which would extend the legislative competence of the National Assembly for Wales to cover:

- charges for non-residential social care provided by or secured by local authorities, and

¹ By ballot.

² Note: the proposed Order does not use the term ‘domiciliary care’.

- direct payments in respect of individuals so they, or persons looking after them, may secure non-residential social care.³

6. The Secretary of State for Wales wrote to the Chair of the Welsh Affairs Select Committee and to the Chair of the Select Committee on the Constitution, House of Lords, inviting these committees to undertake pre-legislative scrutiny.⁴ Both committees decided to do so.

House of Lords Select Committee on the Constitution

7. We note that the House of Lords Select Committee on the Constitution has examined the proposed Order, and has concluded that it “does not raise any matters of constitutional principle”.⁵

The Welsh Affairs Committee’s inquiry and joint working

8. The Secretary of State has noted that “the issue for the Parliamentary committees ... would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the [proposed] Order in Council”.⁶ The purpose of this Committee’s inquiry was therefore to examine the scope and appropriateness of the proposed Order under the terms of the Government of Wales Act 2006. We considered whether the proposed Order is in the spirit and scope of the devolution settlement; the extent to which there is a demand for legislation which might follow the adoption of the proposed Order; and whether the use of the Legislative Competence Order in Council procedure is more appropriate in this instance than, for example, the use of framework powers in a Westminster Bill.⁷ On 13 December 2007 we issued a press notice setting out the scope of our inquiry and inviting written submissions from interested parties.

9. The Committee heard oral evidence from the Parliamentary Under-Secretary of State, Wales Office, and from Wales Office and Department of Health officials.⁸ The Committee also held a joint meeting with the Assembly Committee which was examining the proposed Order, when evidence was given by the Assembly Deputy Minister for Social Services and Welsh Assembly Government officials.⁹ We followed the Assembly Committee’s further deliberations closely, and have been able to draw on the additional oral and written evidence it has received.

10. On this occasion, because the proposed Order was published and referred

³ National Assembly for Wales (Legislative Competence) Order in the Field of social welfare 2008, Explanatory Note (Ev 20).

⁴ Letter from the Secretary of State for Wales to the Chair of the Welsh Affairs Select Committee, 26 November 2007 (Ev 17); letter from the Secretary of State for Wales to the Chair of the Select Committee on the Constitution, House of Lords, 26 November 2007 (not printed here).

⁵ Letter from Rt Hon Lord Goodland to the Secretary of State for Wales, 22 January 2008 (not printed here)

⁶ Wales Office, *Pre-legislative scrutiny of the proposed National Assembly for Wales (Legislative Competence) Order in the Field of social welfare*, Cm 7286 (November 2007), Ministerial foreword, p. 2

⁷ Welsh Affairs Select Committee press notice, 13 December 2007

⁸ Ev 10-16

⁹ Ev 1-9

simultaneously to both committees for pre-legislative scrutiny, joint working – which had eluded us previously – proved possible. The Welsh Affairs Committee welcomes this positive development, and anticipates that in future proposed Orders will be published and referred to Westminster and National Assembly committees in a sequence which allows for such joint working. It is unfortunate that this has not proved to be the case with some of the proposed Orders published so far, which still await Whitehall clearance although their examination by an Assembly committee is underway or complete.

1 The proposed Order on charging for non-residential social care

Purpose

11. As outlined above, if enacted the proposed Order would extend the legislative competence of the National Assembly for Wales to enable the Assembly to legislate in respect of charges for non-residential social care provided or secured by local authorities, and in respect of direct payments to individuals or their carers in order to secure non-residential social care. This is set out in the proposed Order, as follows:

In Field 15 (social welfare), after Matter 15.8 insert –

“Matter 15.9

Charges levied by local authorities for non-residential social care provided or secured by them and payments in respect of individuals with particular needs relating to their well-being so that they, or persons looking after them, may secure non-residential social care to meet those needs.”

12. At present the Welsh Assembly Government is able to issue statutory guidance to local authorities on their charging arrangements under Section 7 of the Local Authorities Social Services Act 1970.¹⁰ However, local authorities are able to depart from this guidance and consequently a significant variation has arisen between the amounts charged by different local authorities in Wales. In a statement to the National Assembly on 27 November, Deputy Minister for Social Services, Gwenda Thomas AM, referred to:

... some significant differences between the charging policies of local authorities in Wales, and therefore wide variability in the impact on service users in various areas of the country.¹¹

13. Later in the same statement the Deputy Minister gave examples of the discrepancies between the maximum weekly charges which varied from £16.20 to £185, while seven local authorities have no set maximum charge. It is this variation which the proposed Order is intended to address, by giving the National Assembly the power to legislate – rather than just issue guidance – to set maximum charges for non-residential social care provided by or secured by local authorities. In addition, the Deputy Minister referred to a disparity in the way in which individuals are assessed for the purposes of disability-related expenditure or benefits,¹² concluding that:

All of this has resulted in inequalities and uncertainties for service users, carers and their representatives.¹³

¹⁰ Q 2

¹¹ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

¹² Income from salary is disregarded for charging purposes, but income from occupational pensions is taken into account

¹³ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

The Deputy Minister told the Assembly Committee:

... it seems to me that the level of variation is certainly significant enough to require action.¹⁴

And, in a later letter to the Chair of the Assembly Committee:

We are quite clear that variations in charging policies are widespread across Wales, are significant, and have a negative effect on service users.¹⁵

14. We received two written submissions, both of which referred to the variation in charges by local authorities for non-residential social care. Age Concern Cymru said that:

The current situation ... creates a “postcode lottery” across Wales, and needs to be rectified.¹⁶

In its submission to us, Help the Aged in Wales expressed the view that:

Charges should not be based on geography or finance¹⁷

This view was supported by those who submitted written evidence to the Assembly Committee. For example, Mencap Cymru wrote:

The current charging system in Wales is leading to a postcode lottery, with the amount a person is charged for care varying widely depending on the local authority in which they live.¹⁸

15. The new powers are being sought, the Deputy Minister explained, “to achieve a fairer and more consistent approach to charging for all adult recipients of non-residential social services across Wales”,¹⁹ although it was not the Welsh Assembly Government’s intention to “fetter the fundamental discretion that local authorities have to charge for certain services and to recover such charges as they consider to be reasonable”.²⁰ This discretion is set out at Section 17 of the Health and Social Services and Social Security Adjudications Act 1983. The Deputy Minister explained:

... the intention here is not to prevent local authorities from charging for non-residential social services, but to ensure that, should they choose to do so, they do it in accordance with a specified set of requirements.²¹

The discretion that local authorities have will remain; there is no question about that.²²

¹⁴ Oral evidence before the Proposed Domiciliary Care LCO Committee, 7 February 2008

¹⁵ Letter from the Deputy Minister for Social Services to the Chair of the Assembly Committee, 13 February 2008

¹⁶ Ev 27 (para 4.1)

¹⁷ Ev 25

¹⁸ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by Mencap Cymru

¹⁹ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

²⁰ *ibid*

²¹ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

What we want to achieve is consistency – to do away with the great differences that exist at present. We feel that we cannot do that through guidance.²³

16. If the proposed Order were approved, the Welsh Assembly Government's intention would be to conduct a review of charging to be completed by the next comprehensive spending review in 2011-12, as a result of which Measures would be brought forward.²⁴

The proposed Order and existing Welsh Assembly Government policy

17. In our examination of a Legislative Competence Order in Council proposed by the Welsh Assembly Government, one of our considerations is the extent to which it is consistent with existing Welsh Assembly Government policy. In her statement to the National Assembly, the Deputy Minister for Social Services emphasised that the powers being sought were consistent with the Welsh Assembly Government's strategy to move away from the provision of residential care towards support for independence at home.²⁵ The Deputy Minister stated that the powers being sought under the terms of the proposed Order were consistent with existing Welsh Assembly Government strategies and principles such as those contained in *One Wales*²⁶ and *Fulfilled lives, supportive communities*.²⁷ This was supported by many of those organisations which submitted written evidence to the Assembly Committee, including the Welsh Therapy Advisory Committee:

The publication of the 10-year strategy for social care in Wales provides the vision for services. The strategy is a uniquely Welsh document and we believe it is important that the National Assembly has the relevant powers to enable that vision to become a reality.²⁸

18. We agree that the proposed Order represents a “good fit” with existing and previously announced Welsh Assembly Government policy, and is consistent with it.

The devolution settlement

19. The Explanatory Note to the proposed Order lists various matters which are excepted from its provisions.²⁹ These relate to child support, tax credits, child benefit and guardian's allowance, social security, independent living funds and motability – in other words, to a range of State benefits and awards.³⁰ The Deputy Minister commented in evidence:

The inclusion of the various benefits as an exception makes clear that they are excluded from the competence because they are the responsibility of the United

²² *ibid*

²³ Oral evidence before the Proposed Domiciliary Care LCO Committee, 7 February 2008

²⁴ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

²⁵ *ibid*

²⁶ *One Wales – a progressive agenda for the government of Wales*, Welsh Assembly Government, 27 June 2007

²⁷ *Fulfilled lives, supportive communities – a strategy for social services in Wales over the next decade*, Welsh Assembly Government, February 2007

²⁸ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by the Welsh Therapy Advisory Committee

²⁹ Ev 20

³⁰ Q 38

Kingdom Government. This LCO therefore reflects the general devolution settlement.³¹

The Parliamentary Under-Secretary of State made the same point to us:

It is very important that we ... define clearly those areas which are retained ... those issues ... are all retained functions and none of these LCOs are meant to challenge that.³²

20. Cardiff County Borough Council, in its written submission to the Assembly Committee, felt that there was a need for further clarity on the exception regarding motability:

There are always issues about transport costs and how these should be included in any charging arrangements ... As such a debate would be welcomed to consider if the Mobility Allowance should be included in charging assessments as a contribution towards transport costs.³³

21. The Deputy Minister confirmed in evidence to the Assembly Committee that:

The excepted matters will not impair the Assembly's ability to deal with the treatment of benefits ... It does not change the situation as it is now.³⁴

22. We agree that the proposed Order reflects the current devolution settlement, by setting out in the Excepted Matters certain aspects which are retained as the responsibility of the UK Government. We note the Welsh Assembly Government's view that the Excepted Matters will not impair upon its ability to enact the policies for which it seeks the powers contained in the proposed Order.

Use of the Legislative Competence Order in Council procedure

23. Another of the considerations to be made by this Committee is whether the Legislative Competence Order in Council procedure is the most appropriate route by which to achieve the policy result being sought. In evidence to the Assembly Committee, the Deputy Minister was clear that the Welsh Assembly Government's opinion was that the Order in Council procedure was the most appropriate – indeed, the only – way by which its policy commitment could be delivered:

I consider this to be the only way to achieve the uniform approach that we seek. Anything less than an LCO will not provide the guarantee that change will happen, and that fairer charging will result.³⁵

24. Use of a Legislative Competence Order in Council was supported by the Chief Executive of Disability Wales, in evidence to the Assembly Committee:

³¹ Q 38

³² Q 62

³³ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by Cardiff County Borough Council

³⁴ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

³⁵ *ibid*

I think that the LCO would add clarity. It would make the situation clear for those who are assessed as needing services and those who support them.³⁶

25. We note that written submissions to the Assembly Committee from Carers Wales, the Coalition on Charging, Help the Aged in Wales, Disability Wales and Age Concern Cymru, while all supportive of the principle of the proposed Order, also advocated action by the Welsh Assembly Government using its *existing* powers in relation to assessment and charging practices. Disability Wales said in evidence to the Assembly Committee:

I think that it is important for the Assembly to use the powers that it has in addition to the further powers that it seeks. ... We feel that it is not using the powers that it has ...³⁷

26. However, in a subsequent letter to the Chair of the Assembly Committee, the Deputy Minister again stressed the Welsh Assembly Government's view that a Legislative Competence Order was the most appropriate way to achieve the desired policy result, which could not be pursued using existing legislation:

... we have previously attempted to improve the situation by issuing Fairer Charging guidance, but ... the disparities and inequities for service users continue. The fundamental stumbling block is that the Assembly Government's power to issue guidance on this subject to local authorities would not enable [the Welsh Assembly Government] to issue guidance that fettered the discretion contained in Section 17 of HASSASSA.³⁸ The legal advice we have is unequivocal: we cannot use the powers in Section 7 of the Local Authority Social Services Act 1970 to achieve the degree of consistency and fairness that we are seeking to achieve.

We remain firmly of the view, therefore, that the only way to deliver a consistent and fair approach to charging is by the conferral of legislative competence and the bringing forward of Measures subsequently.

In my view there are no alternative effective and guaranteed means of bringing about the consistency and fairness without needing to go through the Measure process.

... in the absence of any realistic alternatives, the Assembly Government would want to press on to obtain the legislative competence that we need to enable us to take action by statutory means.³⁹

27. We agree that the use of the Legislative Competence Order in Council procedure is the most appropriate way for the Welsh Assembly Government to pursue its policy objectives in this area, and that this could not be achieved by use of existing legislation. It is also understood that there is no Government bill in prospect which could address these issues through primary legislation.

³⁶ Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

³⁷ *ibid*

³⁸ Health and Social Services and Social Security Adjudications Act 1983

³⁹ Letter from the Deputy Minister for Social Services to the Chair of the Proposed Domiciliary Care LCO Committee, 13 February 2008

The timing of the proposed Order's introduction

28. In his evidence to us, the Parliamentary Under-Secretary of State said that the proposed Order was “not only welcomed by service users but also in principle by the WLGA.”⁴⁰ However, in oral evidence to the Assembly Committee the Welsh Local Government Association expressed reservations. These included the timing of the proposed Order, given that the UK Government has indicated a commitment to a public consultation and subsequent Green Paper on a new long-term funding settlement for adult social care.⁴¹

29. Although the consultation, which is expected to start in Spring 2008, concerns the provision of adult social care services in England, it is anticipated that the Green Paper will have implications for Wales.⁴² As the Deputy Minister told us, although the Green Paper will apply only to England, “there will be issues that will be of great import to Wales”.⁴³ The Welsh Local Government Association’s view was that “we should wait and see what the impact is in Wales”.⁴⁴

30. Mr Steve Milsom, the Acting Director of the Older People and Long Term Care Policy Directorate of the Welsh Assembly Government, told the Assembly Committee:

It is clear that this will not happen immediately or quickly. ... [The Green Paper] will not contradict in any way what is proposed in the LCO, which is quite narrow and specific.⁴⁵

31. The Deputy Minister’s view was that the forthcoming Green Paper was not a reason to delay the introduction of the proposed Order:

There will always be a reason for waiting while some other piece of work is undertaken, but this is an important manifesto commitment and we need to get on with it ...⁴⁶

This LCO fulfils a clear “One Wales” policy commitment that we need to get on with, and we cannot hold it up in order to wait and see what may or may not happen as a result of the Green Paper.⁴⁷

32. We note that some valid concerns were expressed by witnesses before the Assembly Committee as to the timing of the introduction of the proposed Order, particularly in relation to a forthcoming Green Paper for social care in England, and we draw such concerns to the attention of the Welsh Assembly Government.

⁴⁰ Welsh Local Government Association; Qs 45, 58

⁴¹ Ivan Lewis MP, Parliamentary Under-Secretary of State for Care Services, foreword to the Smith Institute’s publication, *Advancing opportunity: older people and social care*, February 2008

⁴² Deputy Minister for Social Services, oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

⁴³ Q 45

⁴⁴ Beverlea Frowen, WLGA, oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

⁴⁵ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

⁴⁶ *ibid*

⁴⁷ *ibid*

The scope of the proposed Order: the exclusion of residential care

33. The Deputy Minister for Social Services has confirmed that the proposed Order is restricted to charges levied by local authorities for non-residential social care. It would not enable the Assembly to legislate in respect of charges levied by private care providers (which, we were told, currently provide 80% of these services⁴⁸), nor would its provisions apply to residential care.⁴⁹ When asked why the proposed Order had been drafted so as to be confined to non-residential care, the Deputy Minister explained that the problem of inconsistencies in charging by local authorities did not exist in the case of residential care.⁵⁰ Mr Steve Milsom, the Acting Director of the Older People and Long Term Care Policy Directorate, of the Welsh Assembly Government explained:

The way we ensure consistency in the charging for residential care is through something called CRAG (Charging for Residential Accommodation Guidance); and that sets out capital limits that have to be applied to individual circumstances. ... We already have a robust mechanism in place to ensure consistency in respect of residential accommodation charging ... Therefore, we do not need to do that through this LCO.⁵¹

34. The Deputy Minister confirmed that, should the Welsh Assembly Government wish to legislate on matters concerning residential care in the future, an additional Legislative Competence Order (or framework power) would be required in order to do so.⁵²

35. We agree that the proposed Order as drafted applies only to non-residential social care provided by or secured by local authorities, and to payments made in respect of individuals with particular needs relating to their well-being.

Respite services

36. In evidence, the question of whether the provision of respite care would fall within the scope of the proposed Order was raised.⁵³ The Deputy Minister clarified the position in a subsequent letter to the Chair of the Assembly Committee:

The LCO covers charges and payments made by local authorities for non-residential social care. It would therefore cover respite services received in a person's own home such as 24 hour emergency care or sitting services. However it does not cover charges and direct payments for residential social care. Consequently charges or payments made in respect of securing temporary respite care in a care home would fall outside the scope of the Order.⁵⁴

⁴⁸ Q 32

⁴⁹ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

⁵⁰ Q 15

⁵¹ *ibid*

⁵² Q 16

⁵³ Qs 21 - 26

⁵⁴ Letter from the Deputy Minister for Social Services to the Chair of the Assembly Committee, 25 January 2008 (Ev 24)

37. We agree that the proposed Order as drafted would cover respite services received in a person's own home, but would not extend to respite care in a care home.

