



House of Commons  
Welsh Affairs Committee

---

**The National Assembly  
for Wales (Legislative  
Competence) (Social  
Welfare) Order 2009:  
Government Response  
to the Committee's  
Sixth Report of Session  
2008-09**

---

**Fifth Special Report of Session 2008–  
09**

*Ordered by The House of Commons  
to be printed 9 June 2009*

**HC 605**  
Published on 17 June 2009  
by authority of the House of Commons  
London: The Stationery Office Limited  
£0.00

## 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 and Co-operative, 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](http://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](http://www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm).

### Committee staff

The current staff of the Committee is Dr Sue Griffiths (Clerk), Georgina Holmes-Skelton (Second Clerk), Judy Goodall (Inquiry Manager), Anwen Rees (Inquiry Manager), Carys Jones (Committee Specialist), Christine Randall (Senior Committee Assistant), Annabel Goddard (Committee Assistant), Tes Stranger (Committee Support Assistant) 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](mailto:welshcom@parliament.uk).

## Fifth Special Report

---

The Committee published its Sixth Report of Session 2008-09 *The proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009* on 28 April 2009. The Secretary of State for Wales wrote a letter to the Chairman of the Committee on 1 June which is published as an Appendix to this Special Report. The draft Order *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009* as well as a separate draft Order, *The National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009*, together with Explanatory Memoranda, are also published as Appendices to this Special Report.

## Appendices

---

### Letter from the Secretary of State for Wales to the Chairman of the Committee

I am writing to inform you about some changes that have been made following the pre-legislative scrutiny of the Proposed National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009.

I would first like to thank the Welsh Affairs Committee for its thorough scrutiny of the proposed Order. I was pleased to note that the scrutiny took place in co-operation with the relevant Assembly Committee, and that your Committee concluded the LCO process to be an appropriate one for conferring legislative competence on the National Assembly in respect to carers.

You will recall the LCO also proposed changes to the way exceptions are handled in Schedule 5 to the Government of Wales Act 2006, so that exceptions would usually apply to all the matters in the Schedule rather than to specific matters. The Lords Constitution Committee and the Joint Committee on Statutory Instruments (JCSI) are each examining the proposed Order and will report back in due course. In informal discussions with my officials, the Committees' legal advisors have made clear their preference for Parliament to consider separately the proposals on carers and the proposed changes relating to exceptions.

To address the Committees' concerns about a single Order covering both carers and changes relating to exceptions, the Welsh Assembly Government has instead prepared two proposed Orders—the National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009, relating to carers, and the National Assembly for Wales (Exceptions to Matters) Order 2009, relating to exceptions. The content of these Orders broadly reflects that of the original proposed LCO, with some changes

following its pre-legislative scrutiny by your Committee and the relevant National Assembly Committee.

The proposed Carers LCO now amends the table of exceptions currently in Part 1 of Schedule 5, and will therefore precede the proposed Order on exceptions. However, I intend to present both draft Orders to Parliament at the same time.

I enclose copies of these proposed Orders and their accompanying Explanatory Memoranda, and have also sent copies to the Constitution Committee and the JCSI.

Turning to the outcomes from scrutiny, your Committee made two recommendations in relation to the proposals on carers. The first called for effective collaboration between authorities on either side of the border to ensure roles and responsibilities are clear and carers' needs are met. Specifically, your Committee called for a joint memorandum from the Welsh Health Minister and the Secretary of State for Health to accompany the final draft of the LCO setting out how these issues will be dealt with when Measures are brought forward.

The Welsh Assembly Government gave careful consideration to the Committee's recommendation. It agrees that effective cross-border collaboration is vitally important, and believes that how to achieve this is best decided at Measure stage. It has amended the Explanatory Memorandum to make this clear (at paragraph 21), but did not consider a formal memorandum to be necessary at this stage. I will ask the Assembly Government to ensure that your Committee's recommendation is borne in mind as the first Measure is being developed.

Your Committee also recommended amending the Order to make clear that it would not disadvantage someone who volunteers for an organisation or body but in addition or as a consequence provides direct voluntary care. The Welsh Assembly Government agrees that individuals who provide care on a voluntary basis in addition to providing care as a volunteer for a body should not be disadvantaged, and is confident that the Order as presented would not exclude or discriminate against this category of carer. Again it has amended the Explanatory Memorandum (at paragraph 12) to make this clear.

