



House of Commons
Welsh Affairs Committee

**The proposed National
Assembly for Wales
(Legislative
Competence) Order in
the Field of social
welfare 2008:
Government Response
to the Committee's
Fourth Report of
Session 2007–08**

**Third Special Report of Session 2007–
08**

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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).

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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).

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Third Special Report

The Committee published its Fourth Report of Session 2007-08 *The proposed National Assembly for Wales (Legislative Competence) Order in the Field of social welfare 2008* on 5 March 2008. The Parliamentary Under-Secretary of State for Wales wrote a letter to the Chairman of the Committee on 22 May which is published as an Appendix to this Special Report. The Order was published in draft form as *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008* and laid before Parliament by the Secretary of State on 22 May 2008. The draft Order, together with an Explanatory Memorandum, are also published as Appendices to this Special Report.

Appendices

Letter from the Parliamentary Under-Secretary of State for Wales to the Chairman of the Committee

The draft Domiciliary Care Order in Council was today laid for approval by resolution of the House. The Order was formally approved by the National Assembly for Wales on 20 May.

I am very grateful to the Welsh Affairs Committee for having carried out detailed and effective scrutiny of the proposed Order. I was delighted to see members of the Welsh Affairs Committee take part in a joint scrutiny session with the ad-hoc Committee in the National Assembly for Wales to consider this Order. I believe this has provided a sound basis for joint scrutiny work in the future between your Committee and the National Assembly.

The Welsh Affairs Committee published its Report on 5 March and the National Assembly Committee published its findings on 14 March. I am writing to set out how the findings and recommendations of both committees have been taken forward in finalising the draft Order.

The definitions and exceptions required to interpret the matter in the proposed Domiciliary Care Order had not been included in the Order itself. Rather, they had been included in another proposed Order relating to field 15 of Schedule 5 to the Government of Wales Act 2006, on Vulnerable Children. But because the Domiciliary Care Order was laid before the Assembly in draft in advance of its sister Order, the following changes have been made, many of which address recommendations made by your Committee and the Assembly Scrutiny Committee in their reports:

- *Re-numbering of the Matter* - The proposed Vulnerable Children Order currently inserts Matters 15.1 to 15.8 into field 15. The proposed Domiciliary Care Order, as

scrutinised by your Committee, therefore inserted matter 15.9 into field 15. As the draft Domiciliary Care Order was laid before the National Assembly first, the Matter that it inserts has been renumbered Matter 15.1.

- *Inclusion of the definitions of social care services, local authorities and well-being* - the definitions to be used in field 15 which are relevant to this Order (social care services, local authorities and well-being) are now included in it. Both the Welsh Affairs Committee and the Assembly Scrutiny Committee recommended that the definitions which are relevant to this draft Order be included in the Explanatory Memorandum and the interaction between this Order and the Vulnerable Children Order explained. As they are now included in the Order itself this is no longer necessary.
- *Definition of social care* - the term 'social care' which was previously included in the Vulnerable Children Order, has been replaced in that Order by the term 'social care services'. The wording of the Matter in this draft Order, and the definition itself, have therefore been amended to reflect that change. The Welsh Affairs Committee recommended that the definition of 'social care' in the proposed Order be amended to read 'means' rather than 'includes'. This recommendation is reflected in the revised definition of 'social care services'.

The term 'residential' care has been specifically excluded from the definition of 'social care services' for the purposes of this draft Order. Both committees felt that this was required in order to provide clarity as to what was included within the scope of the Matter.

- *Exceptions* - When the Order on Vulnerable Children is made a table will be inserted at the end of Schedule 5 and the general exceptions will be moved to that table. In the meantime, the exceptions that are relevant to this Order have been listed within Matter 15.1. This is a technical change that has no effect on the substance of the Order.

Finally, the Welsh Affairs Committee and Assembly Scrutiny Committee recommended that the draft Order should refer to 'needs' rather than 'particular needs' as it was felt that this would make the term more wide-ranging. This change has been made in the draft Order.

These changes are also set out in the Order's accompanying Explanatory Memorandum, which has also been laid before Parliament.

Huw Irranca-Davies MP
Parliamentary Under-Secretary of State for Wales

22 May 2008

The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008

Draft Order laid before Parliament under section 95(5) of the Government of Wales Act 2006, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2008 No.

CONSTITUTIONAL LAW

DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008

Made - - - - *[]*

Coming into force in accordance with Article 1

At the Court at Buckingham Palace, the day of

Present,

The Queen's Most Excellent Majesty in Council

In accordance with section 95(5) of the Government of Wales Act 2006⁽¹⁾, a draft of this Order has been laid before, and approved by resolution of, the National Assembly for Wales and each House of Parliament.

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

Citation and commencement

1. This Order may be cited as the National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2008 and it comes into force on the day after the day on which it is made.

Amendments to Schedule 5 to the Government of Wales Act 2006

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

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

⁽¹⁾ 2006 c.32.

“Matter 15.1

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

This matter does not include any of the following—

- (a) child support;
- (b) tax credits;
- (c) child benefit and guardian’s allowance;
- (d) social security;
- (e) independent living funds;
- (f) motability.

Interpretation of this field

In this field—

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

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

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

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

Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order)

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

The amendments relate to field 15 (social welfare) in Part 1 of Schedule 5. Article 2(2) inserts matter 15.1 which is about—

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

The following are expressly excluded from the matter —

- child support,
- tax credits,
- child benefit and guardian’s allowance ,
- social security,
- independent living funds, and
- motability.