The power to abolish charging

38. In addition to the power for the National Assembly to set maximum charges levied by local authorities for non-residential social care, the proposed Order would also enable it to abolish such charges. That the National Assembly should have the power to abolish charging was strongly supported by the Wales Carers Alliance, Disability Wales and Age Concern Cymru in evidence to the Assembly Committee,⁵⁵ although the Welsh Local Government Authority said that the abolition of charges “would be seen in a very unfavourable light” by local authorities.⁵⁶

39. In a statement to the Assembly, the Deputy Minister confirmed that she did “not see there being any danger of this LCO going down the route of free homecare”:

... although we would want to support the principle of free homecare, the budget does not currently allow for that.⁵⁷

40. However, the Deputy Minister also confirmed that, as drafted, the proposed Order would transfer to the Assembly the ability to legislate to abolish charges:

The LCO is certainly wide enough to allow for charges to be abolished or for certain services to be nil rated ... there is provision, and the scope of the LCO is wide enough.⁵⁸

41. This view was shared by the Parliamentary Under-Secretary of State, although with the “strong proviso” that the policy intention was to “try and regulate the wide range as opposed to the complete abolition of non-residential and domiciliary charges.”⁵⁹

Yes, the competence is there; the intention is not there to do that at the moment.⁶⁰

42. The Deputy Minister was asked which non-residential social care services might be “zero-rated” should the proposed Order take effect, and told the Assembly:

I cannot answer specifically what services would be rated as zero charge; it is too early to do that. However, the LCO would give us the scope to do that.⁶¹

The Deputy Minister also confirmed that although the abolition of such charges was not a current policy proposal of the Welsh Assembly Government because of affordability, “certainly it would not exclude it”.⁶²

⁵⁵ Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

⁵⁶ *ibid*

⁵⁷ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

⁵⁸ *ibid*

⁵⁹ Q 52

⁶⁰ *ibid*

⁶¹ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

43. We agree that the proposed Order as drafted would enable the National Assembly to abolish charges made by local authorities for the provision of non-residential care services. We acknowledge that the Welsh Assembly Government has made clear that it does not intend to do so, but note that the power to do so would be conferred under the terms of this Order.

A requirement to charge

44. Conversely to the above, a concern was raised during evidence that the proposed Order included the power to *require* local authorities to charge for the provision of non-residential care services. The Deputy Minister told the joint meeting of our two committees:

There is no intention whatsoever in this LCO to make it a requirement of local authorities to charge for their [non-residential] services. That discretion will stand within the local democratic system, and the LCO will have no bearing on that. What we want to do is to have the power to legislate ... and ensure that payments are more equitable and more consistent. I do not see that bringing in either a cap or a floor would assist that in any way whatsoever.⁶³

45. While we acknowledge that the Welsh Assembly Government does not intend to make it a requirement of local authorities to charge for the provision of non-residential social care, we note that the proposed Order as drafted does include the power to do so.

Non-residential social care services for children

46. When asked whether the proposed Order would allow the Assembly to legislate in respect of charges for non-residential social care in respect of children and young people, the Deputy Minister confirmed that it would do so:

Yes. That is quite clear. The LCO ... would enable us to introduce a measure on charging by local authorities for children's services. However, we have no intention of introducing such a measure in the foreseeable future – but it would allow it.⁶⁴

47. The Parliamentary Under-Secretary of State agreed:

... the terms of this Order in Council would encompass children as well in terms of non-residential domiciliary care.⁶⁵

48. Both the Welsh Local Government Association and the Association of Directors of Social Services Cymru confirmed that they would like to see the word “children” disappplied

⁶² Q 14

⁶³ Q 39

⁶⁴ Q 12

⁶⁵ Q 51

in respect of the proposed Order.⁶⁶ The Director of Social Care and Housing, Association of Directors, told the Assembly Committee:

... there is a real danger of including this ... If something like this gets out, the message might be that the Assembly is looking for a Legislative Competence Order to introduce charging for children. There would be huge opposition to that ... The other issue is whether, when you get into the detail, you are charging the child or the parents, and what income you take into consideration.⁶⁷

This was supported by the Wales Carers Alliance and by Disability Wales:

... we have a great deal of concern about this area. ... there are no charges for children's services at the moment. If anything, we feel that the LCO should reduce charging rather than introduce other avenues of charging. ... we would not want to see such charges included in any LCO.⁶⁸

49. In later evidence to the Assembly Committee the Deputy Minister again clarified that while this power was included in the proposed Order, the Welsh Assembly Government had no plans to require local authorities to introduce charges for non-residential care services for children:

... there is no intention on the Assembly Government's part to encourage or require local authorities to charge for non-residential care services for children. In fact, we are heading in quite the opposite direction. Children's services are included within the scope only because we want to be able to take remedial action in the future if the need were to arise.⁶⁹

50. We note that the proposed Order would allow the Welsh Assembly Government to legislate in this area and that it was being sought only as "an insurance policy for any developments that might occur in the future", in the event that a Welsh local authority decides to introduce charges for non-residential social care for children.⁷⁰ The proposed Order, if enacted, would mean that the Welsh Assembly Government would not have to repeat the process of seeking a further Order in respect of services provided for children. As the Deputy Minister said in evidence:

... should that situation arise in the future ... the scope of this LCO needs to be wide enough to ensure that any changes so introduced would be fair.⁷¹

51. While we acknowledge that the Welsh Assembly Government does not intend to require local authorities to charge for the provision of non-residential social care

⁶⁶ Bruce McLernon, Director of Social Care and Housing, Association of Directors of Social Services Cymru, and Beverlea Frowen, Director of Social Services and Health Improvement, WLGA, oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008.

⁶⁷ Bruce McLernon, Director of Social Care and Housing, Association of Directors of Social Services Cymru, oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008.

⁶⁸ Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

⁶⁹ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

⁷⁰ *ibid*

⁷¹ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

services to children, we note that the proposed Order does include the power to do so. It will be for the National Assembly to decide how to exercise this power in the future.

Variation in assessments for charging

52. It was not only the variation of the level of charges between local authorities which led the Welsh Assembly Government to propose this Order, but also concern at differences in the way in which people are assessed for those charges.⁷² In its memorandum to us, Help the Aged in Wales referred to:

... a lack of clarity regarding the ways in which authorities arrive at the charges an individual is expected to pay which adds to the confusion.⁷³

The Deputy Minister, in evidence to the Assembly Committee, acknowledged that:

... there are discrepancies with regard to the extent to which individual payments of attendance allowance and war widows' pension are taken into account in the financial assessment.⁷⁴

Mr Steve Milsom, the Acting Director of the Older People and Long Term Care Policy Directorate of the Welsh Assembly Government, said in evidence to the Assembly Committee:

The approach across Wales is quite different on the level of disregards – some are far more generous, particularly in relation to disability-related expenditure, but some are certainly not.⁷⁵

53. In evidence to our joint meeting, the Deputy Minister noted:

We would not want to exclude the opportunity to ensure that the financial assessment process is as fair as the charge itself.⁷⁶

54. Both the Parliamentary Under-Secretary of State and the Deputy Minister confirmed that the proposed Order would enable the Assembly to bring forward measures relating to the process of assessment for charging:⁷⁷

... [the proposed Order] would allow the Assembly to determine the way in which local authorities currently take into account income factors within their calculation of charging.⁷⁸

55. We note that the evidence submitted to this Committee and to the Assembly Committee points to inconsistencies and uncertainty in the assessment of income

⁷² *ibid*

⁷³ Ev 25

⁷⁴ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

⁷⁵ *ibid*

⁷⁶ Q 37

⁷⁷ Q 17

⁷⁸ Q 53

between different local authorities in Wales for the purposes of charging for the provision of non-residential social care. We acknowledge that this proposed Order would enable the National Assembly to introduce legislation (by measure) with the aim of establishing such consistency, and believe that this is an appropriate legislative competence to devolve.

The relation between Field 15 (social welfare) and Field 12 (local government)

56. While Field 15 of Schedule 5 of the Government of Wales Act 2006 relates to social welfare, another Field, Field 12, relates to local government. When asked whether the ability to make Measures under the proposed Order was conditional on the Assembly having additional competence in Field 12, the Deputy Minister assured us:

... we do not need the ability to legislate in Field 12 for the rights that we are seeking in Field 15 to be effective.⁷⁹

57. We agree that the proposed Order would enable the National Assembly to legislate in the Field of social welfare, without requiring amendment to Field 12 relating to local government.

Reimbursement to local authorities

58. If measures were to be introduced under the terms of this proposed Order limiting charges which local authorities could make for the provision of non-residential social care, some authorities would lose revenue. The Deputy Minister for Social Services told us:

I believe that one of the aspects that the measure could deal with is this aspect of capping, but this is something that we will consider as we move towards a measure ...⁸⁰

59. Some witnesses were concerned that, should this be the case, the quality of services provided could suffer. In its written submission to the Assembly Committee, Denbighshire County Council commented:

The emphasis on reducing charges is extremely worrying if it does not also result in higher grant allocations to local authorities. ... without an increased level of funding, services are bound to suffer.⁸¹

60. When asked whether there was a risk that in future a ceiling or cap on charges could lead to lower quality services in some areas and to price increases in other areas, the Deputy Minister replied:

⁷⁹ Q 6

⁸⁰ Q 31

⁸¹ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by Denbighshire County Council

I do not see that placing a cap on charges would create any problems in terms of quality of services because there are other ways ... of ensuring that the care meets the necessary standards.⁸²

61. The Welsh Local Government Association, while broadly welcoming of the proposed Order, cautioned that in its view:

While there persist long term funding shortfalls in the social care system, variances and inequity will continue to exist across Wales. ... The LCO ... will not solve this fundamental problem and even with the power the situation will not improve in the short term. We approve in principle of the LCO but have serious concerns about the potential impact. ... Changes in isolation to the big picture may well cause damage to the delivery of social care services and increase demand way beyond that which is affordable to the Country as a whole.⁸³

62. Beverlea Frowen, Director of Social Services and Health Improvement of the Welsh Local Government Association, told the Assembly Committee:

... in principle, we cannot disagree with the overall desire to smooth out unacceptable variances. Beyond that ... we have to look at it in the context of the ... overall ways and mechanisms of funding social care in Wales. ... We feel that to start looking at measures that potentially drastically change the ability of councils to apply charges in this climate ... is premature. ... we believe that there is time for reflection before [proceeding] immediately to an LCO on this matter.⁸⁴

63. This view was supported by the Association of Directors of Social Services Cymru, whose Director of Social Care and Housing told the Assembly Committee:

I suppose the question will be ... whether this is the appropriate time to be pursuing the LCO when there are bigger issues that we need to be looking at ... in terms of the overall funding regime.⁸⁵

... at the moment we do not know what it is that we will be asked to support in terms of the detail, therefore ... we have to reserve our judgement.⁸⁶

64. The Deputy Minister for Social Services told us that the cost to local authorities of providing non-residential care services was “around £153 million”, although only £23 million was recouped by local authorities by way of charges.⁸⁷ However, it was not the intention to prevent local authorities from charging altogether so, as Mr Steve Milsom, Acting Director of the Older People and Long Term Care Policy Directorate of the Welsh

⁸² Q 32

⁸³ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by the Welsh Local Government Association

⁸⁴ Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ Q 31; Mr Steve Milsom, oral evidence to the Assembly Committee, 7 February 2008

Assembly Government told the Assembly Committee, “there would still be an income stream”.⁸⁸

65. The Deputy Minister told us in evidence that the extent of any compensation could only be decided in the context of a measure:

The extent to which we decide to compensate local authorities for any revenue that they may lose as the result of a subsequent measure on charging is an issue for consideration when the measure is developed.⁸⁹

66. We note the concern expressed by the representatives of local authorities that in order for the quality of their non-residential social care services not to be adversely affected by the imposition of a limit on the amounts they could recoup in charges, they would need to be reimbursed for lost revenue. We also note the Welsh Assembly Government’s assurance that it was its aim to do so, although this could only be defined when measures are brought forward.⁹⁰ We must therefore note that there are potentially significant financial implications with measures which may be brought forward under the powers devolved by the proposed Order.

Cross-border issues

Divergence of policy

67. As the Explanatory Memorandum to the proposed Order makes clear, Section 93 of the Government of Wales Act 2006 imposes a geographical limit to Assembly measures in that they apply only to Wales.⁹¹ This would clearly be so in the case of any measures introduced under the terms of this proposed Order.⁹² Nevertheless it raises the possibility that a marked difference in the delivery of public services and charging arrangements could develop between England and Wales, which would be particularly noticeable in the border areas.⁹³ The Deputy Minister saw this as being “what devolution means” and showed that “Wales can lead the way”.⁹⁴ The Parliamentary Under-Secretary of State told us that:

We are rightly content with the idea of policy differential, but that policy differential has to ensure that on both sides of the border there is proper and good provision for all end users.⁹⁵

⁸⁸ Oral evidence to the Assembly Committee, 7 February 2008

⁸⁹ Q 40

⁹⁰ Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 27 November 2007

⁹¹ Ev 22

⁹² Q 44

⁹³ *ibid*

⁹⁴ *ibid*

⁹⁵ Q 69

Provision of services

68. If as a consequence of this Order policies in England and Wales diverge and there is a different level of provision on either side of the border, people might decide to cross the border in order to benefit from the better provision – an issue raised by Denbighshire County Council and by the Welsh Local Government Association in their written submissions to the Assembly Committee.⁹⁶ According to the Association:

Parts of Wales are subject to variances and pressures due to their proximity with England. The North Wales coast in particular suffers from a huge ingress of people wishing to retire there. It cannot be overlooked that if there were to be a less costly regime to the individual in Wales this would be a further deciding factor on individuals choosing to move to Wales for their retirement.⁹⁷

69. While acknowledging that these were “valid concerns”, the Parliamentary Under-Secretary of State felt that this was “an issue that should be addressed when measures are brought forward”.⁹⁸ Moreover:

...of the 66,000 adults receiving community-based non-residential services, only around 14,000 of those are actually being charged at the moment. Add to this the fact that the cost of any move would far outweigh the amount being saved by reduced charges, we think that we are very unlikely to see the number of people retiring to Wales ... increasing as a result of this policy.⁹⁹

70. Following our joint evidence session with the Assembly Committee, the Deputy Minister wrote to the Chair of that Committee to clarify the circumstances in which non-residential social care in border areas in Wales would be provided by local authorities in England - a situation which, she explained, would be “quite limited given that the vast majority of non-residential social services are received in a individual’s home”.¹⁰⁰

... it might be possible ... to have a scenario where an individual living in the border regions of Wales attended day care in England. In this situation, while the service would be provided by an English local authority or private care provider, it would be provided on behalf of the Welsh local authority. Therefore any charge for that service to the user would be levied by the Welsh local authority. As such it would be subject to any changes introduced by the Welsh Assembly Government as a result of a subsequent measure ... The Welsh service user would not be subject to English charging arrangements even though they were receiving a service in England.¹⁰¹

71. We have given consideration to the implications of this proposed Order for the cross-border provision of services, but do not feel that these are significant at present.

⁹⁶ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by Denbighshire County Council

⁹⁷ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by the Welsh Local Government Association

⁹⁸ Q 71

⁹⁹ *ibid*

¹⁰⁰ Ev 24

¹⁰¹ *ibid*

2 Definitions of the terms used in the proposed Order

The location of definitions

72. The proposed Order is drafted so as to insert a matter into Field 15 of Schedule 5 of the Government of Wales Act 2006. Field 15 relates to social welfare, and the matter which it is proposed is inserted is numbered Matter 15.9. At present, however, no matters are contained in Field 15. Matters 15.1 to 15.8 are in fact contained in another proposed Order, relating to vulnerable children and child poverty.¹⁰² At the time this Report was agreed that proposed Order had yet to achieve Whitehall clearance, although the Assembly Committee had already published its report.¹⁰³

73. Should the proposed Order on domiciliary care be laid before the Assembly for approval first, Matter 15.9 will need to be re-numbered Matter 15.1. This possibility arose because the proposed Order on vulnerable children and child poverty was published and laid before the Assembly before it had achieved Whitehall clearance, and was acknowledged by the Secretary of State when he wrote to invite us to conduct pre-legislative scrutiny:

If this Order is formally laid before Parliament before the other Order then we will amend the numbering to that it will be the first matter inserted into this Field. We hope that this situation will not arise in the future ...¹⁰⁴

74. Although the proposed Order on domiciliary care includes references to the terms “social care” and “well-being”, those terms are not defined there but are to be found instead in the proposed Order relating to vulnerable children and child poverty. The Deputy Minister told us in evidence:

... the purpose of an LCO is to amend Schedule 5 of the Government of Wales Act 2006. This Legislative Competence Order must be read and considered in this light, and not as a free-standing piece of legislation. This LCO contains definitions and is subject to exceptions set out in other LCOs ... If these other LCOs are made before this LCO, Schedule 5 to the Government of Wales Act will already have been amended. Consequently there will be no need to include in this LCO the definitions and exceptions to which we refer.¹⁰⁵

75. While we appreciate that the domiciliary care Order would be re-drafted to include these definitions should it be laid in draft form first,¹⁰⁶ understanding and scrutiny is

¹⁰² National Assembly for Wales (Legislative Competence) (No. 3) Order 2008

¹⁰³ *National Assembly for Wales (Legislative Competence) (No. 3) Order 2007*, report by the Proposed Vulnerable Children LCO Committee, National Assembly for Wales, January 2008

¹⁰⁴ Letter from the Secretary of State for Wales to the Chairman of the Committee, 26 November 2007 (Ev 17); Q 50

¹⁰⁵ Q 8

¹⁰⁶ Qs 9 – 19, 50

made more difficult if the intended legal context in which the matter is to operate is not made fully evident in the official documentation. We believe it would be helpful if each proposed Order were to include for ease of reference definitions of the terms used, either in the proposed Order itself or as part of the accompanying Explanatory Memorandum.¹⁰⁷

76. We also note the haphazard approach to processing proposals for Legislative Competence Orders in Council. The failure on the part of the Welsh Assembly Government to follow the anticipated procedures for these proposals,¹⁰⁸ which were described during the progress of the Government of Wales Act 2006, has created significant problems. The Wales Office, the Welsh Assembly Government and the National Assembly for Wales should seek to coordinate the procedures more effectively in future.

The definition of social care

77. As noted above, the definition of social care is not contained in the proposed Order. Instead, the Explanatory Memorandum notes that the definition to be used is set out in the proposed Order dealing with vulnerable children and child poverty.¹⁰⁹ That definition is as follows:

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

78. As the Deputy Minister clarified in evidence to our two committees, while this definition of social care includes residential care, residential care is not included for the purposes of the proposed Order on domiciliary care.¹¹⁰ With this exception, the proposed Order includes all forms of social care referred to in the above definition; as Amanda Jones of the Legal Services Department of the Welsh Assembly Government put it, “everything that is within the definition of social care that is not residential will be covered”.¹¹¹ The Wales Carers Alliance and Disability Wales both felt that this definition was appropriate for the purposes of this Order.¹¹²

79. The Deputy Minister explained that the definition of social care was wider in the vulnerable children proposed Order for the following reason:

The term “social care” as defined in the vulnerable children LCO is wider than the scope of this LCO as it is intended to apply cross the social welfare field and not only

¹⁰⁷ ‘Interpretation of Field’

¹⁰⁸ Set out, for example, in the 2nd Report of the Welsh Affairs Committee (HC 175, Session 2006-07)

¹⁰⁹ Welsh Assembly Government Explanatory Memorandum, para 16 (Ev 22)

¹¹⁰ Q 5

¹¹¹ Qs 11, 20

¹¹² Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

in relation to this LCO. ... there is wide enough scope within the vulnerable children LCO to accommodate the proposals that this LCO makes.¹¹³

80. It seems unlikely that there are other matters which are intended to be included other than those set out in the definition. We therefore recommend that the definition of “social care” is amended to read “means” rather than “includes”.