The revised Order also makes two minor drafting changes. The phrase "in particular" in matter 15.9 of the proposed Order has been replaced by the term "but is not limited to" to make it clearer that the Order encompasses support to carers provided by a range of bodies, not only social care services. The term "any body" in matter 15.9 has been replaced by "a body" to ensure there is no risk of misinterpreting the term.

Finally, the revised Order includes a minor technical change to matter 15.1, which was inserted into Schedule 5 to the 2006 Act in 2008 by the Domiciliary Care LCO. Matter 15.1 enables the National Assembly to legislate about payments to individuals to secure social care services, but only if payments are made to the person with social care needs

or a person looking after them. The Health and Social Care Act 2008 amended the relevant legislation on direct payments to include a wider range of payment recipients. The change to the Assembly's legislative competence under matter 15.1 therefore reflects the broadening of Welsh Ministers' executive competence effected by the 2008 Act. This change is further explained at paragraph 17 of the Explanatory Memorandum.

Rt Hon Paul Murphy MP  
Secretary of State for Wales

*1 June 2009*

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

*Draft Order laid before the National Assembly for Wales under section 95(5) of the Government of Wales Act 2006, for approval by resolution of the Assembly.*

---

### DRAFT STATUTORY INSTRUMENTS

---

**2009 No.**

## **CONSTITUTIONAL LAW**

## **DEVOLUTION, WALES**

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

*Made* - - - - *\*\*\**

*Coming into force in accordance with Article 1(2)*

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

Present

The Queen's Most Excellent Majesty in Council

In accordance with section 95(5) of the Government of Wales Act 2006<sup>(1)</sup>, 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.**—(1) This Order may be cited as the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009.

(2) This Order shall come into force on the day after the day on which it is made.

(3) In this Order “the 2006 Act” means the Government of Wales Act 2006.

---

<sup>(1)</sup> 2006 c.32.

### Amendments relating to the field of social welfare

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

(2) In matter 15.1, for “persons looking after them” substitute “any other person”.

(3) After matter 15.8 insert—

“*Matter 15.9*

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

This matter includes (but is not limited to) social care services to help carers.

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

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

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

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

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

### Amendments relating to exceptions to matters in the field of social welfare

3.—(1) In Part 1 of Schedule 5 to the 2006 Act, the table under the heading “TABLE – Social welfare”<sup>(3)</sup> is amended in accordance with this article.

(2) In the row containing exception 1 (child support), in column 2, after “15.8” insert “,15.9”.

(3) In the row containing exception 2 (child trust funds), in column 2, after “15.5” insert “,15.9”.

(4) In the row containing exception 3 (tax credits), in column 2, after “15.5” insert “,15.9”.

(5) In the row containing exception 4 (child benefit and guardian’s allowance), in column 2, after “15.5” insert “,15.9”.

(6) In the row containing exception 5 (social security), in column 2, after “15.8” insert “,15.9”.

(7) In the row containing exception 6 (independent living funds), in column 2, after “15.8” insert “,15.9”.

(8) In the row containing exception 7 (motability), in column 2, after “15.8” insert “,15.9”.

(9) In the row containing exception 8 (vaccine damage payments), in column 2, after “15.8” insert “,15.9”.

(10) In the row containing exception 10 (Children’s Commissioner established under the Children Act 2004), in column 2, after “15.8” insert “,15.9”.

(11) In the row containing exception 11 (family law and proceedings), in column 2, after “15.5” insert “,15.9”.

(12) In the row containing exception 12 (welfare foods), in column 2, after “15.8” insert “,15.9”.

Clerk of the Privy Council

<sup>(2)</sup> Matter 15.1 was inserted into field 15 by the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008 (SI 2008/1785). Matters 15.2 to 15.8 were inserted into field 15 by article 3(b) of the National Assembly for Wales (Legislative Competence) (Social Welfare and other Fields) Order 2008 (SI 2008/3132).

<sup>(3)</sup> This table was inserted by article 5 of the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132).

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

Article 2(2) amends matter 15.1 to allow the National Assembly for Wales to make provision by Measure about payments in respect of individuals with needs relating to their well being so that any person may secure social care services on their behalf. Matter 15.1 as originally enacted allows provision about payments to secure social care services only if they are made to the person with those needs or a person looking after them.