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

Explanatory Memorandum to the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008

1. This Explanatory Memorandum has been prepared by The Wales Office and is laid before Parliament by Command of Her Majesty.

2. Description

This instrument makes amendments to Schedule 5 to the Government of Wales Act 2006 (“the Act”), which sets out the subjects in relation to which the National Assembly for Wales (“the Assembly”) would be able to legislate if it were given the power to pass Measures of the Assembly.

3. Matters of special interest to the Joint Committee on Statutory Instruments.

None

4. Legislative Background

4.1 Section 95 of the Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to fields within Schedule 5 to the Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the Act.

4.2 Matters may be inserted into the fields contained in Schedule 5 to the Act, by either an Act of Parliament or an Order in Council, which has first been approved by the Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, by seeking an Order in Council.

4.3 The draft Order would confer further legislative competence on the National Assembly for Wales, in the field of social welfare (field 15 within Schedule 5 of the 2006 Act). The text of Schedule 5, as it stands at the time of laying this explanatory memorandum is attached.

5. Territorial Extent and Application

Although the instrument extends to the whole of the United Kingdom, its practical application is limited to Wales as it amends provisions which will define the scope of the Assembly’s legislative competence.

6. European Convention on Human Rights

Huw Irranca-Davies, Parliamentary Under Secretary of State for Wales, has made the following statement:

“In my view the provisions of The National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2008 are compatible with the Convention rights.”

7. Policy Background

7.1 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 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.

7.2 In February 2007, the Welsh Assembly Government published its ten 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.

7.3 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.

7.4 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.

7.5 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.

7.6 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.

7.7 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.

7.8 Section 7 therefore provides a vehicle for issuing general guidance in this area. However, if the Welsh 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’ discretion to charge for certain services and to recover such charges as they consider reasonable as set out in section 17 of HASSASSA. The Welsh Assembly Government has given guidance as to how an authority should set about exercising its discretion to charge (“Fairer Charging”), but that guidance cannot make it obligatory for local authorities to exercise their discretion in a particular way. Neither can it alter that discretionary power by limiting the power to charge. 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. The current executive powers of the Welsh Ministers are not sufficient to enable them to achieve a fairer and more consistent approach.

7.9 The Welsh Assembly Government has taken steps to ameliorate the impact of charging, but other 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 Welsh 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. It will be important that the charging regimes are supportive of this.

7.10 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 it to achieve a fair and consistent approach to charging.

7.11 The draft Order will insert a new matter into 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 any type of payment to enable them, or persons looking after them, to secure non-residential social care to meet their needs.(this would currently only capture a "direct payment" as this is the only type of payment currently made directly to an individual for this purpose

7.12 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 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 an Assembly Measure.

7.13 The principle purpose of this draft Order 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.

7.14 The proposed Order which was submitted for pre-legislative scrutiny was dependent on elements of a subsequent Order (Social Welfare and other fields) not yet approved by Parliament for definitions and exceptions. Because this draft Order has been laid before the other Order, the following amendments have been made, many of which address recommendations made by the Welsh Affairs Committee and the Assembly Scrutiny Committee in their reports:

- Re-numbering of the matter – the proposed Order in Social Welfare and other fields inserted matters 15.1 to 15.8 into Field 15 of schedule 5 to the Government of Wales Act 2006. The previous version of this Order on charging for non-residential social care therefore inserted matter 15.9 into Field 15. As this Order will now be laid before the Parliament in advance of the Social Welfare and other fields Order, the matter that it inserts is now numbered 15.1.
- Inclusion of the definitions of social care services, local authorities and well-being – the definitions to be used in Field 15 which are relevant to this Order (social care services, local authorities and well -being) have been moved into it with minor amendments to reflect the fact that for the time being, the definitions will apply to this Order only..
- Definition of social care – the term ‘social care’ which, as explained above, was previously included in the Social Welfare and other fields Order has been replaced in that Order by the term ‘social care services’. The wording of the matter in this

Order has therefore been amended to reflect that change. The Welsh Affairs Committee recommended that the definition of ‘social care’ in the proposed Order be amended to read ‘means’ rather than ‘includes’. This has been addressed in the revised definition of ‘social care services’ as suggested.

The term ‘residential’ care has also been specifically excluded from the definition of ‘social care services’ for the purposes of this Order. Both Committees felt that this was required in order to provide clarity as to what was included within the scope of the matter.

- Exceptions – When the Social Welfare and other fields Order is laid a table will be inserted at the end of Schedule 5 and the general exceptions will be moved to that table. In the meantime, the exceptions that are relevant to this Order have been listed within matter 15.1. This is a technical amendment that has no effect on the substance of the Order.

7.15 The Welsh Affairs Committee and Assembly Scrutiny Committee recommended that the Order should refer to ‘needs’ rather than ‘particular needs’ as it was felt that this would make the term more wide-ranging. Whilst it is not clear how removing the word ‘particular’ would make the matter more wide-ranging, the phrase has been amended so as to simply refer to ‘needs’, on the grounds that the word ‘particular’ was not needed in the context of this Order.

7.16 As explained above, the definition of the matter covered in this Order includes certain exceptions. These exceptions clarify that the matter does not include child support (i.e. 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; or Motability.

8. Impact

A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.