81. We note that the definition of “social care” to be used not synonymous with the definition of “community care services”, the term used in the National Health Service and Community Care Act 1990. As was confirmed by the Deputy Minister in evidence to the Assembly Committee, the term “social care” as used in the proposed Order is wider, and includes:

... a description of different types of care rather than a list of existing legislation. That will ensure that the definition remains extant, and not subject to future changes to legislation concerning powers and duties to provide services.¹¹⁴

The definition of well-being

82. The definition of the term “well-being” is also set out as part of the vulnerable children and child poverty proposed Order, as follows:

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

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

83. This definition of the term “well-being” was supported in evidence to the Assembly Committee by the Welsh Local Government Association and by the Association of Directors of Social Services Cymru supported this definition.¹¹⁵ The Coalition on Charging Cymru proposed amendments to points d), e) and f), to the following effect:

- d) *their contribution to society;*
- e) social and economic well-being *and participation;*

¹¹³ Q 11

¹¹⁴ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

¹¹⁵ Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

f) securing their rights *and dignity*.¹¹⁶

84. The Deputy Minister said that she was “very interested” in these suggestions and although she did not consider that they changed the definition of “well-being” in any way, she undertook to consider them in the light of the Assembly Committee’s report.¹¹⁷

85. We are broadly satisfied with the definition of “well-being” to be used, but recommend that it be amended in line with the proposals put forward by the Coalition on Charging Cymru. As mentioned previously, we recommend that all definitions to be referred to in a proposed Order are contained either in the proposed Order itself or in the accompanying documentation.

The definition of particular needs

86. The proposed Order refers to “payments in respect of individuals with particular needs”. When asked what was meant by the term “particular needs”, the Deputy Minister explained:

Direct payments may be made for the provision of care required to meet a wide range of needs. These needs are not specified in the relevant legislation, and accordingly no definition has been included in this LCO. This will enable the Assembly to legislate in respect of all payments for securing non-residential social care which are made to individuals with needs, provided these needs relate to that individual’s well-being and do not fall within one of the excepted matters.¹¹⁸

87. In its written memorandum to the Assembly Committee, Carers Wales preferred the term “assessed needs”, as it already exists in the context of local authority social care provision:

The primary legislation relates to “assessed” needs, and we feel this may be a more appropriate terminology as it builds on existing law and statutory guidance.¹¹⁹

88. In evidence, the Association of Directors of Social Services Cymru said that “it would be better to keep the definition as wide as possible”. Both the Association of Directors of Social Services Cymru and the Welsh Local Government Association preferred the use of the term “assessed needs”.¹²⁰ The Wales Carers Alliance, however, told the Assembly Committee that:

The difficulty with that term is that it is reliant on an assessment, which raises the question of who does the assessment. Therefore, the term “particular needs” may be preferable.¹²¹

¹¹⁶ Memorandum to the Proposed Domiciliary Care LCO Committee submitted by the Coalition on Charging Cymru; oral evidence to the Proposed Domiciliary Care LCO Committee by Disability Wales and by the Wales Carers Alliance, 31 January 2008.

¹¹⁷ Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

¹¹⁸ Q 28

¹¹⁹ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by Carers Wales

¹²⁰ Oral evidence to the Proposed Domiciliary Care LCO Committee, 31 January 2008

¹²¹ *ibid*

As explained by the Deputy Minister for Social Services, the term “particular needs” is used because it was considered to be wide-ranging.¹²² In the view of the Deputy Minister:

... the term “particular needs” is more appropriate than “assessed needs”, which brings in such issues as who must carry out the assessment of needs and the assessment process itself.¹²³

However, the necessity of referring to “particular” needs was questioned by the Coalition on Charging Cymru¹²⁴ and by Arthritis Care in its memorandum to the Assembly Committee:

It is submitted that the word “particular” be removed because it can be narrowed in its interpretation.¹²⁵

89. We consider that the term “needs” is more wide-ranging than the term “particular needs”. Accordingly, we recommend that the proposed Order be revised to refer to “needs” rather than to “particular needs”.

Clarification of other terms contained in the proposed Order

“Individuals” and “persons”

90. The proposed Order uses both the terms “individuals” and “persons”. “Persons” can be construed to cover both individuals and corporate bodies and other organisations.¹²⁶ In evidence, the Deputy Minister clarified that the term “persons” as used in the proposed Order includes both individuals and organisations that might be involved in looking after someone in receipt of social care:

The term “persons” does include individuals as well as corporate and unincorporated bodies.¹²⁷

“Payments” and “direct payments”

91. We asked the Parliamentary Under-Secretary of State why the proposed Order refers to “payments” in respect of individuals, whereas the reference in the accompanying Explanatory Note uses the term “direct payments”.¹²⁸ The Parliamentary Under-Secretary of State replied:

We did not want to limit the potential scope of this matter by using the name of one particular scheme ... because it could change. The reference to “payments” in this particular LCO is intended to capture all relevant payments, irrespective of what the

¹²² Oral evidence to the Proposed Domiciliary Care LCO Committee, 7 February 2008

¹²³ *ibid*

¹²⁴ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by the Coalition on Charging Cymru

¹²⁵ Memorandum submitted to the Proposed Domiciliary Care LCO Committee by Arthritis Care

¹²⁶ Consequent upon the definition of “person” in Schedule 1 of the Interpretation Act 1978

¹²⁷ Q 27

¹²⁸ Ev 20

name of that payment scheme happens to be ... so the broader definition of payments as opposed to direct payments is one that I think helps to address that issue.¹²⁹

Conclusion

92. We agree that the proposed Order is consistent with existing Welsh Assembly Government policy and priorities, and that the use of the Legislative Competence Order in Council procedure is the most appropriate route for this to be pursued. We have noted in this Report that the proposed Order would grant the National Assembly powers in certain areas for which there are no current plans to introduce legislation – for example, the ability to abolish charges for non-residential social care provided by local authorities. We also acknowledge that the proposed Order reflects the current devolution settlement, as illustrated by the Excepted Matters it specifies.

93. Concerns expressed to us in evidence regarding the timing of the introduction of the Order and on local authority budgets are properly matters for the Welsh Assembly Government, and we make no comment on these other than to set out the points raised in evidence.

94. We acknowledge that measures introduced under the terms of this Order may have implications for the delivery of and the demand for services on the Wales-England border, but do not feel that such implications are sufficiently great to prevent us from recommending the granting of competence.

95. We agree that the proposed Order should be proceeded with, with some specific amendments as set out in the recommendations of this Report. We also recommend that in future each proposed Order should contain the definitions of the terms to be used, for ease of reference and for clarity.

¹²⁹ Q 67

Conclusions and recommendations

1. On this occasion, because the proposed Order was published and referred simultaneously to both committees for pre-legislative scrutiny, joint working – which had eluded us previously – proved possible. The Welsh Affairs Committee welcomes this positive development, and anticipates that in future proposed Orders will be published and referred to Westminster and National Assembly committees in a sequence which allows for such joint working. It is unfortunate that this has not proved to be the case with some of the proposed Orders published so far, which still await Whitehall clearance although their examination by an Assembly committee is underway or complete. (Paragraph 10)
2. We agree that the proposed Order represents a “good fit” with existing and previously announced Welsh Assembly Government policy, and is consistent with it. (Paragraph 18)
3. We agree that the proposed Order reflects the current devolution settlement, by setting out in the Excepted Matters certain aspects which are retained as the responsibility of the UK Government. We note the Welsh Assembly Government’s view that the Excepted Matters will not impair upon its ability to enact the policies for which it seeks the powers contained in the proposed Order. (Paragraph 22)
4. We agree that the use of the Legislative Competence Order in Council procedure is the most appropriate way for the Welsh Assembly Government to pursue its policy objectives in this area, and that this could not be achieved by use of existing legislation. It is also understood that there is no Government bill in prospect which could address these issues through primary legislation. (Paragraph 27)
5. We note that some valid concerns were expressed by witnesses before the Assembly Committee as to the timing of the introduction of the proposed Order, particularly in relation to a forthcoming Green Paper for social care in England, and we draw such concerns to the attention of the Welsh Assembly Government. (Paragraph 32)
6. We agree that the proposed Order as drafted applies only to non-residential social care provided by or secured by local authorities, and to payments made in respect of individuals with particular needs relating to their well-being. (Paragraph 35)
7. We agree that the proposed Order as drafted would cover respite services received in a person’s own home, but would not extend to respite care in a care home. (Paragraph 37)
8. We agree that the proposed Order as drafted would enable the National Assembly to abolish charges made by local authorities for the provision of non-residential care services. We acknowledge that the Welsh Assembly Government has made clear that it does not intend to do so, but note that the power to do so would be conferred under the terms of this Order. (Paragraph 43)
9. While we acknowledge that the Welsh Assembly Government does not intend to make it a requirement of local authorities to charge for the provision of non-

residential social care, we note that the proposed Order as drafted does include the power to do so. (Paragraph 45)

10. While we acknowledge that the Welsh Assembly Government does not intend to require local authorities to charge for the provision of non-residential social care services to children, we note that the proposed Order does include the power to do so. It will be for the National Assembly to decide how to exercise this power in the future. (Paragraph 51)
11. We note that the evidence submitted to this Committee and to the Assembly Committee points to inconsistencies and uncertainty in the assessment of income between different local authorities in Wales for the purposes of charging for the provision of non-residential social care. We acknowledge that this proposed Order would enable the National Assembly to introduce legislation (by measure) with the aim of establishing such consistency, and believe that this is an appropriate legislative competence to devolve. (Paragraph 55)
12. We agree that the proposed Order would enable the National Assembly to legislate in the Field of social welfare, without requiring amendment to Field 12 relating to local government. (Paragraph 57)
13. We note the concern expressed by the representatives of local authorities that in order for the quality of their non-residential social care services not to be adversely affected by the imposition of a limit on the amounts they could recoup in charges, they would need to be reimbursed for lost revenue. We also note the Welsh Assembly Government's assurance that it was its aim to do so, although this could only be defined when measures are brought forward. We must therefore note that there are potentially significant financial implications with measures which may be brought forward under the powers devolved by the proposed Order. (Paragraph 66)
14. We have given consideration to the implications of this proposed Order for the cross-border provision of services, but do not feel that these are significant at present. (Paragraph 71)
15. While we appreciate that the domiciliary care Order would be re-drafted to include these definitions should it be laid in draft form first, understanding and scrutiny is made more difficult if the intended legal context in which the matter is to operate is not made fully evident in the official documentation. We believe it would be helpful if each proposed Order were to include for ease of reference definitions of the terms used, either in the proposed Order itself or as part of the accompanying Explanatory Memorandum. (Paragraph 75)
16. We also note the haphazard approach to processing proposals for Legislative Competence Orders in Council. The failure on the part of the Welsh Assembly Government to follow the anticipated procedures for these proposals, which were described during the progress of the Government of Wales Act 2006, has created significant problems. The Wales Office, the Welsh Assembly Government and the National Assembly for Wales should seek to coordinate the procedures more effectively in future. (Paragraph 76)

17. It seems unlikely that there are other matters which are intended to be included other than those set out in the definition. We therefore recommend that the definition of “social care” is amended to read “means” rather than “includes”. (Paragraph 80)
18. We are broadly satisfied with the definition of “well-being” to be used, but recommend that it be amended in line with the proposals put forward by the Coalition on Charging Cymru. As mentioned previously, we recommend that all definitions to be referred to in a proposed Order are contained either in the proposed Order itself or in the accompanying documentation. (Paragraph 85)
19. We consider that the term “needs” is more wide-ranging than the term “particular needs”. Accordingly, we recommend that the proposed Order be revised to refer to “needs” rather than to “particular needs”. (Paragraph 89)
20. We agree that the proposed Order is consistent with existing Welsh Assembly Government policy and priorities, and that the use of the Legislative Competence Order in Council procedure is the most appropriate route for this to be pursued. We have noted in this Report that the proposed Order would grant the National Assembly powers in certain areas for which there are no current plans to introduce legislation – for example, the ability to abolish charges for non-residential social care provided by local authorities. We also acknowledge that the proposed Order reflects the current devolution settlement, as illustrated by the Excepted Matters it specifies. (Paragraph 92)
21. Concerns expressed to us in evidence regarding the timing of the introduction of the Order and on local authority budgets are properly matters for the Welsh Assembly Government, and we make no comment on these other than to set out the points raised in evidence. (Paragraph 93)
22. We acknowledge that measures introduced under the terms of this Order may have implications for the delivery of and the demand for services on the Wales-England border, but do not feel that such implications are sufficiently great to prevent us from recommending the granting of competence. (Paragraph 94)
23. We agree that the proposed Order should be proceeded with, with some specific amendments as set out in the recommendations of this Report. We also recommend that in future each proposed Order should contain the definitions of the terms to be used, for ease of reference and for clarity. (Paragraph 95)

Formal Minutes

Tuesday 26 February 2008

Members present:

Dr Hywel Francis, in the Chair

David Jones

Hywel Williams

Albert Owen

Draft Report (The proposed National Assembly for Wales (Legislative Competence) Order in the Field of social welfare 2008), proposed, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph. Paragraphs 1 to 95 read and agreed to.

Resolved, That the Report be the Fourth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

.

[Adjourned till Tuesday 4 March at 10.00 a.m.]

Witnesses

Thursday 17 January 2008

Page

Gwenda Thomas AM, Deputy Minister for Social Services, **Mr Steve Milsom**, Acting Director, Older People and Long term Care Policy Directorate, **Ms Amanda Jones**, Legal Services Department, Welsh Assembly Government

Ev 1

Thursday 31 January 2008

Huw Irranca-Davies MP, Parliamentary Under-Secretary of State, Wales Office, **Mr Geth Williams**, Head of Legislative Policy, Wales Office and **Mr Alan Probett**, Department of Health

Ev 10

List of written evidence

1	Letter from Rt Hon Peter Hain MP, Secretary of State, Wales Office, to the Chairman	Ev 17
2	Letter from the Chairman to Rt Hon Peter Hain MP, Secretary of State, Wales Office	Ev 17
3	Welsh Affairs Committee press notice	Ev 17
4	Draft Order, including Explanatory Note	Ev 20
5	Welsh Assembly Government Explanatory Memorandum	Ev 21
6	Letter from Huw Irranca-Davies MP, Parliamentary Under-Secretary of State, Wales Office	Ev 23
7	Letter from Gwenda Thomas AM, Deputy Minister for Social Services, Welsh Assembly Government, to the Chairman of the proposed Domiciliary Care LCO Committee, National Assembly for Wales	Ev 24
8	Memorandum submitted by Help the Aged in Wales	Ev 24
9	Memorandum submitted by Age Concern Cymru	Ev 26

List of Reports from the Committee during the current Parliament

Session 2007-08

First Report	Energy in Wales: follow up inquiry	HC 177
Second Report	The proposed Legislative Competence Order in Council on additional learning needs	HC 44
Third Report	Work of the Committee in 2007	HC 325
First Special Report	The proposed Legislative Competence Order in Council on additional learning needs: Government response to the Committee's Second Report of Session 2007-08	HC 377

Session 2006-07

First Report	Work of the Committee in 2005-06	HC 291
Second Report	Legislative Competence Orders in Council	HC 175
Third Report	Welsh Prisoners in the Prison Estate	HC 74
First Special Report	Government Response to the Committee's Second Report of Session 2006-07, Legislative Competence Orders in Council	HC 986

Session 2005-06

First Report	Government White Paper: Better Governance for Wales	HC 551
Second Report	Proposed Restructuring of the Police Forces in Wales	HC 751
Third Report	Energy in Wales	HC 876-I
Oral and written Evidence	Energy in Wales	HC 876-II
Fourth Report	Future of RAF St Athan	HC 1129
Fifth Report	Current Restructuring of the Police Forces in Wales	HC 1418
Oral and written Evidence	NHS Dentistry in Wales	HC 771-i
First Special Report	Government Response to the Committee's Second and Third Reports of Session 2004-05, Manufacturing and Trade in Wales and Public Services Ombudsman (Wales) Bill	HC 433
Second Special Report	Government Response to the Committee's Fourth Report of Session 2004-05, Police Service, Crime and Anti-Social Behaviour in Wales	HC 514
Third Special Report	Government Response to the Committee's First Report of Session 2005-06, Government White Paper Better Governance for Wales	HC 839
Fourth Special Report	Government Response to the Committee's Second	HC 1431

	Report of Session 2005-06, Proposed Restructuring of the Police Forces in Wales	
Fifth Special Report	Government Response to the Committee's Third Report of Session 2005-06, Energy in Wales	HC 1656
Sixth Special Report	Government Response to the Committee's Fourth Report of Session 2005-06, Future of RAF St Athan	HC 1657
Seventh Special Report	Government Response to the Committee's Fifth Report of Session 2005-06, Current Restructuring of the Police Forces in Wales	HC 1695

Oral evidence

Taken before the Welsh Affairs Committee (enlarged by the proposed domiciliary Care LCO Committee, National Assembly for Wales)

on Thursday 17 January 2008

Members present:

Dr Hywel Francis MP, in the Chair

Mrs Siân C James MP

Hywel Williams MP

The following members of the Proposed Domiciliary Care LCO Committee of the National Assembly for Wales also attended, in accordance with Standing Order Number 137A(3):

Joyce Watson AM

Dai Lloyd AM

Peter Black AM

Jonathan Morgan AM

Irene James AM

Witnesses: **Gwenda Thomas AM**, Deputy Minister for Social Services, **Mr Steve Milsom**, Acting Director, Older People and Long term Care Policy Directorate, **Ms Amanda Jones**, Legal Services Department, Welsh Assembly Government, gave evidence.