Article 2(3) inserts matter 15.9 into field 15 (social welfare) of Part 1 of Schedule 5 to the 2006 Act. Matter 15.9 is about supporting the provision of care by carers and promoting the well-being of carers.

Article 3 applies exceptions to the new matter 15.9 by amending the table of social welfare related exceptions in Part 1 of Schedule 5 to the 2006 Act.

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

## **Explanatory Memorandum to the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009**

### **Introduction**

1. The Government of Wales Act 2006 (“the 2006 Act”) empowers Her Majesty, by Order in Council, to confer continuing legislative competence on the National Assembly for Wales (“the Assembly”) to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred on the Assembly and subject to the provisions of the 2006 Act.

2. The attached document is a draft Order in Council. It sets out a matter which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of the draft Order by the Assembly and by both Houses of Parliament. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

### **Background**

3. 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.

4. Carers are at the heart of 21st Century families and communities. In a changing society most people are living longer, many are developing long-term conditions and the vast majority have rising aspirations about their quality of life. Consequently, an increasing number of people will find themselves fulfilling caring responsibilities.

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

6. Unpaid carers currently provide around 70% of care in the community and forecast demographic changes suggest that the pool of potential carers relative to numbers needing care is likely to decrease over the medium term. With an increasing life expectancy for those in need of care, it cannot be assumed that their carers will be able

and willing to sustain their caring role over a longer period without help and support. There are also clear signs that informal care to older people by their adult children is unlikely to keep pace with demand, due to underlying demographic trends, a trend that is reflected across the UK (see for example *Informal Care for Older People Provided by Their Adult Children: Projections of Supply and Demand to 2041 in England*, PSSRU Discussion Paper 2515) but is likely to be particularly acute in those parts of Wales where present reliance on informal carers is highest.

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

8. The Welsh Assembly Government's *Carers Strategy for Wales Action Plan 2007*, recognised the need to mitigate the effects of these demographic changes, and foresaw that these changes including trends towards more dispersed families could require a range of measures designed to support carers in their caring role and help them maintain their own health and well being. The 2007 Action Plan will be reviewed in 2009. Detailed proposals for measures will be informed by the outcomes of this review of the Wales strategy.

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

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

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

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

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

- **Carers and Disabled Children Act 2000**

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

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

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

- **The Work and Families Act 2006**

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

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

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

In addition the Welsh Assembly Government has a range of powers to inspect, regulate and issue statutory guidance in respect of local authority services under the Local Authority Social Services Act 1970, the Care Standards Act 2000 and the Health and Social Care (Community Health and Standards) Act 2003. It also has powers to direct the NHS under the National Health Services (Wales) Act 2006.

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

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

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

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

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

11. The current framework of legislation and guidance in Wales has clearly proved insufficient to ensure that the Welsh Assembly Government's policy objectives with regard to carers are given the necessary priority, so that these gaps and inconsistencies in service provision are tackled effectively. The Assembly Government's 'One Wales' programme of Government therefore included a commitment to prepare new legislation on carers rather than rely on existing reinforcement means alone such as performance measures and inspection, financial incentives or powers of direction. This proposal for legislative competence derives from the need to support the provision of care by carers and to promote the well-being of carers as noted above. In particular we envisage the need to improve the lives of carers in the following key areas:

a. to ensure that carers have the right information at the right time to support them in their caring role. The *Carers' Strategy Implementation Plan in Wales 2000* highlighted a need for the provision of easily accessible, relevant and factually correct information for carers, as well as acknowledging the need for a longer term view of the information needs of carers. The kind of information carers may need from time to time would include information about financial benefits, employment provisions including flexible working, rights to a needs assessment, social services functions available to them, care planning for the person cared for, medicines management, safe handling and lifting and other matters related to the care of the person cared for.

b. to ensure that timely and appropriate practical and emotional help and support is provided to carers both to sustain them in their caring role and also to help them attain their personal ambitions for accessing education, training and employment opportunities. This would include giving them a right to appropriate breaks from caring responsibilities.