Joyce Watson: Good morning, everybody, *bore da bawb*. I am afraid that I will have to speak in English because it is the only language that I can speak that anyone would be able to understand what I was saying. Although I am learning Welsh, I have a considerable way to go. I welcome everybody to this meeting this morning, a joint meeting on the Proposed Domiciliary Care LCO between our Committee and the House of Commons Welsh Affairs Committee. I have had apologies from Karen Sinclair AM, and Irene James AM is substituting for her. I remind everybody that this Committee, as all committees do, will operate bilingually; that they can use their headsets to listen to the translation of Welsh contributions or as an induction loop to hear the whole proceedings more clearly. Channel 0 on the headphones will provide the verbatim broadcast and channel 1 will provide the translation. I remind everybody to turn off mobile phones, pagers or electronic devices that may interfere with the broadcast and translation system. If there is a fire, after I have left the ushers will escort the rest of you out of the room! I remind you all not to touch the microphones as that will disable the system because they work automatically. It is the very first meeting of this particular Assembly legislative committee and of the Welsh Affairs Committee, so I would like to extend a very warm welcome to the Chair of the Welsh Affairs Committee, to Dr Hywel Francis, to Siân James MP, and Mr Hywel Williams MP. I am delighted that our respective committees have taken an opportunity to meet jointly. I hope, and I am sure, that this will be the beginning of a constructive working relationship with the Welsh Affairs Committee that will be mutually beneficial to all of us.

Chairman: *(Through an interpreter)* Thank you very much, and thank you for your words of welcome. It is a privilege for us to be here again. This, I believe,

however, is a very special day, and before we commence our activities I would like to welcome this opportunity to collaborate with Assembly Members. This is a historic day for us all and, as Chair of the Welsh Affairs Select Committee, I am looking forward very much to collaborating with you in the future for the benefit of the people of Wales. It is a great pleasure for me personally to be here to take evidence from my old friend Gwenda Thomas.

Q1 Joyce Watson: The purpose of the meeting today is simply to take oral evidence in connection with the proposed National Assembly for Wales Legislative Competence Order No.4 relating to charges for non-residential social care. The proposed Order was laid before the Assembly by the Deputy Minister for Social Services on 26 November 2007. The Business Committee subsequently agreed to refer the proposed Order to this Committee at plenary on 5 December. At the same time that it was laid before the Assembly it was also laid in both the Houses of Parliament by the Secretary of State for Wales and referred to the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee for pre-legislative scrutiny. I should also like to welcome Gwenda Thomas AM, Deputy Minister for Social Services today. I would like to ask Gwenda if she would like to introduce herself and her officials.

Gwenda Thomas: Thank you. *(Through an interpreter)* May I thank you for your kind words and say that it is a pleasure for me to be here as part of a process which, as you have said, is historic and very special. I believe that joint scrutiny along with the Westminster Committee is an extremely important part of the process. I am sure that we will all benefit from this process, and I very much hope that we will be able to respond to your questions today and that you will be able to support this LCO

 17 January 2008 Gwenda Thomas AM, Mr Steve Milsom and Ms Amanda Jones

as it goes through the scrutiny process, so that we are able to legislate here in Wales for the benefit of the people of Wales. It is a great pleasure to be here, as I have said, and joining me is Amanda Jones, who is a lawyer, and Steve Milsom, who is a high-ranking official. (*Continued in English*) You are an Acting Director for the Older People's Directorate.

Mr Milsom: That is right, Minister.

Gwenda Thomas: (*Through an interpreter*) There are more officials sitting at the back here. Penny Hall, for example, has been working very hard on this process. Thank you very much.

Joyce Watson: We are here to take evidence and we have some questions to get through. It is my intention to move to that now. Irene James has indicated that she would like to ask the first three questions.

Q2 Irene James: Thank you. What would conferral of legislation competence in respect of Matter 15.9 allow the Assembly to do that cannot be done through existing legislation? Matter 15.9 states: "Charges levied by local authorities for non-residential social care provided or secured by them and payments in respect of individuals with particular needs relating to their well-being so that they or persons looking after them may secure non-residential social care to meet those needs."

Gwenda Thomas: Thank you, Irene. Whilst the Assembly Government can issue statutory guidance to local authorities under Section 7 of the Local Authorities Social Services Act 1970 on the exercise of their charging arrangements, local authorities are able to depart from such guidance, and its impact has therefore been very limited. If the Assembly Government were to issue further guidance under Section 7, it would need to ensure that this guidance did not fetter the fundamental discretion of local authorities to charge for certain services, and to recover such charges as they consider reasonable, as set out in Section 17 of the 1983 Act. Any policy that sought to establish greater uniformity, for example by applying maximum charges or standard charges, could not therefore be achieved using the existing powers.

Q3 Irene James: How does the proposed Order provide an opportunity for the Assembly to introduce future Measures which would be aiming at improving the quantity and the quality of social care provision in Wales? My third question: the proposed Order would confer further legislation competence on the Assembly by inserting a new matter, Matter 15.9 in Field 15, which is the social welfare, in Part 1 of Schedule 5, Government of Wales Act—which sounds very, dare I say, officious! Given that the legislative competence sought refers specifically to "charges levied by local authorities" is the ability to make Measures under the proposed Order conditional on the Assembly having legislative competence in other fields in Part 1 of Schedule 5, for example Field 12 (local government)?

Gwenda Thomas: To deal with question 2 first, this takes me back to some comments that Jonathan made during the plenary debate on 27 November.

To try and clarify, this LCO has been drafted to address the specific issues regarding fairer charging, for which we need to gain legislative competence before we can act. It is not intended to be a comprehensive cure-all, to put right all of the issues confronting social care in Wales, nor does it need to be. On Tuesday we debated the CSSIW report. This report showed an improvement in the quality and care being provided in Wales, but it also clearly stated that there was quite a distance to go in achieving consistency. I think this LCO can serve that purpose when we come to considering the Measure. Our strategy *Fulfilled Lives: Supporting Communities* is the appropriate vehicle for tackling broader issues of improving the supply and quality of social care in Wales; and I have given a commitment, and the Welsh Assembly Government's commitment to review the whole of the funding of social care. We hope to move towards discussing those specifics very soon. That review, of course, will take place over the next two years. I think we need to consider quite seriously the way that this LCO can facilitate this work, or any things that come out of that work.

Q4 Dai Lloyd: (*Through an interpreter*) Thank you, Chair. I have a supplementary question to that second question, Minister. I think that we are all fundamentally agreed that making these payments consistent across the Welsh counties is a good idea because at present social service users at home face payments and charges that are very high in some counties and relatively low in others. Would you agree with the aim of this Order? If I could spell it out, it is that we need to make charges consistent. That will in its way be a means of improving the service to those service users.

Gwenda Thomas: (*Through an interpreter*) I would agree, and I believe that that is a very important point. There are great inconsistencies in the way that people are charged for services that are jointly provided on the same level. It is important. We have seen that Cynon Taff has the lowest charges. Some authorities do not even have a maximum charge, and so that is important. That is the main thrust behind this LCO. The *One Wales* document emphasises the importance of this policy.

Irene James: The definition of "social care" is not included. That is perhaps something that we really need to look at.

Q5 Joyce Watson: We will be coming on to that later.

Gwenda Thomas: The definition of "social care" is spelt out in the previous LCO that was introduced, the Vulnerable Children and Child Poverty LCO. My interpretation of social care is that it includes the provision by any person of residential care. It includes the provision by any person of residential care, although that is not included in this LCO—non-residential care, support, financial or any other assistance, advice or counselling in connection with the well-being of any person. That is the interpretation of social care that we are using in this LCO.

17 January 2008 Gwenda Thomas AM, Mr Steve Milsom and Ms Amanda Jones

Joyce Watson: If I can clarify the situation: there are questions on definitions that will be asked later on. If we could deal with them later on, that would be useful, to keep the meeting flowing.

Q6 Hywel Williams: (*Through an interpreter*) The question follows on from Irene James's comments. I looked at Field 12 to look for that right for local authorities, or to allow you here to pass Measures to allow local authorities to raise charges for services, and I could not see anything in Field 12. Just to endorse what Irene James said, will you be able to pass Measures under this LCO if there is not some change to Field 12 also, which deals more generally with this place's right to come to an opinion and to make Measures on local authorities' charging provisions? Is one not dependent on the other?

Gwenda Thomas: (*Through an interpreter*) I think there is a technical aspect to this question, but, as I understand it, we do not need the ability to legislate in Field 12 for the rights that we are seeking in Field 15 to be effective. If the Chair is content, I could ask Amanda to expand on that technical point regarding the current law.

Ms Jones: A matter can relate to more than one field; that is quite clear in the way the Government of Wales Act has been created. It does not have to be in every field, but it can relate to more than one field and be effective.

Peter Black: Can I ask a supplementary to the question that Dai asked in terms of the way you are going to be levying consistent charging across the whole of Wales? Is it the intention that that is phased in over a period of time? How would you be allowing for the impact on local authorities' budgets of, for example, ordering them to reduce the level of charging they have for particular services?

Joyce Watson: I advise that I think you are straying into a different remit, which would be a Measure, and that is not what we are dealing with here. If we start doing that—and the temptation I can understand, and the concerns I can understand; but I do not think for the purposes of this meeting which is dealing specifically with the legislation that it should be—

Peter Black: The principle of the Order is that local authorities would be asked to levy charges on a consistent basis.

Joyce Watson: I understand that.

Peter Black: What I am trying to understand is whether there is a similar principle in terms of how local authorities would be compensated for that.

Joyce Watson: I understand what you are saying, but if we do not stick to our remit—

Peter Black: I would argue that that is part of the principle, and how that is applied is an important point—

Joyce Watson: I would say it is outside our remit.

Peter Black: Well, I do not see how that is the case. It seems to me a very simple question in relation to the principle and the Order.

Joyce Watson: That is as well may be, but I think it is—

Peter Black: I would like—we could have had an answer in this time! It seems to me important that we have an answer to that question.

Joyce Watson: No, I need to stick to the remit of our Committee.

Q7 Peter Black: I am sorry, I do disagree with that. It does seem to me that we have a principle at stake here: if local authorities are being asked to levy a standard charge, how that principle will be applied is quite important.

Gwenda Thomas: Would it be helpful to ask the Committee to refer to the plenary debate where I gave these answers in public on 27 November?

Peter Black: That would be helpful, thank you.

Joyce Watson: Thank you.

Q8 Chairman: (*Through an interpreter*) I think you will see that in our questions we will tend to concentrate on the principles and perhaps the broader impacts of what we have before us on Great Britain in a way, although we do not wish to see this necessarily from a British standpoint. (*Continued in English*) You have to ask—and I am sure my colleagues would agree—we would be looking for a wider perspective and how this fits into other legislation and other proposals. My first question is: why is this proposed Order as drafted dependent to an extent on the contents of another Order, for example the definition of “social care”? I know you have attempted to address this already, Minister, but can you give some observations on that?

Gwenda Thomas: I will do my best, and if I need to ask for official support I will do that. My understanding is that the purpose of an LCO is to amend Schedule 5 to the Government of Wales Act 2006. This Legislative Competence Order must be read and considered in this light, and not as a free-standing piece of legislation. This LCO contains definitions and is subject to exceptions set out in other LCOs—for example some benefits issues that were already accepted in the Vulnerable Children LCO, and of course the Environmental Protection and Waste Management LCO. If these other LCOs are made before this LCO, Schedule 5 to the government of Wales Act will already have been amended. Consequently there will be no need to include in this LCO the definitions and exceptions to which we refer. It sounds a bit convoluted perhaps, but I think of it as a kind of bridge, where the bridge into legislative competence will rely on the timing of previous LCOs. Where Schedule 5 has already been amended, then the introduction of subsequent LCOs can rely on the amendments as have been previously made. Is that accurate?

Ms Jones: That is correct.

Q9 Jonathan Morgan: The concern I have with the answer you have given is that you are making an assumption that the previous Competence Order will clear all hurdles. I am saying that everything may be fine, but this is not a standard that we would wish to set for the future because you are relying on this to clear all the necessary hurdles without any problems at all and relying on the fact that

colleagues in Westminster will be completely satisfied with what has been outlined in a previous Competence Order. Would it not have been better to have specified in this Order the scope and definition of “social care”?

Gwenda Thomas: I assume that if this LCO is considered first, then this LCO will bring about the amendments to the schedule, but I will ask for support on this.

Ms Jones: If this LCO does come first then it will need to be amended to incorporate those things in the other LCOs that are needed for its purpose.

Dai Lloyd: (*Through an interpreter*) I think my question has been answered, because I just wanted confirmation of the fact that the Legislative Competence Order, the Vulnerable Children and Child Poverty Order, was in front of this LCO in the pecking order, as it were; so I just wanted confirmation of that. Therefore your definition of what will occur will hold water, as long as that LCO is in front of this one in the great manner of things.

Q10 Chairman: I think we are a little bit further forward. The difficulty I have is that I have tried to put myself in the position of members of the public, trying to make sense of what we are saying and doing here, and trying to understand it from a lay person’s point of view. If I could put the question in a slightly different way, would it not have been clearer if the intended legal context had been included in the official documentation? There is a sense in which each of these kinds of proposals need to be free-standing and understood within their own context. I know they relate to other things. Am I making myself clear? I am not sure whether I am.

Gwenda Thomas: My understanding is that the LCO can be free-standing, depending on the timing. Perhaps Amanda or Steve would want to add to that.

Ms Jones: I do appreciate what you are saying, but at the point that this LCO is to be introduced to the Assembly for approval, it will be amended if it needs to be. In the meantime, we have attempted to deal with that by way of the explanatory memos, and of course these discussions in Committee.

Q11 Chairman: It is understandable and perfectly reasonable for us to be pressing the Government on this question of definition because a great deal will turn on it, will it not? Does the matter relate to all cases of social care mentioned in the definition of “social care” other than residential care; or does it apply solely to non-residential care in connection with the well-being of a person?

Gwenda Thomas: This LCO is concerned with non-residential social care that is provided by local authorities. With the exception of residential care, this LCO will include all forms of social care referred to in the definition of “social care” set out in the Vulnerable Children LCO and to which I referred earlier in this meeting. The term “social care” as defined in the Vulnerable Children LCO is wider than the scope of this LCO as it is intended to apply across the social welfare field and not only in relation

to this LCO. What is being said is that there is wide enough scope within the Vulnerable Children LCO to accommodate the proposals that this LCO makes.

Q12 Jonathan Morgan: Minister, on 27 November you made several references to adult recipients of non-residential social care. Can you confirm that the proposed Order would allow the Assembly to legislate in respect of charges for non-residential social care to children and young people?

Gwenda Thomas: Yes. That is quite clear. The LCO, as currently drafted, would enable us to introduce a Measure on charging by local authorities for children’s services. However, we have no intention of introducing such a Measure in the foreseeable future—but it would allow it.

Q13 Jonathan Morgan: In terms of Government thinking, why would you not wish to introduce a Measure to allow that? I know that the principal concern you had was on adult social care, but there are issues around children and young people as well, so I am just wondering why that is the case.

Gwenda Thomas: Because we do not have local authorities at the moment charging for children’s services. I understand that some authorities have given consideration to that, but to the best of my knowledge I know of no authority that is seeking to charge for those services at the moment.

Q14 Jonathan Morgan: Would the proposed Order enable the Assembly by Measure to abolish charging for home care and other non-residential social care?

Gwenda Thomas: Yes, it would allow that, but as I made very clear in the plenary debate on 27 November, and as is underlined by *One Wales*, that is not a proposal at the moment because of affordability. Certainly it would not exclude it.

Q15 Jonathan Morgan: Can you explain why the scope of the Order is limited to charges in respect of non-residential social care, and why it does not extend to residential social care? Earlier, in response to Dr Lloyd, you said that there are inconsistencies for other services that are jointly provided; and of course there are issues about fee levels in residential care. I am wondering why you are confining it purely to non-residential care.

Gwenda Thomas: Our proposals to legislate on charging for non-residential social services have been made in response to a particular problem with inconsistencies of the charging regime for non-residential social services. This particular problem does not exist in the field of residential social care. That is because the Welsh Assembly Government has issued guidance, *Partnership in Care*, which offers guidance to local authorities. Also, a toolkit has been developed by the WLGA based on explanations of that guidance. Of course, local authorities have clear guidance, and within law, as to how they must charge for residential care.

Mr Milsom: If I could clarify what the Minister was saying then; in relation to the *Partnership in Care* guidance and the toolkit, they relate to how local

17 January 2008 Gwenda Thomas AM, Mr Steve Milsom and Ms Amanda Jones

authorities set their remuneration to care home-owners. In law, the Assembly Government cannot set those charges. It is a matter of commissioning between the local authority and the individual care home-owners. The way we ensure consistency in the charging for residential care is through something called CRAG (Charging for Residential Accommodation Guidance); and that sets out capital limits that have to be applied to individual circumstances. If someone has more than £22,000 in capital, savings and house, then they have to pay all of their care. Then there is a sliding scale between £22,000 and £17,500 where they pay some of the care; and then below £17,500 the local authority pays all the individual's care. We already have a robust mechanism in place to ensure consistency in respect of residential accommodation charging, and it is updated through regulations on an annual basis. Therefore, we do not need to do that through this LCO.

Q16 Peter Black: I understand the reasoning around residential care, but of course some residential care is owned by local authorities as well; it is not all contracted. The question really is, if at some stage in the future you did wish to legislate around residential care, would you require an additional LCO to do that?

Gwenda Thomas: Yes. I would like to stress that of course local authorities have a legal duty to apply the statutory framework that Steve has mentioned.

Q17 Dai Lloyd: *(Through an interpreter)* Will the proposed Order, which we are scrutinising today, enable the Assembly to bring forward other Measures which are related to the whole process of assessment for charging? Naturally, Minister, you will be aware that other benefits are often involved; here there are various benefits of course, and occupational pensions and so on. Is there then the scope to bring other Measures forward at a later date which would look at this whole process of how charging is assessed?

Gwenda Thomas: *(Through an interpreter)* Quite clearly, yes. Speaking from personal experience I think this is a very important. It is important that we can consider not only the levels of payments but we can also look at the financial assessment. There are inconsistencies on this issue that we are aware of. For example, if we can discount some benefits and pensions, then that might be a positive, and I think there is some work to be done in the future; but that would be a matter for the Measures themselves.

Q18 Dai Lloyd: Matter 15.9 relates only to non-residential social care—we have covered this a little earlier—although the definition of “social care” also includes residential care. Is there potential here for confusion, or will you make it entirely clear as part of this LCO?

Gwenda Thomas: *(Through an interpreter)* As you said, we touched upon this earlier. I do understand why the Committee is seeking clarity on this issue, but I myself do not believe that there will be any confusion. Of course, this LCO does not cover

residential care, but I am sure that the definition of social care that is included in this LCO will bring clarity to this whole process.

Q19 Hywel Williams: *(Through an interpreter)* I would just like to follow up on this issue. I acknowledge, Minister, that you responded earlier; you said for example that under the Children's LCO the definition is broader; but you have a definition here that is far narrower because residential care is not included. What concerns me is that there is a definition outlined in that other LCO when there is no definition in this one, as far as I can see. How can you say whether or not it is going to be broad enough in scope? For example, as is noted here, is it broad enough to include financial support or any other assistance, advice or counselling, in connection with the well-being of an individual? Is it broad enough to cover that, or not, because you have no definition here. That is what concerns me here; that you are in danger of taking action without having a clear basis for that.

Gwenda Thomas: *(Through an interpreter)* I do understand that residential care has not been given a legal definition, but we are attempting to discuss this as it is usually provided, and as we know it is provided within our communities; and that is care within people's own homes or in their communities. However, the definition of “non-residential care” is included, and that is intended to include all sorts of care with the exception of home care, which can include all sorts of support and assessments, as Dai mentioned, and all the other ways we can assist people in living within their own homes and within their own communities, using the domiciliary status—if I can use that English term there.

Q20 Hywel Williams: Minister, what concerns me is the criteria in terms of not including some services, because it will be extremely important for service-users to know whether or not this service is included. We are looking at the boundaries here, are we not? That is why I am concerned that if this definition is very broad it will include everything; but if it is not quite that broad then some services will be omitted and we will not be able to pass the Measures required. That is just an explanation. I do not know if you have any further comment?

Gwenda Thomas: *(Through an interpreter)* My opinion is that it is broad enough to include all sorts of services and support that are not residential. Perhaps Amanda could endorse that response.

Ms Jones: Social care is defined for the purposes of this LCO and the Vulnerable Children LCO, and it is broad enough to cover all these other things that we have talked about. This LCO is dealing only with non-residential social care, so everything that is within the definition of social care that is not residential will be covered by this.

Q21 Peter Black: In your guidance to local authorities *Fairer Charging Policies for Home Care and Other Non-Residential Social Services* you drew a distinction between home care and other non-residential social services, which include services

provided in a day centre and respite care rather than merely the personal care and domestic help provided in an individual's home. The *Fair Charging Policies* document also describes types of social services, meals at home or in day-care, domestic help, personal home-care equipment, housing adaptations not provided through DFGs *et cetera*. So what types of provision and/or services are covered by the term "non-residential social care" in the proposed Order?

Gwenda Thomas: I did not quite catch what you said about respite care, but it would certainly or could cover respite care if it was provided in the home setting. It is important to make that point. Perhaps I can answer your question by referring to what we mean by "personal home care" as part of the answer. Personal care of course is not defined in law, but it is set out in a regulatory framework. The Assembly Government's view is that personal care includes assistance with bodily functions such as feeding, bathing, walking and toileting, and care that falls just short of assistance with bodily functions but still involves physical and intimate touching. You have mentioned some other issues such as financial support and welfare rights—all of that can come within the terms of this LCO.

Q22 Peter Black: Would that include services in a day centre or respite care?

Gwenda Thomas: Yes, it could, yes.

Q23 Peter Black: It would?

Gwenda Thomas: Yes, it could, yes.

Q24 Peter Black: And respite care—outside that, other than the home.

Gwenda Thomas: Respite care provided in the home setting, and also day care, and possibly—and I do not know if I am right here—even transport to services.

Q25 Peter Black: Can you define what you mean by "respite care in the home setting"?

Gwenda Thomas: This is happening more and more and is a very valuable service. Where a crisis arises at home, then the care can be moved in to the home, rather than move the service-user out of the home.

Q26 Peter Black: It would not include respite care where the cared-for person is moved to another institution for a week or so to give respite to the carer?

Gwenda Thomas: It depends on the setting in which that respite care would be provided. I do not think it totally excludes respite care in another setting if that was provided on a very short-term basis in another place.

Mr Milsom: The *Residential Accommodation Regulations and Guidance* that I mentioned earlier would enable us to deal with the matter of respite care in a care-home setting, which is often the case, so it would just be going down another route for that.

Q27 Peter Black: Can you clarify what is meant by the term "persons" in Matter 15.9? For example, does it include both individuals and organisations that might be involved in looking after an individual in receipt of social care?

Gwenda Thomas: The term "person" does include individuals as well as corporate and unincorporated bodies.

Q28 Peter Black: Thank you. Finally, the proposed Order refers to "payment in respect of individuals with particular needs". Can you elaborate on what is meant by "particular needs"?

Gwenda Thomas: This part of the Order deals with those individuals who are in receipt of a payment for securing non-residential social care, which currently means those in receipt of direct payments. Direct payments may be made for the provision of care required to meet a wide range of needs. These needs are not specified in the relevant legislation, and accordingly no definition has been included in this LCO. This will enable the Assembly to legislate in respect of all payments for securing non-residential social care which are made to individuals with needs, provided these needs relate to that individual's well-being and do not fall within one of the excepted matters.

Q29 Peter Black: You are saying it will be defined in the Measure.

Gwenda Thomas: Well, I think we can have discussions and consultations around this matter but certainly the direct payments issue is a scheme in its own right, and we would not want to exclude any other schemes that might be introduced, or payments made in the future.

Q30 Peter Black: So when you come to make the Measures, any additional definitions will be carried out at that stage.

Gwenda Thomas: Indeed, and it could accommodate any change in policy on the way payments are made, rather than service provided.

Q31 Hywel Williams: (*Through an interpreter*) I just wanted to ask you about the effects of any new regulations which may be introduced under any Measures in the future. I do not think we are here, as a Committee, to find out exactly the detail of what the Assembly wishes to do over the next five or ten years, as is acknowledged in the foreword that Peter Hain has provided here. It would be of assistance for us to know how you believe these Measures will work. My question fundamentally revolves around the risks of capping charges or placing a floor on charges. Is there a risk in the future that placing some kind of ceiling or cap on charges would lead to lower quality services in some areas and to price increases in other areas? Much as we would like to see consistency throughout Wales—and we know the detrimental effects of the postcode lottery—is there a danger of that happening in the future?

Gwenda Thomas: (*Through an interpreter*) I think it is important that we bear in mind when we consider the impact of future charging that only 15% of the

17 January 2008 Gwenda Thomas AM, Mr Steve Milsom and Ms Amanda Jones

charges made by local authorities come from payments—and this puts it into its context. I believe the figure is £23 million, the funding claimed by local authorities, and that the cost of services is somewhere around £153 million; so that gives you some idea of the context of the charges. I believe that one of the aspects that the Measure could deal with is this aspect of capping, but this is something that we will consider as we move towards a Measure and consult on any future Measure as we introduce that Measure.

Q32 Mrs James: *(Through an interpreter)* I want to turn now to the private sector. Do you accept that charging caps may inadvertently affect the private sector providers, particularly those providers that are paid by the local authorities; and if there has been any response from the private sector, what has that response been to what is being proposed in the Order?

Gwenda Thomas: *(Through an interpreter)* There is no evidence of a direct link between charging and the quality of the care provided. As I have already explained, it is a very small percentage of the funding claimed by local authorities, a very small percentage of the actual cost of providing those services. I am not saying that it is not important, but I am saying that it is only 15% that is raised in charges. There is a framework in place so that we can ensure that the quality of care is of a sufficiently high standard. We are aware of the work of the SSIW as was and the CSIW. We did receive their report this year on 2006/2007 so we know what the quality of the care is and what needs to be done. Personally, I do not see that placing a cap on charges would create any problems in terms of quality of services because there are other ways and means of ensuring that the care meets the necessary standards.

Q33 Mrs James: Do you see any expansion in that gulf between the private sector and the public sector?

Gwenda Thomas: *(Through an interpreter)* No, not really. We were discussing the LCO with officials, and I was surprised in hearing that 80% of services are currently provided by the private sector; and perhaps some years ago we would have thought that that would have been turned on its head. I believe that the private sector now forms an important part of the partnership. I have not received a single word of a response from the private sector regarding this LCO, but we will of course be wanting to consult with all sectors—the local authorities, the private sector, as well as the independent and voluntary sectors. When it does come time for the Measure we will certainly carry out that consultation.

Q34 Chairman: *(Through an interpreter)* I am surprised, Gwenda, that you have not had any response at all from the private sector to date. Am I right in saying that?

Mr Milsom: That is correct. We have regular dialogue with Care Forum Wales, the leading representative body for the private sector, and they have not raised this in any formal or informal discussions.

Q35 Chairman: *(Through an interpreter)* Therefore, do we take it that they are quite happy with these proposed changes?

Gwenda Thomas: *(Through an interpreter)* The work of the National Forum is extremely important as regards creating an effective partnership, and that is in place; but I am sure that when we consult on any Measures we will consult through the Forum and through other methods with the private sector. We will certainly want to speak to them and to demonstrate our own commitment to the partnership that is developing here in Wales.

Joyce Watson: We are looking at direct payments now, and Dr Dai Lloyd will be asking a question on that.

Q36 Dai Lloyd: The explanatory note to the proposed Order that we are looking at today refers specifically to direct payments, whereas Matter 15.9 simply includes the term “payments”; there is no talk of direct payments as such. Can I ask what is the reason for this, and what other types of payment could be included within this Order, as well as the direct payments?

Gwenda Thomas: *(Through an interpreter)* I think I may be repeating myself in answering this question. This issue covers payments rather than direct payments because, as I have already explained, the scheme is a direct payment scheme, which is a scheme in its own right, and it would not be wise, in my opinion, to talk only of direct payments when perhaps policies will develop that make reference to other payments. We know that we are awaiting the Green Paper in England, and we have to be open as to how policies could develop in future, and ensure that we have the legislative competence to consider that should it become an issue.

Q37 Jonathan Morgan: In essence, my question has been answered in that the scope of the Order goes beyond direct payments to payments more generally. Looking specifically at the direct payments system, do you anticipate the Order being able to allow the Assembly by Measure to make any more fundamental changes to the direct payments system itself?

Gwenda Thomas: My understanding—but I will seek support on this—is that it is more concerned with the assessment of the level of contribution of the individual service-user. We would not want to exclude the opportunity to ensure that the financial assessment process is as fair as the charge itself. That is the way I understand it, but I will ask if anything else needs to be said in response to that question from Jonathan.

Mr Milsom: I think that explains it well. The two, direct payments and charging, are linked in the way they impact on users. It has to make sense in terms of the direct payment scheme as well.

Q38 Joyce Watson: I am going to ask a question of the Minister now on the Excepted Matters. Article 3 of Matter 15.9 refers to six Excepted Matters, namely child support, tax credit, child benefit and guardian allowance, social security and independent

 17 January 2008 Gwenda Thomas AM, Mr Steve Milsom and Ms Amanda Jones

living funds and mobility. Minister, can you please explain the reason for the exceptions and the implications that this may have on effectiveness of any future proposed Measure brought forward under Matter 15.9?

Gwenda Thomas: Given the scope of this LCO and that it extends to payments in respect of individuals with particular needs relating to their well-being, it could be interpreted as giving the Assembly competence in relation to a range of state benefits and awards. The inclusion of the various benefits as an exception makes clear that they are excluded from the competence because they are the responsibility of the United Kingdom Government. This LCO therefore reflects the general devolution settlement.

Q39 Hywel Williams: *(Through an interpreter)* Can you confirm, Minister, that unless the Welsh Assembly Government is able to remove charging discrepancies by imposing minimum and maximum, the proposed Order would not bring the postcode lottery to an end because the problem is how much power you will have centrally and what impact it will have at grass roots level if you are unable to do that?

Gwenda Thomas: This point was raised by Jenny Randerson during our debate in plenary. There is no intention whatsoever in this LCO to make it a requirement of local authorities to charge for their services. That discretion will stand within the local democratic system, and the LCO will have no bearing on that. What we do want to do is to have the power to legislate on this particular aspect and to try and ensure that payments are more equitable and more consistent. I do not see that bringing in either a cap or a floor would assist that in any way whatsoever.

Q40 Mrs James: *(Through an interpreter)* We covered the subject of powers and resources a little earlier when Peter Black raised his question, but I did want to return and expand upon this issue. I wanted the opportunity to ask whether you had sufficient powers and resources to support the increased financial pressures on those local authorities. I will say it in English—I have lost my train of thought—I do apologise. *(Continued in English)* . . . with adequate powers and resources to support the increased financial pressure on those local authorities that would be forced to reduce charges.

Gwenda Thomas: The extent to which we decide to compensate local authorities for any revenue that they may lose as the result of a subsequent Measure on charging is an issue for consideration when that Measure is developed. Today we are discussing whether it is appropriate for the Assembly to gain competence in this area. We do, however, have a track record, which I hope will go some way to reassuring you on this issue. We have fully reimbursed local authorities for changes we made to the fairer charging guidance in 2007, using the powers we had under Section 31 of the Local

Government Act; and that can clearly be seen in budget lines. Those payments to local authorities are based on actual expenditure.

Q41 Mrs James: Will central funding be made available to those local authorities?

Gwenda Thomas: That is a matter of course again for the Measure, as and when we consider it.

Q42 Joyce Watson: Minister, what are the implications of drafting the proposed Order if it is laid before the Assembly for approval before the proposed Orders relating to vulnerable children, child poverty, and environmental protection and waste management?

Gwenda Thomas: The LCOs that refer to those topics?

Q43 Joyce Watson: Yes.

Gwenda Thomas: I have tried to explain that this is down to timing, and whichever LCO is considered first. What we need to remember is that this is about amendments to Schedule 5 and that any one of the LCOs so far introduced—and we are pleased that this LCO did receive the agreement of Westminster at a very early point, and I hope that that will facilitate its passage. I do think that any amendments to Schedule 5 can be done by any LCO. I think we have visited this before, but perhaps we need to offer some extra clarification.

Ms Jones: The question was: if this LCO proceeds, or the others, what will happen? It will need to be redrafted to incorporate those elements of the other LCO that are required for the purposes of this LCO.

Q44 Chairman: *(Through an interpreter)* I believe that this is the last question—and I am sure you will be pleased about that, Gwenda! I made reference at the outset to the effect of these developments in Wales on England, and the Welsh Affairs Committee is about to start an inquiry in a month's time into public services and the various other policy developments in England and in Wales, and the impact on the border communities in Wales and in England. Have you, as a government, looked into the possibility that there will be entirely different charges and policies in place and that public services will be entirely different in those border areas between England and Wales, particularly in places like Monmouthshire and Clwyd?

Gwenda Thomas: *(Through an interpreter)* I do not see how this LCO will impact upon the responsibilities in terms of assessment of individuals and the provision of care, which is consistent to an extent across England and Wales—but policies between England and Wales can differ. That is true in a number of policy areas, and I do believe that that is something to be welcomed, because that is what devolution means, in my opinion. We are giving Wales the right to legislate as its own government sees fit and sees as being in the best interests of the people of Wales; but I do accept your point on the border area between England and Wales. As I understand it, we will only be legislating for people who are resident in Wales, and I think we can be

17 January 2008 Gwenda Thomas AM, Mr Steve Milsom and Ms Amanda Jones

quite clear about that. We have seen Wales in the vanguard in terms of appointing a Children's Commissioner first of all, and then a Commissioner for Older People. I am very proud to say that Wales can lead the way. I am sure that there are things that we can learn from Westminster, but, likewise, Westminster can learn some lessons from us here in Wales too. I believe that a joint Committee such as this one underlines that; we can be open with each other and scrutinise jointly, as we have done today.

Q45 Chairman: *(Through an interpreter)* Amen to that; I would agree with every word that you have said. You, perhaps, would look forward to seeing England following your lead on this LCO?

Gwenda Thomas: *(Through an interpreter)* Yes, indeed. We do look forward to seeing what the Green Paper will say, because although that will be a paper for England only there will be issues that will be of great import to Wales, and perhaps this Order will put us in a good position to make legislation in Wales so that we do our best for the people of Wales, particularly our most vulnerable people. Of course, that is our aim.

Chairman: *(Through an interpreter)* That is a good point to finish on. It is a very positive point. Hywel has a supplementary question.

Q46 Hywel Williams: *(Through an interpreter)* I am sorry to raise a further issue, but there are two aspects to this border issue. We have a different system to that which exists in England, and I would say the system in Wales is better; so as far as I can see it is a matter for decision-makers in England. Perhaps there are differences, but there we go—that is just the way it is. On occasion there is a perception that the people are given better services over the border, in terms of health service in particular; but in terms of these services referred to here, is there anywhere in Wales where, for practical reasons, the service is provided from Chester or Shropshire? I am thinking of the border towns, which are exactly on the border. Perhaps you could provide a note for the Welsh Affairs Select Committee and for Assembly Members.

Gwenda Thomas: *(Through an interpreter)* I am sure we can answer your questions in a letter. I do not know if those figures are available. I do not have that information, but I am quite clear in my own mind

that we are discussing here charges for people resident in Wales. If there are people in England who receive services in Wales, then it is the responsibility of the local authority in England to fund that service, so I do not see that there is any question that could cause difficulties as this LCO develops.

Q47 Chairman: *(Through an interpreter)* Do you, as a government, have a strategy to ensure that there is collaboration in those border areas? Do you give advice to local authorities to ensure that there is some kind of strategy to ensure that everyone is treated fairly in those areas?

Gwenda Thomas: *(Through an interpreter)* I do believe that the rules are quite clear on who has the responsibility for the funding of services. I have no doubt about that. I know that Hywel has raised the issue on figures, and perhaps once we have that information that will give us some clarity in this area. I think it is quite safe for us to put our faith in the rules already in existence.

Dai Lloyd: *(Through an interpreter)* The services you receive are dependent on your postcode, and if your postcode is in Wales the provision will be there; and if that provision happens to be provided in England, then the Assembly will look after you through the local health board by means of a contract or agreement; and the opposite is also true: if your home address is in England and you are receiving services in Wales, then your local authority will pay for that where necessary. The last time I looked at the figures in terms of health services, you will recall that some 2.9 million people live in Wales, and 37,000 patients from Wales are treated in England, which is a very small figure.

Joyce Watson: I am going to draw the meeting to a conclusion. I am going to start by thanking the Minister for her contributions and for being very open and forthright with us. I also thank the Members of the Welsh Affairs Committee for their contributions and for being here with us today. The Welsh Affairs Committee and our Committee will be meeting separately on 31 January to take further evidence in connection with this proposed Order.