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

## Scope

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

13. The definition of carer in this matter does not exactly mirror that given in the Carers and Disabled Children Act 2000 in that it contains no age restriction. This will ensure that the Assembly is able to legislate to promote the well-being of children and young people who are carrying out caring responsibilities, as well as older carers. The National Assembly already has competence in relation to social care services for children; persons who care for, or who are about to care for, children; and young persons. This matter will enable a Measure to broaden provision beyond that relating only to social care services and provide a single framework for a range of services to support carers.

14. The Matter would enable the Assembly to ensure that the provision of care by carers is supported and that their well-being is promoted. It would, for example, allow for a requirement to be placed on relevant public sector agencies to develop carers information strategies along the lines of the Scottish legislation in this area; for them to work together effectively to support the provision of care by carers and to promote their well-being (particularly the well-being of young carers); and also for improvements to be made to carers' access to replacement care (respite care) with provision for an entitlement to respite for defined groups. The matter specifies that it includes, "but is not limited to", the provision of social care services. This means that Assembly Measures made in reliance on this matter could make provision which, in promoting the well-being of carers and supporting the provision of care by them, was not exclusively confined to social care services: such as provision to ensure that health

bodies take the interests of carers into account, for example in making arrangements for appointments, discharge arrangements and collection of prescriptions for the person being cared for.

15. The definition of “well-being” to be used in relation to the matter is as set out in the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008. The definition of “social care services” in that Order is to be amended by virtue of this Order so as to include the provision of “information”. For ease of reference, the definitions can also be found at Annex A.

16. The principal purpose of this LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the 2006 Act that will enable the Assembly Government to improve services for carers and fulfil the commitment given in ‘One Wales’.

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

17. The following changes have been made to the order following pre-legislative scrutiny by the National Assembly for Wales Legislation Committee No 3, the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee:

Exceptions – article 3 of the proposed Order made technical amendments to Section 94 and Schedule 5 of the 2006 Act. The effect of the amendments was twofold; to apply the exceptions to matters listed in the table in the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 to all matters in Part 1 of Schedule 5 and to effect a change from drafting exceptions as matter specific to making them of general application to all matters. After further consideration we have decided that this new approach to exceptions will now be subject to a separate and subsequent Order—the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009.

Article 3 now amends the table of social welfare exceptions currently in Part 1 of Schedule 5. The effect of this will be to exclude the following subjects from the scope of the legislative competence of the new matter: child support (i.e. arrangements for the provision of maintenance by both parents of a child); child trust funds; tax credits; child benefit and guardian’s allowance; social security; Independent Living Funds; Motability; vaccine damage payments; the Children’s Commissioner established under the Children Act 2004; family law and proceedings and welfare foods.

Use of the phrase ‘in particular’ – the term ‘in particular’ in matter 15.9 of the proposed Order has been replaced by the term ‘but is not limited to’ in order to make it clear that the Order encompasses support for carers provided by a range of bodies, and not just social care services. This reflects proposals made by witnesses in giving evidence;

- Volunteer for any body – Whilst the definition of Carer in the Order is very wide, it is not intended to cover those who care “by virtue of a contract of employment or other contract with any person”, nor those who act “as a volunteer for any body (whether or

not incorporated)”. The Welsh Affairs Committee expressed concern that this wording might disadvantage those who are volunteer carers for a body, but who also provide voluntary care in addition to this role. The Committee recommended that the wording of the LCO be amended to make this clear. The Welsh Assembly Government agrees that individuals who provide care as a volunteer for a body, but who also provide care above and beyond that role, should not be disadvantaged. It is, however, confident that the Order as drafted would not exclude this category of carer and that an amendment is not therefore necessary. Paragraph 12 of this Memorandum has been amended so as to provide reassurance on this point.

The term ‘any body’ has been replaced by the term ‘a body’. This is a technical amendment that has no effect on the substance of the LCO. It has been made to ensure that there is no risk of misinterpreting the provision.