Chairman: *(Through an interpreter)* Ms Watson, thank you very much for the way in which you have chaired proceedings on behalf of the National Assembly for Wales today. It has been an exceptionally successful meeting and, as I said earlier, it is a historic day. Thank you.

Thursday 31 January 2008

Members present:

Dr Hywel Francis, in the Chair

Mr David Jones
Hywel Williams

Mark Williams

Witnesses: **Huw Irranca-Davies MP**, Parliamentary Under-Secretary of State, Wales Office, **Mr Geth Williams**, Head of Legislative Policy, Wales Office and **Mr Alan Probett**, Social Care, Local Government and Care Partnerships Directorate, Department of Health, gave evidence.

Q48 Chairman: Good morning and welcome, or should I say welcome back? First of all, Minister, could I thank you for coming before us again at very short notice at a very challenging time for the Wales Office. Could you introduce yourself and your colleagues, please?

Huw Irranca-Davies: Yes, indeed, thank you, Chairman, Dr Francis. Could I introduce to my left Geth Williams from the legislative policy unit within the Wales Office and Alan Probett from the Department of Health, policy adviser in regulated social care. If you are content, Dr Francis, I am sure my colleagues on either side would be willing to answer questions, particularly on technical issues as well as we go through this.

Q49 Chairman: Thank you for that. I know you are keen to speak to us not just about technical matters but on the broader process, and it may well be that in the course of this session you will have that opportunity and, if not, perhaps we could invite you to say something at the end of this session. First of all could I begin by asking a question which this Committee will be asking ministers and everyone else who is coming before us on LCOs and that is what is the difference? What would this proposed LCO allow the Assembly to do that it cannot currently do?

Huw Irranca-Davies: Dr Francis, that is a significant question and one that should be put at the front of all of these LCOs in the process we are going through. What difference would it make to the quality of the end experience of the service users of this? Certainly the variations in charging between local authority areas in Wales has long been an issue that has been identified by service users, way back to and including the report in 2000 *Charging and Care*, a report on England and Wales that was brought forward. There was further research by Swansea University, the Welsh Assembly Government had consultations with stakeholders and also that resulted in the expressions, right across service users, of their concern over the quite wide variations in service charges, which led into reports such as the *Fairer Charging Policies for Home Care and other Non-Residential Social Services*. There has been a consistent identification, therefore, not only from an official level but from the end users, that these discrepancies have caused them concern. Under the current powers the Welsh Assembly can of course issue guidance to local authorities under section 7 of the Local Authority Social Services Act 1970, but

the guidance is exactly what it says, it is guidance. The Assembly currently is limited in how it can actually, beyond guidance, try and perhaps narrow the range of charging that currently goes on, and the figures will show that where there are authorities that currently have, for example, maximum charges, it varies between £16.50 all the way up to £185, so there is the purpose behind this LCO and the justification for it. That is an imperative; that we actually see what will be the difference for the end users, for the people at the end of this LCO.

Q50 Mark Williams: Turning to a very specific matter but a fundamental one is the absence in the Order of a specific definition on social care and the reliance on another LCO, the Vulnerable Children and Child Poverty LCO, to provide that definition. Why is that the case; why is there not a specific and clearer definition proposed in this Order but you instead rely on another LCO?

Huw Irranca-Davies: Thank you, Mr Williams, and I have to say that this shows the role that this Committee plays in terms of proper scrutiny of these LCOs coming through. You are absolutely right, the proposed Vulnerable Children Order in Council was presented to the National Assembly for Wales for scrutiny before this Domiciliary Care Order, but we are not in a position to present the Vulnerable Children Order to this Committee for scrutiny before this domiciliary care Order as negotiations are still on-going. However, I do assure the Committee that if the draft Order is laid in Parliament and the National Assembly before the Vulnerable Children Order, it would be amended to include certain conditions currently provided for in the Vulnerable Children Order. The numbering of the Matters will also be addressed. Social care is, as you are aware, defined in the proposed Vulnerable Children Order as including residential care, non-residential care, support financially and other assistance and so on. The Welsh Assembly Government intends that the same definition of social care in the Vulnerable Children Order should apply across the social welfare field; however, for the purpose of this Order, as on the details within the Order itself, residential care will not be relevant as it will be excluded from the proposed competence by the wording within it. I hope that answers the question; it has slightly in the timetabling shifted around, but we have addressed the way that that will be defined with the definitions in the Vulnerable

31 January 2008 Huw Irranca-Davies MP, Mr Geth Williams and Mr Alan Probett

Children Order and also within the Matters. If there is a slight slip in the timetable we will make sure that it is properly laid out in the legislation.

Mark Williams: I appreciate the solution that you have now come to, but that could obviously be much clearer were that definition contained in this Order.

Q51 Hywel Williams: Thank you, Chairman. We had a meeting jointly with the Assembly on 27 November with the Deputy Minister in front of us and I just want to clear up some Matters of detail on that. She referred to adult recipients of non-residential care in her evidence; can you confirm that the proposal will allow the Assembly to legislate in respect of local authority charges for non-residential services provided to children and young people as well?

Huw Irranca-Davies: Yes, absolutely, and I thank you for giving me the opportunity to clarify that. You are absolutely right, the terms of this Order in Council would encompass children as well in terms of non-residential domiciliary care, so yes. Thank you for that opportunity.

Q52 Hywel Williams: You have referred already to the wide variation in charges. Would the proposed Order enable the Assembly to abolish charges for non-residential care finally?

Huw Irranca-Davies: Yes, I can give you the technical answer that this bestows upon the Assembly should it be laid. The competence extends right across the charging field so technically yes, but I would put a strong proviso on that which is that the clear indication of the Welsh Assembly Government in recognition that currently all local authorities in Wales apply some charge, the policy intention behind this, as the Minister has clearly stated, is to try and regulate the wide range as opposed to the complete abolition of non-residential and domiciliary charges. Yes, the competence is there; the intention is not there to do that at the moment.

Q53 Mr David Jones: Would the proposed Order enable the Assembly to regulate the method for calculating an individual's income?

Huw Irranca-Davies: Yes, within the terms of the competence it would allow the Assembly to determine the way in which local authorities currently take into account income factors within their calculation of charging, so it would allow that. Geth or Alan, I do not know if you want to add to that in terms of the detail.

Mr Williams: I am not sure we can add to that at this stage. The competence is clearly to grant the Assembly competence over charges and presumably that includes the way those charges are calculated.

Huw Irranca-Davies: The straight answer is yes.

Q54 Mr David Jones: Thank you for that. Local authorities have got power at present to charge for a defined range of social care services under section 17 of the Health and Social Services and the Social Security Adjudications Act 1983. Why does the

scope of the proposed Order not just mirror the range of services for which local authorities can charge under that Act?

Huw Irranca-Davies: Sorry, Mr Jones, you are not referring here to the exceptions under the retained Matters which are listed within the Order.

Q55 Mr David Jones: No, this is a defined range of social care services.

Huw Irranca-Davies: I just wonder whether I can tease out from you a little bit some of the specifics on that, such as the examples of that, Mr Jones?

Mr Jones: I have to rely upon my adviser for the examples, Minister.

Q56 Chairman: We are talking about section 17 here.

Huw Irranca-Davies: Dr Francis, I am not quite clear on the detail of the question but I wonder whether it would be helpful for the Welsh Assembly officials if we can clarify the point and we will happily write to the Committee with an answer on that, because I am not quite clear on the purpose behind it, but we will happily write to you and confirm it.

Q57 Mr David Jones: Thank you, Minister. This is very much on the same line: is it contemplated that the discretion that is now vested in local authorities by Section 17 will be repealed as a result of the proposed Order and any Measure that may flow from it?

Huw Irranca-Davies: Certainly, within the competence of this, in the language that is used within the Order in Council, it would—subject to consultation, including with the WLGA who totally welcome this and in fact have strongly welcomed the principle behind this—look not only at the charging regime but at those matters that impact upon it, including allowances that are made in terms of the income and all those other factors. So it is certainly within the competence, but because it is related I suspect to your previous question if we can bring the detail forward we will write to you with a response on that.¹

Q58 Mr David Jones: I think the question of local authority discretion is what is important and what is certainly exercising a number of councils I have spoken to. Would it be unfair to describe this proposal as a highly interventionist proposal by the Assembly Government?

Huw Irranca-Davies: Yes, and the reason I say that is it is certainly an Order in Council that is not only welcomed by service users but also in principle by the WLGA, but for any subsequent Measures that are brought forward it has been made clear by the Minister that there will be the fullest consultation, because the last thing that the Welsh Assembly Government wanted to do was either to impose Measures that affected the quality or unfairly affected the fees charging arrangement for the end users or unfairly imposed obligations upon local authorities that they did not feel that they could

¹ Ev 23.

actually comply with. Certainly, the Welsh Assembly Minister responsible has made that clear. Is it an unfair imposition? No, because I think it has been welcomed by the WLGA, subject to those provisos on proper consultation.

Q59 Mr David Jones: I would be unduly cynical if I were to describe this as a power grab by Assembly Ministers at the expense of local authorities.

Huw Irranca-Davies: I would never accuse you of being unduly cynical at all, or any member of this Committee but it is fair to say that this has been broadly welcomed because of the issue that has been identified through it, which is not a narrow disparity in charging but such a wide range and such a feeling that there has been unfairness in this, but how do you reconcile this? This is part of the process should it be laid, but it also has to be part of the process to be properly consulted on when those Measures are brought forward, so it is not a pure imposition in some Stalinist way, I have to say, it is an imposition that has been welcomed by most stakeholders in the field.

Q60 Hywel Williams: Just referring to the question that was asked a moment ago, that is just complete ignorance on my part as to whether the HASSASSAA²—a very effective name—actually defines under section 17 what can be charged for. As a matter of principle, I am asking you—and it might be because of ignorance—when we have further Orders will they always reflect the legislation which has already been passed here, or does it give the Assembly scope to charge for other things in this case? Can they go skiing off piste subsequently? Perhaps you would like to answer that by letter.

Huw Irranca-Davies: I am happy to answer that by letter because it does tie in to what was earlier said, but if I can answer that by letter we will do that.³

Q61 Mark Williams: I am returning to definitions or perhaps the lack of them in the Order. The proposed Order concerns “charging for non-residential social care” and yet there is no specific definition of non-residential social care in the Order. Why is that so?

Huw Irranca-Davies: It does tie a little bit back to the response that I gave earlier which is that social care is defined and will be defined within the Vulnerable Children Order, and certainly that is the definition that will be referred to albeit with some timetable overlapping within this particular Order; however, excluding the issue of residential care. There will therefore be a definition that we will be working from, but it will be within the Vulnerable Children Order instead and simply, as is made clear on the Order in Council that we are currently looking, the wording of this is specifically for non-residential.

Q62 Mark Williams: Turning to excepted Matters, do you see any conflict between the competence to make payments to individuals for non-residential social care and reserved Matters? The Order lists the

excepted Matters which are child support, tax credits, child benefit, guardian’s allowance, social security, independent living funds and motability. Is there a potential clash there?

Huw Irranca-Davies: No, quite the opposite, Mr Williams, but it is an important issue as we look at each one of these LCOs coming through. It is very important in the scrutiny of this that we do define clearly those areas which are retained, and those exclusions are very specific to areas that otherwise would be impinging in some sort of way in a sort of reverse devolution on the Whitehall administration and the Westminster Government. All those issues you mentioned: child benefit, guardian’s allowance, social security, independent living funds, motability and child support are all retained functions and none of these LCOs are meant to challenge that and if you like to broaden the field of devolution, it is within what is already prescribed within Schedule 5 and Schedule 7.

Q63 Mark Williams: You do not take the view that that extensive list could actually have implications on future Measures from the centre?

Huw Irranca-Davies: The implications for future Measures would be purely to delineate clearly where the legislative competence would be, so any Measures that they brought forward under the Matters inserted in the Fields would only be—and that is why those exclusions are in there—in their Field of competence. That, I have to say, is very much where this Committee and the Houses of Parliament play a role in making sure that we get that right, so actually within this Order I would compliment the Welsh Assembly Government officials and those of the Department of Health and other departments who have very clearly prescribed where those exclusions should lie, not only for now but for the future, because as this competence is passed down the competence is there for ever and a day.

Q64 Hywel Williams: Can I ask about any effects, if there are any effects, in the private sector? The Welsh Assembly Government says that the Order will not affect private providers because it is limited to charges levied by local authorities. Is there any risk at all that Wales could become less attractive to private non-residential care providers as compared to England?

Huw Irranca-Davies: No, I do not think so, and as you know, Mr Williams, this particular Order refers very specifically not to the private sector, so it does not impinge directly. The motivation behind this is very much to ensure—in concert, I have to say, with the parallel strategies that the Welsh Assembly Government already has in place in terms of quality of care, in terms of both domiciliary and residential care—that the whole field of care is actually lifted up, both in the charging regimes that we are looking at today, but also in terms of the wider private and public sector provision. I do not have a worry that it will impact negatively on that, in fact quite the opposite.

² Health and Social Services and Social Security Adjudications Act 1983.

³ Ev 23.

31 January 2008 Huw Irranca-Davies MP, Mr Geth Williams and Mr Alan Probett

Q65 Hywel Williams: It might be different rather than better or worse, as it were, but it just occurred to me as we were speaking earlier if the charges in Powys are £185 and the charges in the Rhondda are about £18, that sets a ceiling for charges. If everywhere in Wales was £100, presumably it is less attractive in Powys to provide private services because there is some element of competition there.

Huw Irranca-Davies: That is a very fair point, and I suspect that the Welsh Assembly Minister and the National Assembly for Wales will also want to consider that issue when subsequent Measures are brought through, so that in the consultation that I have talked about those wider issues of the effect on the private sector are taken into consideration as well when Measures are brought forward. Sometimes I know it causes some frustration for Members of Parliament and Committee members here as we look at the scope and the appropriateness and the value of an Order like this because we cannot adequately speculate and second-guess what the National Assembly for Wales is going to take as a view when they bring forward the Measures, but I would fully expect that not only the Welsh Assembly Government but the wider National Assembly for Wales in its scrutiny role would want to deal with exactly that sort of question when Measures are brought forward.

Q66 Hywel Williams: This is an observation, Chairman, but I am worried about market failures because especially in rural Wales there are all kinds of difficulties. If I can move on to a question about payments, the proposed Order refers to “payments” whereas the Explanatory Note refers to “direct payments”, and for me a direct payment scheme is something very specific. What is the reason for the difference and perhaps you would like to explain what types of payments, other than direct payments, would be included within the scope of the proposed Order?

Huw Irranca-Davies: Can you just repeat the question again, Mr Williams, I missed part of it?

Q67 Hywel Williams: The Order refers to “payments” whereas the Explanatory Note refers to “direct payments”. Direct payments in my experience are payments that some people with a disability receive from the local authority to enable them then to purchase their own care. One constituent, for example, gets a large amount of money from the Independent Living Fund and putting all that together enables him to buy 24 hour care, and some of that is a direct payment from the local authority. There is just an inconsistency between the Order and the Explanatory Note because “direct payments” actually means something very special as far as I understand it. I am just wondering if your perception is the same.

Huw Irranca-Davies: Certainly our understanding of this is that the Matter refers to payments rather than direct payments. We did not want to limit the potential scope of this Matter by using the name of one particular scheme as it exists at this point in time because it could change. The reference to

“payments” in this particular LCO is intended to capture all relevant payments, irrespective of what the name of that payment scheme happens to be, and whilst there are not any types of payments that fall within the scope of the LCO at this current time, we cannot assume that this will always be the case, so the broader definition of payments as opposed to direct payments is one that I think helps to address that issue that you raise.

Q68 Chairman: Could we now move on to the question of cross-border issues? When we jointly scrutinised the Deputy Health Minister, Mrs Gwenda Thomas, we raised this question of the possibility of breaches in what we would call the quality of provision across the border, and she quite rightly emphasised the importance of the need to do things better rather than doing things differently. Have you had discussions on the possibility or the danger of very different policies and different legislation between England and Wales and that having an effect or a breakdown in fairness and equality of provision?

Huw Irranca-Davies: Dr Francis, I am steering way back from using the stock ministerial answer which is the one that we have regular discussions on a range of subjects and all that because it would be unfair entirely to use that. We are cognizant of this and actually we welcome the Welsh Affairs Select Committee’s inquiring into cross-border issues which may well take in this issue as well. We are at a level of maturity now within the devolution settlement that we would fully expect in the bringing forward of Measures that relate to this, to bring them forward with a view to improving the quality of care and provision and charging on this aspect, and to be cognizant of those cross-border issues. It is significant in terms of this LCO that there is an immediate practical issue of an individual who might live literally one side of Offa’s Dyke but who also receives some services five miles across the road because of the configuration of social care and health within that area. That individual, as long as they are a resident of Wales, would be covered within this, and they would be acutely aware of any difference from a different type of charging regime across the border. I would anticipate and I would, yes, echo the sentiments in my discussions with Welsh Assembly Government ministers that on this, as with any other issue that has cross-border implications, they do take into account that it is not to do with policy differential for the sake of policy differential, it is to do with what has a positive impact on the quality of the provision that is received by the end user.

Q69 Chairman: I take it from that answer then that you would be very hostile to a journey that would result in a two-tier service between England and Wales.

Huw Irranca-Davies: Yes. Dr Francis, we are rightly content with the idea of policy differential but that policy differential has to ensure that on both sides of the border there is proper and good provision for all the end users. That does not mean that there should

 31 January 2008 Huw Irranca-Davies MP, Mr Geth Williams and Mr Alan Probett

not be different approaches, in fact in some ways that is one of the great benefits of devolution, that we can have different approaches and different experiments in a way to best provide services for people, but if it results in better or worse then that does become an issue. I do not expect it to be with this one, but certainly I am very cognizant of the points that you make and I am sure that the Welsh Assembly Government minister is as well.

Q70 Mr David Jones: Minister, you say that you do not expect there to be problems but Denbighshire County Council, part of whose area I represent, and also councils from Conway have expressed concern that the abolition of charges for non-residential care could lead to people crossing the border from England into Wales for their retirement. This is a phenomenon that exists already, but it could indeed exacerbate that—we have all heard anecdotes of people crossing the border from England into Wales to get their free prescriptions. Do you agree with these concerns expressed by Denbighshire County Council?

Huw Irranca-Davies: It is a valid point and they are valid concerns. My feeling is that those issues, which will not only be from Denbighshire County Council but from others as well, should be fully articulated at the point at which these Measures are brought forward—and now as well, I have to say, because it is thoroughly appropriate to exercise those issues here as well. At the point where Measures are brought forward it is vitally important that the concerns of Denbighshire County Council and others are fed into the way in which these Measures are brought forward because if there were to be negative implications of a policy differential, those need to be fully debated, fully discussed and ways around found so that did not happen, that those negative impacts of what is a well-meaning policy issue did not come about. It is a valid issue, it is a valid concern, the question is when the Measures are brought forward are the right things put in place to make sure that that does not happen.

Q71 Mr David Jones: Do you want to add to that, Minister?

Huw Irranca-Davies: Only one aspect, Mr Jones. One thing to bear in mind as well as we look at this is the possible impact of any future changes and the scale of it. In Wales I understand that of the 66,000 adults receiving community-based non-residential services, only around 14,000 of those are actually being charged at this moment. Add to this the fact that the cost of any move would far outweigh the amount being saved by reduced charges, we understand that we are very unlikely to see the number of people retiring to Wales—the very point that you were making—increasing as a result of this policy, but it is still an issue that should be addressed when Measures are brought forward.

Q72 Mr David Jones: Would you accept that this is a concern that is possibly greater in North Wales than it is in South Wales because in North Wales of course people do live a lot closer to the border than

they tend to do in South Wales, there are much bigger conurbations close to the English border than there are in South Wales and this of course is a phenomenon that is causing difficulties in North Wales in other areas—I am thinking in particular of neurosurgery where the Welsh Assembly Government's policy on elective neurosurgery is causing huge difficulties because of course people are used to crossing the border in North Wales. You say that the concerns of Denbighshire County Council will be taken into consideration, but my frank concern is that the Assembly Government appears to be very much South Wales oriented and appears to have a great deal—you may grimace, Minister, but that is the impression that my constituents who were relying on neurosurgery services are now getting. Clearly the memorandum from Denbighshire in this regard shows that they have a similar concern in respect of social care.

Huw Irranca-Davies: Their concern is a valid one and in putting forward those concerns they are doing a very good job in flagging up very early on what their concerns will be as Measures come forward. It would also be a concern, I have to say, whether it was in Knighton and Presteigne, whether it was in Chepstow *et cetera*; although I do take your point about the large conurbations in the North East there are also significant conurbations in Bristol, the Midlands and so on which would have an effect.

Q73 Mr David Jones: But much further from the border.

Huw Irranca-Davies: Yes, but the same principle applies and this will factor into the investigation that you are doing in the Welsh Affairs Select Committee I am sure. All I would say in responding, whilst acknowledging those concerns which are valid to be raised here and valid to be raised as Measures come forward, is that the WLGA which does reflect authorities right across the board, in all parts of Wales and is a mix of nature, both in terms of the types of authorities but also the political make-up of those authorities as well—they are broadly welcoming this in terms of the principle; in fact, I say that in a fairly cool manner. They are welcoming of this, they want to see this work because they can see the benefits of it, but you are right in saying that the concerns you have raised and others have raised will need to be addressed by the Measures that are brought forward. I have confidence that when Measures are brought forward, if this is laid, the National Assembly for Wales, a democratically elected body, will have the ability to properly scrutinise them and to feed into this process, and feed in the concerns from North, South, East and West.

Q74 Chairman: Could I end by asking a very open-ended question and I hope that you use this as an opportunity to give your observations on your experiences—yours and our Committee's experiences—over the past six to eight months. Do you share my cautious optimism that the process is working, that we are hearing less and less, maybe thankfully only in the media, about concerns over

31 January 2008 Huw Irranca-Davies MP, Mr Geth Williams and Mr Alan Probett

blocking and delays and what we are actually witnessing is the working out of a process of rigorous scrutiny, both in Whitehall and in Westminster and in the Assembly? Would you lay out before us your thoughts on this briefly?

Huw Irranca-Davies: Yes, thank you, Dr Francis, for that opportunity, and it was remiss of me at the beginning not to—so perhaps I can say it as part of my concluding comments—to welcome the opportunity always to be in front of the Welsh Affairs Select Committee. Yes, I do share the optimism in terms of the way we are developing this process, because undoubtedly this is a new process. We are in the first year of bringing forward these Orders in Council. Members of the Welsh Affairs Select Committee and others have raised their views about how to improve the process as we go. I know that internally within the Wales Office we are very seized, working in partnership with the Welsh Assembly Government, that we learn from what we have done so far, including issues such as how to better project manage the whole path of Orders in Council/Legislative Competence Orders, in order that from the moment when the announcement is made on the floor of the National Assembly for Wales of the intention for an Order to be brought forward, that there is an early managed approach to how we manage expectations around it, manage the policy negotiations, both in the Assembly and through Whitehall. Obviously the Welsh Affairs Select Committee as well has a strong input into this, and how we talk about what is realistic in terms of timetables around it. There is a lot of learning going on, but do I share the optimism? Yes, I do, because in the first year of a process like this realistically it would have been expected that there was an enormous amount to get to grip with, how this process would work. What was laid down in the Government of Wales Act was only the starting point of it and the input of the Welsh Affairs Select Committee has been invaluable in taking this forward. We particularly welcome the fact that the Welsh Affairs Select Committee has now met for the first time in joint scrutiny of an Order in Council and we hope that will become the basis of future work. We will be doing our bit as well and by the end of this session I am more than cautiously optimistic that we will have proven that this procedure, for all the criticisms that there have been of it—sometimes external criticisms from those not involved in the process, I have to say—will prove that we can deliver well-scrutinised, solid pieces of legislative Orders in Council that the National Assembly for Wales will subsequently be able to give full consideration to in their democratically elected bodies. I am cautiously optimistic and I would like to reiterate my thanks to the Welsh Affairs Select Committee for the singular role that they have played in developing this process as we have gone along.

Chairman: While we are in the mood of being nice to one another could I reciprocate and say that this morning's session has been refreshingly open and full of a sense of not certainty but genuine uncertainty about some of these things. I imagine the

Royal Mail will be very pleased because you are going to be sending us lots of letters clarifying the position. Mr David Jones wants to ask a question.

Q75 Mr David Jones: I am sure we are all agreed as to the importance of scrutiny and I would certainly agree that the scrutiny process of Legislative Competence Orders is actually starting to fall into a pattern and is certainly starting to work. We have all gone through something of a learning curve, but would you agree, Minister, that it is equally important that framework powers in Bills should be subject to adequate scrutiny too? Would you agree with that?

Huw Irranca-Davies: Entirely.

Q76 Mr David Jones: Could you explain, therefore, why the Welsh framework powers which are incorporated in the Planning Bill which is currently in Committee were not available for debate on the floor of the House at Second Reading and in fact were produced only on Thursday of last week?

Huw Irranca-Davies: Dr Francis, will you allow me some leeway perhaps to respond to a question from Mr Jones?

Q77 Chairman: I thought you were going to offer to write us another letter.

Huw Irranca-Davies: I am very happy to say that both in terms of the complexity of that Bill and the detailed negotiations and discussions going on as to the precise wording of those powers we would have liked to have seen those brought forward earlier so that there was some earlier consideration; I am being quite frank in that. Having said that, the shape that they have arrived in now, we hope is such a good shape that it will allow proper consideration of scrutiny. Ideally, Mr Jones, you are absolutely right, they would have been there earlier and we will do our best.

Q78 Mr David Jones: Whose fault is it because the request was made last summer, I was told at an evidence session about three weeks ago. The request was made to the Wales Office last summer and it took them six months for just one clause to be drafted. I appreciate there has to be liaison between departments and so on, but that does seem to me to be an inordinately long time, and what concerns me is that fortuitously there are three Welsh members of the Planning Bill Committee but no Welsh colleagues have had the opportunity of debating this on the floor of the House at Second Reading; the only opportunity there will be will be on Report, when of course time is limited. I must express my personal concern that a matter of constitutional significance, the devolution of primary powers to the Welsh Assembly, appears as a bolt-on extra to the Bill, very much at the last moment. I would like to record I do not think it is acceptable and I would like to know whose fault it was.

Huw Irranca-Davies: If I could say in response, Mr Jones, it is the fault of no one specific; the cause of it, however, is the very complex nature of the devolution settlement, and we are certainly of the

31 January 2008 Huw Irranca-Davies MP, Mr Geth Williams and Mr Alan Probett

firm opinion that on an issue of such crucial importance—not only in terms of the planning regime but constitutionally as well—it is absolutely right that there are and there have been detailed and positive long discussions to get this to where we are. Ideally we would have brought it forward before, but it is now in a position where it is fit for purpose. I might also add as well—and I know you were there and it was great to see a very good attendance at the briefing session that we held on this, the best attendance at any briefing session, in which, even though we did not have the clause and the amendments in place, what we did have was, I have to say, a fair degree of clarity, both from the Welsh Assembly Government minister and myself as to what would be in it. It is no different from what we actually said in that briefing a fortnight ago. I do take your point and ideally we would have wanted to bring it forward earlier.

Chairman: At the risk of reopening a situation, these are questions that will obviously be raised when we have the new Secretary of State for Wales before us, and we hope that will be sooner rather than later. Are you happy with that, Mr Jones?

Mr David Jones: There was one further point, Chairman, with your indulgence and very briefly.

Chairman: You are struggling with your voice though. Very briefly for the sake of your voice.

Q79 Mr David Jones: You mentioned the point of the briefing session and I would like to thank you for that because it was helpful. The concern I have, however, is that only Welsh colleagues were as I recall invited to that—correct me if I am wrong. It seems to me that it would have been helpful if Members of the Planning Bill Committee could have had the opportunity for such a briefing too because they will be considering it, possibly this very afternoon, unsighted. A suggestion might be that

Bill committees also should be invited to such briefing sessions. I appreciate there is always a difficulty in terms of timing and so on—the Committee may not have been selected—but a suggestion is that it would be helpful for the information of members of those committees.

Huw Irranca-Davies: Mr Jones, I am seeing nods around the table here and I think that is a very constructive suggestion that we can take away and look at. Certainly, we do want to make this process as inclusive as possible. What we are trying to do is extend the level of scrutiny and whilst there has been an issue over here over the timing of these, what we want to make sure is that all Members, Welsh or not, have a proper opportunity to input. We will take that away and look at it and perhaps through the usual channels as well look at the way we can do it. I do welcome your recognition as well that we have three Welsh members on that Planning Bill Committee, so that has to be a good thing. Thank you for that very constructive suggestion.

Chairman: On that constructive note could I thank you, Minister, for a very useful session once again, and thank you also to your colleagues. Could I take this opportunity to say that this is the first session that we have held since the changeover in the Wales Office with the new Secretary of State for Wales and I would like, as Chairman, to place on record my personal thanks and I am sure my colleagues would join with me here in placing on record our appreciation of the work of the former Secretary of State for Wales, the Rt Hon Peter Hain, in his major contribution to democratic devolution. We also look forward to hearing the new Secretary of State, the Rt Hon Paul Murphy; we warmly welcome his appointment and congratulate him. I hope that you convey those congratulations to him and our thanks to the Rt Hon Peter Hain as well. Thank you very much.

Written evidence

Letter from Rt Hon Peter Hain MP, Secretary of State, Wales Office, to the Chairman

PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED DRAFT ORDER IN COUNCIL DEALING WITH CHARGING FOR NON-RESIDENTIAL SOCIAL CARE

I am writing to invite you and your Committee to undertake pre-legislative scrutiny of the proposed draft Order in Council dealing with charging for non-residential social care. I am pleased to be able to inform you that the UK Government has given its consent to this Order being submitted to Parliament for pre-legislative scrutiny and I would be grateful if you could make the necessary arrangements for this to happen.

I have today laid the Order along with the accompanying Explanatory Memorandum before Parliament in the form of a Command Paper (CM7286) and I have issued a written ministerial statement drawing the Command Paper to the attention of Members. I have also written specifically to Welsh Members enclosing a copy of the Command Paper.

Following a recommendation made by the Lords Constitution Committee on completing their scrutiny of the additional learning needs proposed draft Order in Council we have included an up-to-date copy of Schedule 5 showing all the matters that have been inserted into fields and their sources;¹ we have not, in this instance included the proposed Matter as part of that Schedule because to do so might confuse the Committee[s]. This Matter is numbered 15.9 even though the field of social welfare is currently empty. You may be aware that two legislative consent Orders have been published in the Assembly which have not yet been submitted for Parliamentary scrutiny.

One of these Orders proposes to insert Matters 15.1 to 15.8 into Schedule 5 and to maintain the sequence for Assembly business, the Matter inserted by this Order is numbered 15.9, (para 19 of the Explanatory Memorandum provides more detail). If this Order is formally laid before Parliament before the other Order then we will amend the numbering so that it will be the first Matter inserted into this Field.

We hope that this situation will not arise in the future and it is our intention to provide the Committee with a copy of Schedule 5 which includes the matters under consideration as well as those which have been approved by Parliament.

May I take this opportunity to thank you for the work that you and your Committee have carried out so far in relation to the new Order in Council process and also your continuing work on a wide range of issues affecting Wales. As Secretary of State for Wales I value your role and look forward to working with you on this and other issues.

26 November 2007

Letter from the Chairman to Rt Hon Peter Hain MP, Secretary of State, Wales Office

PROPOSED LEGISLATIVE COMPETENCE ORDER: CHARGING FOR NON-RESIDENTIAL SOCIAL CARE

Thank you for your letter of 26 November inviting the Welsh Affairs Committee to conduct pre-legislative scrutiny on the proposed Legislative Competence Order dealing with charges levied by local authorities for non-residential social care.

I circulated your letter to my colleagues on the Committee for consideration at our meeting yesterday, and I am pleased to be able to let you know that the Committee has agreed to conduct pre-legislative scrutiny of this proposed Order. The Committee will shortly issue a press notice calling for evidence and outlining the broad areas on which it expects to focus.

28 November 2007

Welsh Affairs Committee Press Notice

PROPOSED LEGISLATIVE COMPETENCE ORDER IN COUNCIL: CHARGING FOR NON-RESIDENTIAL SOCIAL CARE

The Government of Wales Act 2006 introduced a process enabling the National Assembly for Wales further to enhance its law-making powers by a new procedure known as Legislative Competence Orders in Council (LCOs).

The Secretary of State wrote to the Chairman inviting the Welsh Affairs Committee to conduct pre-legislative scrutiny of the proposed Order on charging for non-residential social care on 26 November.

The proposed Order, together with an Explanatory Memorandum, is on the National Assembly's website, www.assemblywales.com

¹ Not printed here.

The Welsh Affairs Committee invites written submissions on the proposed Order on charging for non-residential social care, which should be received by 25 January. If you wish to submit written evidence, please send it to the following address—

by email:

welshcom@parliament.uk

or by mail:

Welsh Affairs Select Committee, House of Commons, No 7 Millbank, London SW1P 3JA

Please head your submission “Proposed LCO on charging for non-residential social care”.

The Committee will particularly consider the following aspects of the proposed Order—

1. Is the LCO request in the spirit and scope of the devolution settlement?
2. Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?
3. Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill?
4. The extent to which there is a demand for legislation on the matter(s) in question?
5. To what extent might the transfer of functions proposed have wider implications for the UK budget?
6. To what extent might the transfer of functions impact on reserved functions; for example, would the transfer of functions increase regulatory burdens on business?
7. Are there any cross-border issues relating to the LCO? (Would legislation subsequently be required in England?)
8. Would the proposed LCO necessitate the formation or abolition of Welsh institutions and structures? If so, where does the legislative competence to exercise such changes lie?

Concurrent to the work of the Welsh Affairs Select Committee, a detailed legal examination of the proposed Order will be conducted by the Constitution Committee, House of Lords.

Dr Hywel Francis MP

Chair, Welsh Affairs Select Committee

Charges levied by local authorities for non-residential social care provided or secured by them and payments in respect of individuals with particular needs relating to their well-being so that they, or persons looking after them, may secure non-residential social care to meet those needs.”

(3) In the table at the end of Part 1 (excepted matters), insert “, 15.9” after “15.8” in each of the rows relating to excepted matters 19, 21, 22, 23, 24 and 25.

Clerk to the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends Schedule 5 to the Government of Wales Act 2006 (“the 2006 Act”). The effect of the Order is to extend the legislative competence of the National Assembly of Wales to make new laws for Wales by Measure under section 93 of the 2006 Act.

The amendments relate to field 15 (social welfare) in Part 1 of Schedule 5. Article 2(2) inserts a new matter 15.9 which extends the legislative competence of the National Assembly for Wales to cover—

- charges for non-residential social care provided or secured by local authorities , and
- direct payments in respect of individuals so they, or persons looking after them, may secure non-residential social care.

This extended legislative competence of the National Assembly for Wales is subject to the general limitations that apply to the exercise of such competence by virtue of Part 3 of the Government of Wales Act 2006.

Article 2(3) applies specified excepted matters to the new legislative competence. The excepted matters are listed in the table in Part 1 of Schedule 5 to the 2006 Act. The table has effect so that the matters specified in the first column (the excepted matters) are not included in the matters identified in the second column (matters inserted under the fields). The excepted matters in the first column will be outside the scope of the matters specified in the corresponding entry in the second column.

The specified excepted matters relate to—

- child support (excepted matter 19),
- tax credits (excepted matter 21),
- child benefit and guardian’s allowance (excepted matter 22),
- social security (excepted matter 23),
- independent living funds (excepted matter 24) and
- motability (excepted matter 25).

Welsh Assembly Government Explanatory Memorandum

PROPOSAL FOR A LEGISLATIVE COMPETENCE ORDER IN THE FIELD OF SOCIAL WELFARE

CHARGING FOR NON-RESIDENTIAL SOCIAL CARE

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 proposed Order in Council sets out a matter which it is proposed to add to the legislative competence of the Assembly by inserting it into Schedule 5 of the 2006 Act. 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 “matter” 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 provision of social services, including charging for services, is a devolved matter. Assessing the need for social services, as defined in section 1 of the Local Authority Social Services Act 1970, and the provision of these services is a local authority function. The powers of the Secretary of State under the 1970 Act were devolved by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999 and it is the Welsh Ministers who are responsible for issuing directions and guidance to local seven authorities as to the exercise of their social services functions. The Welsh Ministers are also responsible for regulating and supervising the provision of social care under various pieces of social care legislation including the Care Standards Act 2000 and the Health and Social Care (Community Health and Standards) Act 2003.

6. In February 2007 the Welsh Assembly Government published its 10 year strategy for Social Services in Wales, *Fulfilled Lives, Supportive Communities*. It sets out how modernised social services will contribute to a better Wales and to improving the lives of its citizens and emphasises the need for modern, accessible and responsive services, delivered flexibly, consistently and sustainably across organisational boundaries to a high standard.