Article 2(2) – article 2(2) amends matter 15.1 to allow the National Assembly for Wales to make provision by Measure about payments in respect of individuals with needs relating to their well being so that any person may secure social care services on their behalf. This amendment is needed to ensure that the Assembly’s competence under matter 15.1 encompasses the making of payments to all persons to whom direct payments may be made. Matter 15.1 as originally enacted only allows provision about payments to secure social care services if they are made to the person with those needs or to a person looking after them. Matter 15.1 was added to Schedule 5 to the Government of Wales Act 2006 prior to the Health and Social Care Act 2008 which made amendments to the relevant direct payments legislation. The category of person to whom direct payments may be made was expanded as a result of changes made to section 57 of the Health and Social Care Act 2001 by the 2008 Act. The amended section 57 gives the Welsh Ministers the power, by regulation, to expand the category of recipients to include a representative of the service user, a deputy appointed by the Court of Protection under the Mental Capacity Act 2005, a donee of a lasting power of attorney or such other person as a local authority considers to be a suitable person.

### **Committee recommendations/conclusions**

18. The word “regular” in the definition of carers has been retained in the Order. The Assembly Scrutiny Committee expressed reservations about the use of this word regular, which it considered could exclude some patterns of care, for example, those patterns of care which might be irregular and highly variable.

19. The test that applies to the definition of carers in the LCO is drawn from the Carers and Disabled Children Act 2000 which uses the wording substantial and regular.

20. There is no intention that those whose caring patterns are irregular and highly variable should come within the scope of the LCO. There is a risk that, otherwise, carers who adopt a caring role on a one off basis, for example, caring for someone who has broken their leg in an accident, would be defined as a carer, and that is not the policy intention. The policy intention is that only those who provide a “substantial amount of care on a regular basis” are to fall within the definition of carer in the LCO. The assumption of a caring role which is recurrent, follows a discernible pattern, or happens

in certain circumstances (e.g. someone who adopts a caring role for a disabled father whenever his or her mother is at work or otherwise unable to perform a caring role) would be included. Specifically, persons who suffer from unpredictable episodes of mental illness that are likely to recur will also be included. The caring role that is intended to be covered by the LCO is one which may vary over time, but which nonetheless may present a regular and substantial burden for carers.

21. The Welsh Affairs Committee expressed concern that placing new duties on local authorities and health boards with regard to carers will have cross-border implications where carers may live across the border from the person they are caring for. The Committee noted the need for effective collaboration between border authorities to ensure that all carers' needs are met and that local authorities are clear about their duties. The Welsh Assembly Government agrees that effective cross-border collaboration is vitally important, and believes that how to achieve this is best decided at Measure stage.

### **Geographical limits of any Assembly Measure**

22. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the Assembly's legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

23. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales.

### **Minister of the Crown functions**

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

### **Conclusion**

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

accordance with the provisions of the draft Order to which this Explanatory Memorandum relates.

June 2009

## The National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009

*Draft Order laid before the National Assembly for Wales under section 95(5) of the Government of Wales Act 2006, for approval by resolution of the Assembly.*

---

### DRAFT STATUTORY INSTRUMENTS

---

**2009 No.**

## **CONSTITUTIONAL LAW**

## **DEVOLUTION, WALES**

### The National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009

*Made* - - - - *\*\*\**

*Coming into force in accordance with Article 1(2)*

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

Present

The Queen's Most Excellent Majesty in Council

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

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

#### **Citation and commencement**

4.—(1) This Order may be cited as the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009.

(2) This Order shall come into force two days after the day on which it is made.

(3) In this Order “the 2006 Act” means the Government of Wales Act 2006.

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

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

---

<sup>(1)</sup> 2006 c.32.

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

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

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

(5) In section 101(1)(a) of the 2006 Act, after “Schedule 5” insert “(or falls within any of the exceptions specified in paragraph A1 of Part 2 of that Schedule)”.

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

(7) In Part 1 of Schedule 5<sup>(2)</sup>—

(a) in matter 10.1 omit the words from “This does not include” to the end of that matter;

(b) omit the words and tables from “EXCEPTIONS TO MATTERS” to the end of that Part.

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

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

“Exceptions to matters

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

*Highways and transport (field 10 of Part 1)*

- (1) Registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.
- (2) Regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used (apart from regulation relating to matter 10.1).
- (3) Road traffic offences.
- (4) Driver licensing.
- (5) Driving instruction.
- (6) Insurance of motor vehicles.
- (7) Drivers’ hours.
- (8) Traffic regulation on special roads (apart from regulation relating to matter 10.1).
- (9) Pedestrian crossings.
- (10) Traffic signs (apart from the placing and maintenance of traffic signs within the meaning of section 177 of the Transport Act 2000 for purposes relating to matter 10.1).
- (11) Speed limits.
- (12) Public service vehicle operator licensing.
- (13) Provision and regulation of railway services, apart from financial assistance which—
  - (a) does not relate to the carriage of goods,
  - (b) is not made in connection with a railway administration order, and

---

<sup>(2)</sup> Matter 10.1 was inserted by section 122 of the Local Transport Act 2008 (c.26). The words and tables from “EXCEPTIONS TO MATTERS” to the end of Part 1 of Schedule 5 were inserted by article 5 of the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/ 3132).

(c) is not made in connection with Council Regulation (EEC) 1191/69 as amended by Council Regulation (EEC) No. 1893/91 on public service obligations in transport.

(14) Transport security.

(15) Shipping, apart from financial assistance for shipping services to, from or within Wales.

(16) Navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation.

(17) Technical and safety standards of vessels.

(18) Harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for communications between places in Wales.

*Social welfare (field 15 of Part 1)*

(1) Child support.

(2) Child trust funds, apart from subscriptions to such funds by—

- (a) a county council or county borough council in Wales, or
- (b) the Welsh Ministers.

(3) Tax credits.

(4) Child benefit and guardian's allowance.

(5) Social security.

(6) Independent living funds.

(7) Motability.

(8) Vaccine damage payments.

(9) Intercountry adoption, apart from adoption agencies and their functions, and functions of the "Central Authority" under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

(10) The Children's Commissioner established under the Children Act 2004.

(11) Family law and proceedings apart from—

- (a) welfare advice to courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and
- (b) Welsh family proceedings officers.

(12) Welfare foods.

General restrictions

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

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

*Interpretation*

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

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

Clerk of the Privy Council

## **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order amends provisions of the Government of Wales Act 2006 (“the 2006 Act”) relating to the legislative competence of the National Assembly for Wales.

The National Assembly for Wales may make laws known as Measures in relation to the matters set out in Part 1 of Schedule 5 to the 2006 Act, subject to general limitations on the exercise its legislative competence which apply by virtue of section 94 of, and Schedule 5 to, that Act. Article 2 amends section 94 of the 2006 Act and Parts 1 and 2 of Schedule 5 to that Act to make provision for exceptions that apply generally to matters in Part 1 of Schedule 5. The new generally applicable exceptions (inserted into Part 2 of Schedule 5 by this Order) replace the tables of exceptions in Part 1 of Schedule 5 in which exceptions are fixed to particular matters. It also makes consequential amendments to Part 3 of Schedule 5 and other provisions of the 2006 Act.

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

## **Explanatory Memorandum to the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009**

### **Introduction**

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.32. It sets out the background to the provisions in the attached Government draft Legislative Competence Order (LCO) relating to the legislative competence of the National Assembly for Wales. The term “Legislative Competence Order” is used to refer to an Order in Council under Section 95 of the Government of Wales Act 2006 (“the 2006 Act”).

### **Background**

2. Under Part 3 of the 2006 Act, the legislative competence of the Assembly is defined by section 94 and Schedule 5 of that Act. Part 1 of Schedule 5 specifies the matters in relation to which the Assembly has power to legislate by Assembly Measure. Part 2 of Schedule 5 lists general restrictions on that power and Part 3 lists exceptions to those general restrictions. Section 95 (1) of the 2006 Act enables Her Majesty, by Order in Council, to amend Schedule 5 so as to add new matters to Part 1; to vary or remove a matter, or add, remove or vary a field; or to amend Part 2 or Part 3. Section 95 (3) specifies that an Order in Council under that section may make such modifications of any enactment—including the 2006 Act itself—as Her Majesty considers appropriate in connection with the provision made by the Order in Council.

3. It is sometimes necessary to include, in the definition of matters in Part 1 of Schedule 5, exceptions to those matters, so as to make it clear that a matter does not include a particular area of policy. It has also proved necessary in many cases to apply the same exception to more than one matter. As a result of the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132), exceptions to matters in Part 1 of Schedule 5 are now listed in a table, with the matters to which each exception applies being identified against each one.