7. It envisages a shift from residential care towards support at home and a switch towards more preventative services. This request for legislative competence therefore derives from a need to ensure that local authority social services charging arrangements support this strategy.

8. Under the terms of Section 17 of the “Health and Social Services and Social Security Adjudications Act 1983” (HASSASSA) whether to charge, and how much to charge, for non-residential social services is at individual local authorities’ discretion. This has resulted in significant variations in charging for comparable services.

9. Service users, carers and their representatives are concerned that charges are often set too high and that differing amounts can be charged by different local authorities for similar services resulting in inequities and uncertainties for these groups of people. There is also disparity in the way that benefits and/or disability related expenditure are treated in an individual’s assessment.

10. This request for legislative competence is also made in the context of the limitations to the current settlement which, in some respects, restricts the Welsh Assembly Government from tackling Welsh priorities and issues. Whilst the Assembly Government can provide statutory guidance to local authorities under Section 7 of the Local Authority Social Services Act 1970 on the exercise of their charging arrangements, this has been limited in its impact.

11. Using the powers in Section 7 the Welsh Assembly Government issued *Fairer Charging* guidance to local authorities in 2002 in an attempt to address some of the problems with the wide variation in charging policies operated in Wales. It remains largely good practice except for four key elements which are statutory and which ensure service users are left with a guaranteed level of income after charging has been applied.

12. Section 7 therefore provides a vehicle for issuing general guidance in this area. However, if the Assembly Government were to issue further comprehensive guidance under Section 7 in relation to charging for non-residential social care it would need to be sure that it did not fetter local authorities’ fundamental discretion to charge for certain services and to recover such charges as they consider reasonable as set out in

Section 17 of HASSASSA. Any policy that sought to establish greater uniformity, for example by applying maximum charges or standard charges, could not therefore be achieved using Section 7 powers. In this way the current executive powers of the Welsh Ministers are not sufficient to enable them to achieve a fairer and more consistent approach.

13. As well as issuing the *Fairer Charging* guidance, the former Minister for Health and Social Services announced, in February 2006, a package of measures aimed at reducing the impact of charging for non-residential social care for disabled and older people and a range of initiatives to improve the quality and quantity of those services for recipients and carers. He also announced an ongoing commitment to “keep the domiciliary care charging arrangements under review and to make reforms when there is an opportunity to do so”.

14. Whilst the Assembly Government has therefore taken steps to ameliorate the impact of charging, other future developments suggest that further action on charging will be necessary:

- (a) Rising pressure on services, with budgets increasing more slowly than in recent years, is likely to mean that individual local authorities will increasingly feel compelled to put up charges in ways which are likely to extend the current disparities;
- (b) As a result of *Delivering Beyond Boundaries*, the Assembly Government’s framework for public services in Wales, there is likely to be a move towards more regionally commissioned and delivered services provided jointly by groupings of bodies. Again, it will be important that the charging regimes are supportive of this.

15. New powers in this Field would therefore enable the Welsh Assembly Government to bring forward coherent proposals for Measures, based on Welsh priorities and timescales that will allow us to achieve a fair and consistent approach to charging.

Scope

16. It is proposed that the Matter be inserted under Field 15: social welfare in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to legislate on this issue by way of Assembly Measure. The Order only covers charges levied by local authorities in respect of non-residential social care. It would not enable the Assembly to legislate in respect of charges levied for non-residential social care by private care providers. It also encompasses the charging arrangements for those service users in receipt of a direct payment to enable them, or persons looking after them, to secure non-residential social care to meet their needs. The definition of social care to be used in Field 15 is set out in the proposed Order dealing with vulnerable children and child poverty which also seeks to insert matters into this Field.

17. The Matter would enable the Assembly to ensure that where a local authority decides to charge it does so in accordance with such requirements as may be specified by or under an Assembly Measure. The Assembly Government also wishes to have the flexibility to set the level of charging at nil for specific services or for specific client groups, should it conclude that this is appropriate, and the Matter is drafted so as to enable such provision to be made by or under an Assembly Measure.

18. The principle purpose of this LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act that will enable the Assembly Government to regulate the setting of charges and remove the wide disparities that currently exist.

Exceptions

19. The matter covered in this Order will be subject to certain exceptions. The effect of the exceptions will be to exclude the following subjects from the legislative competence in the new matter: child support (ie arrangements for the provision of maintenance by both parents of a child); tax credits; child benefit and guardian’s allowance; social security; Independent Living Funds; and Motability. When the Order is formally laid before Parliament, these exceptions will be inserted by article 2(3) into a table at the end of Part 1, Schedule 5. The numbering of the matter is currently shown as 15.9 as Matters provisionally numbered 15.1–15.8 are contained in the vulnerable children Order, which has not yet been referred to Parliament. The numbering of the Matter and the drafting of the exceptions will be adjusted as necessary in the final draft Order, depending on the progress of each of the proposed Orders under consideration.

Geographical limits of any Assembly Measure

20. Section 93 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly’s legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

21. 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

22. 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 the Minister of the Crown without the consent of the Secretary of State for Wales. In relation to any future proposals that may impact on Minister of the Crown functions the appropriate UK Government Department will be consulted and agreement sought to any proposals to change or modify these functions.

Conclusion

23. 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 proposed Order to which this Explanatory Memorandum relates.

November 2007

Letter from Huw Irranca-Davies MP, Parliamentary Under-Secretary of State, Wales Office

DOMICILIARY CARE ORDER IN COUNCIL

Thank you once again for inviting me to give evidence to the Welsh Affairs Committee on the proposed draft Domiciliary Care Order in Council on Thursday 31 January. At that session I undertook to write to the Committee on a few points.

Why does the scope of the proposed Order not just mirror the range of services for which local authorities can charge under the Act?

The matter which defines the scope of this Order is drafted in general terms and not by reference to existing legislation. This drafting approach which is consistent with the drafting of other matters in Schedule 5, has been adopted because of the need to ensure that any new powers and duties concerning the provision of social care are covered by the Order.

Currently the main power that local authorities have to charge for social care service is found in Section 17 of the Health and Social Services and Social Security Adjudications Act 1983. This Section does not list the types of services for which charges may be made, rather it enables local authorities to charge for services provided under certain enactments which are listed in Section 17. Given the nature of this Order, as explained above, it would not have been appropriate or helpful to follow this approach.

Is it contemplated that the discretion now vested in local authorities by Section 17 will be repealed as a result of the proposed Order and any measures that may flow from it?

It is not the intention of the Welsh Assembly Government to remove local authorities discretion on whether to charge for non-residential social services but rather to ensure that where a local authority does decide to charge it does so in accordance with a specified set of requirements. I am assured that any subsequent Assembly Measure will of course be subject to full public consultation and the scrutiny of the Assembly.

Will this Order allow the Assembly to enable local authorities to charge for other services?

The Order covers charging for all social care services other than residential care services and is not restricted to those services provided under the enactments listed in Section 17 of the Health and Social Services and Social Security Adjudications Act 1983.

I trust this answers the points raised. If I can be of any further assistance in helping you to scrutinise this Order, please do not hesitate to contact me.

14 February 2008

Letter from Gwenda Thomas AM, Deputy Minister for Social Services, Welsh Assembly Government, to the Chairman of the Proposed Domiciliary Care LCO Committee, National Assembly for Wales

THE PROPOSED LEGISLATIVE COMPETENCE ORDER (LCO) ON CHARGING FOR NON-RESIDENTIAL SOCIAL CARE

At the recent meeting of the joint Welsh Affairs and Assembly Committees on the proposed LCO on charging for non-residential social care I undertook to write to you to clarify the circumstances in which non-residential social care for individuals residing in border areas of Wales would be provided by local authorities in England.

The circumstances in which the above situation might arise are quite limited given that the vast majority of non-residential social services are received in an individual's home. However, it might be possible, for example, to have a scenario where an individual living in the border regions of Wales attended day care in England. In this situation, while the service would be provided by an English local authority or private care provider, it would be provided on behalf of the Welsh local authority. Therefore any charge for that service to the service user would be levied by the *Welsh* local authority. As such it would be subject to any changes introduced by the Welsh Assembly Government as a result of a subsequent Measure in this area. The Welsh service user would not be subject to English charging arrangements even though they were receiving a service in England.

The issue of whether respite services would fall within the scope of the LCO was also raised and I would like to take this opportunity to clarify our discussion on this. The LCO covers charges and payments made by local authorities for non-residential social care. It would therefore cover respite services received in a person's own home such as 24 hour emergency care or sitting services. However, it does not cover charges and direct payments for residential social care. Consequently charges or payments made in respect of securing temporary respite care in a care home would fall outside the scope of the Order.

In order to bring such respite care within this Order, the scope of the Order would need to be widened beyond what is required so as to include all charges made by local authorities for *residential* care.

Where concerns arise in relation to residential respite care we will look to use the existing primary and secondary legislation governing charging for residential care to address these concerns. In doing so we will seek to ensure that the same principles of consistency and fairness apply to charging for residential respite care as those that will be applied by way of an Assembly Measure to charging for non-residential social care.

I would like to thank you and other Committee members for providing me with an opportunity to come and clarify issues on the LCO and look forward to attending future meetings if required. I am committed to ensuring that the process is transparent and helpful and appreciate member's thorough scrutiny and commitment to this very important agenda.

25 January 2008

Memorandum submitted by Help the Aged in Wales

1. *Is the LCO request in the spirit and the scope of the devolution settlement?*

Help the Aged in Wales believes that the LCO request is within both the scope and the spirit of the devolution settlement. Whilst the aspiration of Help the Aged in Wales is for the abolition of home care charges in Wales, we believe that conferring power in this matter will enable the Assembly to achieve a more consistent approach to charging whilst it still exists.

The Deputy Minister in introducing the proposed LCO to the National Assembly was clear that the Welsh Assembly Government continues to support the principle of free home care, and that whilst the budget does not currently allow for that the provision and scope of the LCO is wide enough to achieve such an aim.²

We support the principle that the Welsh Assembly Government should have the powers to bring forward proposals for Measures in respect of the issue of charging for non-residential social care based on Welsh priorities and timescales. We support the shift from residential care towards support at home and a switch towards more preventative services envisaged in *Fulfilled Lives, Supportive Communities* and we believe that this LCO will facilitate that switch by ensuring that local authority charging arrangements support the strategy.

² National Assembly for Wales, *The Record*, 27 November 2007.

2. The extent to which there is a demand for legislation on the matter(s) in question?

Fees for domiciliary care are currently a highly contentious issue in Wales, on a number of levels, not least because in 2006 the Welsh Assembly Government abandoned its pledge to provide free home care for disabled people. In addition to the principle of the charge itself, the levels of charging and variations in the way charging policies are applied across the 22 local authorities in Wales, and the inherent discrimination against older people also cause anger and confusion. Moreover the lack of affordability in some cases can lead people to a position where they do not receive the support they need to maintain their health and wellbeing. Charges should not be based on geography or finance but based on the results of the Community Care Assessment.

The great majority of those in need of long-term care are older people. With an ageing population, it is expected that the numbers of people who need support will rise substantially over the next 25 years before levelling off. This issue of home care charges is one that affects and concerns a large proportion of the population of Wales.

THE PRINCIPLE OF CHARGING

The “means test” leads many people who have built up assets to feel that they are no better off than had they not saved at all. Small private pensions and savings are quickly diminished. Moreover, it is not until they need to access the care system that most people discover that it is means tested and that they will be expected to pay.

Charges can be a huge barrier for vulnerable people at a time when they are in need of care and in many instances will prevent an older or disabled person from accessing the care that they need because paying for this help leaves them without enough money to meet other essential expenditure. This may also hasten the need for more acute social care or even medical care and moreover the point at which an older person feels that they have to give up their independence.

THE LEVEL AND VARIATION OF CHARGES

In 2001 new charging guidance to local authorities was designed to ensure that whilst authorities were able to set their charges, they needed to ensure that service users receiving basic Income Support plus a 25% buffer were not required to pay for home care services. It also advised that although authorities could take into account disability related income, users could not be left without the means to pay for other care arising from their disability. This guidance still resulted in wide variation of application across Wales. With some authorities applying a broad disability disregard and others not, leading to wide variations in the levels that people across Wales were expected to pay for similar services.

New guidance in Wales that has been applied since April 2007 increased the income buffer to 35% and implementing a 10% disregard for disability related expenditure. This has reduced the number of people in Wales having to pay for care, and reduced the level of charges for others, nevertheless, those who continue to pay still have to contend with the postcode lottery. In addition, those who continue to pay also in some instances saw large increases in charges implemented from 2007.

The charges range from a maximum of £16.20 per week in Rhondda Cynon Taf to £185 in Powys; other Welsh authorities do not have a maximum charge and in these instances authorities could potentially charge even higher rates per week. Such variations are unacceptable, particularly when you consider that these charges are being levelled at individuals that are largely reliant on low, fixed incomes. In addition, there is a lack of clarity regarding the ways in which authorities arrive at the charges an individual is expected to pay which adds to the confusion.

The system remains bureaucratic and leaves people with the impression that they are being penalised for hard work and thrift in the past, as small private pensions can be easily diminished by such levels of charges.

AGE DISCRIMINATION

A further reason for wanting change to the current system is the inherent discrimination against older people in the *Fairer Charging* guidance. The guidance enables local authorities to disregard earned income for the purposes of calculating charges, but takes into account income from sources such as, pensions. It is older people that are most likely be in receipt of pensions, so this clause adversely impacts on older people and is therefore discriminatory.

We strongly believe that this can be tackled within the current powers of the Assembly and should not be delayed whilst the LCO is sought. Eradicating age discrimination was a priority for the first phase of the Strategy for Older People in Wales, and will continue to be so through the second phase of the Strategy. We believe that tackling the age discrimination within the Fairer Charging Guidance, will provide a clear commitment on the part of the Welsh Assembly Government to making this priority a reality.

CAUTION

Whilst Help the Aged in Wales supports the aim of the Welsh Assembly Government to seek power in this area to enable them to mitigate the variations in charging, we are concerned to ensure that charges are not levelled up. Levelling up of charges would mean that recipients of home care would be levied at the highest level of existing charges. This would be detrimental to the health and wellbeing of both the older people in Wales and those with disabilities.

Our overall aim remains free home care, and we will continue to press this case, whilst supporting steps towards such a position. We believe that competence in the area of home care charging should be viewed as such.

25 January 2008

Memorandum submitted by Age Concern Cymru

1. INTRODUCTION

1.1 Age Concern Cymru is pleased to respond to the Welsh Affairs Committee's request for evidence on the proposed Order on charging for non-residential social care. We are very pleased that this important issue is being addressed by the Welsh Assembly Government and we very much welcome the proposed use of new legislative competence in order to take this forward. Age Concern Cymru is the leading all-Wales charity working with and for older people. Age Concern in Wales is made up of Age Concern Cymru and 27 locally based, independent Age Concern Organisations. Our activities include campaigning, research, advocacy, information, support for forums of older people and befriending. Through the combination of an all-Wales presence, local community based organisations and our network of over 200 older people Age Concern in Wales is well positioned to be in touch with the issues affecting older people.

1.2 Age Concern Cymru has been campaigning on behalf of older people in Wales on the issue of charging for care for a number of years. We believe that the current system is inequitable, discriminatory and penalises savers and even those with modest assets. We hope that any new legislation will be used to create the best possible outcome for older people in relieving the burden that charging for care places on them.

1.3 We appreciate that, at this stage, the primary purpose of the Committee is to consider whether the Assembly should have the power to legislate in this area. However, we have provided some background information at the end of this response detailing why we feel the legislation is needed and some of the issues that older people in Wales currently face as part of the charging system. If legislative competence is achieved then we will provide further information on what we feel should be done with the powers but even in making the initial decision about legislative competence we feel it is important that Committee members are aware of the wider context in which the proposed Legislative Competence Order (LCO) sits.

2. COMMENTS ON ISSUES OF PARTICULAR INTEREST TO THE COMMITTEE

2.1 Age Concern Cymru feels that this LCO is very much in the spirit of the devolution settlement and will allow the Welsh Assembly Government to take the lead in addressing an issue that affects thousands of people in Wales. Based upon our understanding of the Government of Wales Act 2006 we feel that the use of the LCO mechanism is in accordance with the Act.

2.2 There is a clear need and demand for legislation in this area. The current system creates a "postcode lottery" across Wales and disadvantages people who are already vulnerable. The impact of charging for care on older people is something that Age Concern Cymru has been aware of for a number of years. It has remained high on agenda throughout that time because older people have continued to tell us that it is one of the main issues that affects their ability to lead a happy, healthy and independent life.

3. FURTHER COMMENTS

3.1 An ICM opinion poll carried out for Age Concern Cymru in February 2006 found 83% of people of all ages in Wales supported free home care for older people. Meanwhile, research commissioned by the Joseph Rowntree Foundation from the University of Stirling, found that Scotland's policy of providing free personal care for older people at home and in residential and nursing homes has created a fairer system without undue extra public spending.

3.2 Charging for care significantly disadvantages vulnerable older people, many of whom are living on a limited fixed income and cannot cope with the increased expenditure. Ultimately, the new legislation should be used to implement free home care in Wales. We would like to see charging abolished for any care provided at home following a community care assessment.

3.3 Current charging policies discriminate on the grounds of age. Currently income from salary is disregarded for charging purposes but occupational pensions, for example, are taken into account. The Strategy for Older People in Wales takes as one of its five key aims to reflect “the UN Principles for Older People, to tackle discrimination against older people wherever it occurs”. As the equalities agenda becomes stronger and in light of the newly formed Equality and Human Rights Commission such discrimination is becoming increasingly unacceptable. There is still the opportunity for Wales to lead the way in abolishing discrimination in policy and practice by ceasing to charge against occupational pensions.

3.4 The process of gaining legislative competence in this area and then implementing change could take a number of years. In the meantime there is an urgent need for the Welsh Assembly Government to make changes to the system now, using their existing powers, to benefit those currently struggling with the burden of charging for care.

4. CONCLUSION

4.1 Age Concern Cymru is pleased that this important step is being taken to address the issue of charging for non-residential social care. The current situation which creates a “postcode lottery” across Wales needs to be rectified and we feel that gaining legislative competence in this area will be an important step forward in allowing Wales to lead the way in addressing social care issues.

4.2 We would be happy to provide any further information to support this response and would be willing to give oral evidence to the Committee if required.

23 January 2008