### **Scope**

4. The draft Order makes technical amendments to Section 94 and Schedule 5 of the 2006 Act. The effect of these amendments is to apply the exceptions which are currently listed in that table to all matters in Part 1 of Schedule 5. The table of exceptions is replaced by a list of exceptions, set out in a new paragraph A1 in Part 2 of Schedule 5. Section 94 of the 2006 Act is amended to make it clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph.

5. The proposed Order does not add any new exceptions. It amends exceptions 2 and 8 under the heading of Highways and Transport so as to preserve the scope of Matter 10.1 (road charging).

### **Rationale**

6. The current approach of linking each exception to specific matters involves trying to anticipate all the circumstances in which a particular exception might be relevant to a particular matter. Where both the Government and the Welsh Assembly Government have agreed that an area of policy remains the UK Government's responsibility and primary legislation in those areas would in all circumstances remain the preserve of Parliament, it would be the intention to except such areas from the Assembly's legislative competence in all cases where they were relevant. It would appear more straightforward to recognise this by making such areas general ("floating") exceptions to the Assembly's competence, where there is any matter in Part 1 of Schedule 5 which is relevant to one of those areas.

7. If amendments to Schedule 5 had continued on the basis of applying specific exceptions to each matter, the table of exceptions would itself have become more cumbersome and harder to follow because certain exceptions would need a large number of matters to be listed against them. There would also have been a risk of perverse and inconsistent consequences if the UK Government and the Welsh Assembly Government failed to anticipate all matters to which an exception should apply. The considerable time and effort incurred in identifying scenarios where a particular exception may be relevant to a particular matter would not necessarily succeed in capturing every eventuality.

8. The move to "floating" exceptions will not lessen the current flexibility of the Schedule in terms of applying exceptions to matters. It will not, for example, preclude exceptions applying only to one matter in Schedule 5 or applying to several matters (as part of the definition of those matters). But it will at the same time recognise that there are some areas which are generally not intended to be within the competence of the Assembly, even though they could be interpreted as relating to one or more matters in Part 1 of Schedule 5.

9. It will therefore be possible to add new exceptions to the list (including under other fields) when new matters are added which make further exceptions necessary and where it is intended that those further exceptions should apply across the board. It will also still be possible to specify an exception to an individual matter in future, where it is required only as part of the definition of that matter.

10. The inclusion of "floating" exceptions within Part 2 means that all limitations that are of general application will be in one place in the Schedule (whilst any exception that is of specific application to a matter will be included in Part 1 of the Schedule).

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

11. A proposed Order to which this Order relates was subject to pre-legislative scrutiny by the National Assembly for Wales Legislation Committee No 3, the House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee. The proposed Order in question was the proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 which contained a matter relating to carers as well as containing the changes in relation to exceptions. The National Assembly for Wales Committee considered but did not raise any concerns in its report on that part of the proposed Order which relates to this draft Order.

12. The Welsh Affairs Committee noted that the changes with regard to exceptions were essentially technical and that there was agreement that that they would enhance transparency and make the reading of Schedule 5 far more straightforward. It concluded:

“We accept that the revision of the list of excepted matters in Part 1 of Schedule 5 of the Government of Wales Act 2006 does not in any way broaden or change the Welsh Assembly's legislative competence. There is some doubt about whether such a change to the structure of Schedule 5 was envisaged as part of the LCO process. However, given that there is unlikely to be an opportunity for further primary legislation amending the Government of Wales Act 2006, we can see some logic in tidying up loose ends which may have emerged during the implementation process, so long as this is designed to clarify rather than alter the fundamental settlement that the 2006 Act embodies. We await with interest the findings of the Constitution Committee”.

13. The Constitution Committee of the House of Lords concluded that the proposed Order should be split so that both legislatures were able to consider and vote separately on the different issues of adding to the Assembly's legislative competence in relation to carers and amending the way in which exceptions to matters in Schedule 5 operate. It also requested further clarification of the grounds for making the Order: this Explanatory Memorandum has been expanded accordingly.

14. Apart from presenting it as a separate LCO, this draft Order does not differ from the relevant content of the proposed Order other than to provide for it to come into force two days after it is made. This will ensure that, even if it is considered simultaneously with the draft National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 relating to carers, the technical changes which it brings about will apply subsequently.

## **Conclusion**

15. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be amended in accordance with the provisions of the Government draft Order to which this Explanatory Memorandum relates.

Carwyn Jones  
Counsel General

June 2009