



House of Commons  
Welsh Affairs Committee

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**The proposed draft  
National Assembly  
for Wales  
(Legislative  
Competence) (social  
welfare and other  
fields) Order 2008**

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**Fifth Report of Session 2007–08**

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

*Ordered by The House of Commons  
to be printed 17 June 2008*

**HC 576**  
Published on 26 June 2008  
by authority of the House of Commons  
London: The Stationery Office Limited  
£0.00

## The Welsh Affairs Committee

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### 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](mailto:welshcom@parliament.uk).

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# Introduction

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## 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.<sup>1</sup> 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. If adopted, the proposed Order relating to vulnerable children would expand field 5 (relating to education and training), field 15 (relating to social welfare) and field 16 (relating to sport and recreation) of Schedule 5 of the Government of Wales Act 2006 by adding new matters which would extend the competence of the National Assembly for Wales. In its original form, the proposed Order was laid before the Assembly by the Deputy Minister for Social Services on 9 July 2007, with a statement in plenary the following day.<sup>2</sup> The Assembly's Business Committee had previously decided to refer the

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<sup>1</sup> By ballot.

<sup>2</sup> *The National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008*; Legislative Statement by the Deputy Minister for Social Services to the National Assembly for Wales, 10 July 2007

proposed Order to an Assembly committee for pre-legislative scrutiny, to report by 25 January.<sup>3</sup> The Assembly Committee published its Report that day.<sup>4</sup>

5. Agreement with Whitehall departments<sup>5</sup> that the proposed Order proceed having been reached, on 19 March 2008 the Secretary of State for Wales laid the proposed Order and accompanying Explanatory Memorandum before Parliament in the form of a Command Paper.<sup>6</sup> The Secretary of State wrote to the Chair of the Welsh Affairs Committee and to the Chair of the Select Committee on the Constitution, House of Lords, inviting these committees to undertake pre-legislative scrutiny.<sup>7</sup> Both Committees decided to do so.

6. The process of Whitehall clearance had led to some substantial revision of the proposed Order as first published and laid before the Assembly; as the Deputy Minister put it, “As a consequence of these consultations the LCO has been further developed”.<sup>8</sup> Effectively, this meant that the Assembly Committee had undertaken considerable work in scrutinising and reporting on a very different proposed Order to that which was referred to the Welsh Affairs Committee. It also substantially reduced opportunities for formal joint working between the two committees, something which each committee decides on a case-by-case basis. On this occasion we decided not to conduct formal joint working, as the Assembly Committee had completed its investigations and published its Report - almost two months before the revised proposed Order was referred to us.

7. The proposed Order in its revised form has therefore not been scrutinised by the Assembly Committee as that Committee acknowledged in a second Report, published on 13 May:

We note that the revised proposed Order has been amended substantially and that, as such, there are many areas we have not been able to scrutinise and report on ...<sup>9</sup>

The Deputy Minister also noted, in a letter to the Chair of the Assembly Committee:

... the pre-legislative scrutiny process on this LCO has necessitated a singular approach and as a result it has not been possible to have simultaneous or joint scrutiny by the Assembly’s Committee and the Welsh Affairs Committee. ... this is not ideal<sup>10</sup>

8. This unsatisfactory situation could have been avoided had the proposed Order first been cleared with Whitehall departments before being published, and if it had been laid simultaneously before the Assembly and before Parliament. This would also have helped

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<sup>3</sup> National Assembly for Wales Business Committee, 3 July 2007

<sup>4</sup> Report by the Proposed Vulnerable Children LCO Committee, National Assembly for Wales, 25 January 2008

<sup>5</sup> See para 2

<sup>6</sup> Cm 7343

<sup>7</sup> Letter from the Secretary of State for Wales to the Chair of the Welsh Affairs Committee, 19 March 2008 (Ev 19); letter from the Secretary of State for Wales to the Chair of the Select Committee on the Constitution, House of Lords, 19 March 2008 (not printed here).

<sup>8</sup> Letter of 18 March 2008 from the Deputy Minister to the Chair of the Assembly Committee (not printed here); Ev 37-38

<sup>9</sup> 2<sup>nd</sup> Report of the Proposed Vulnerable Children LCO Committee, 13 May 2008, para 6

<sup>10</sup> Letter of 18 March 2008 from Gwenda Thomas AM, Deputy Minister for Social Services, to Karen Sinclair AM, Chair of the Assembly Committee (not printed here)

facilitate complementary working by the two committees. As the Deputy Minister acknowledged in evidence to us:

It is my personal view that if there is agreement before the scrutiny process commences, then that facilitates the process.<sup>11</sup>

In our view, this underplays the extent of disruption which pre-clearance publication of a proposed Order and its referral to an Assembly committee causes to the process as it was anticipated to work. We welcome the Parliamentary Under-Secretary of State's comment to us that:

... one of the things we are coming to be aware of is that it would be better if through all the various partners ... we bring forward these Orders in a way that is planned and programmed in order that there can be effective scrutiny, ... certainly more simultaneous scrutiny so that we end up at the same points at certain milestones on the path ...<sup>12</sup>

**9. We do not believe that the process for the scrutiny of this proposed Order has been satisfactory, or that it has worked as intended. We would again urge the Welsh Assembly Government to synchronise the publication and referral of a proposed Order to an Assembly Committee with its referral to Parliament by the Secretary of State.<sup>13</sup> Failure to do so represents the single biggest obstacle to the effective scrutiny of proposed Orders and, coming as it does at the very beginning of the process, it adversely affects all subsequent arrangements.**

## The Welsh Affairs Committee's inquiry

10. The purpose of this Committee's inquiry was to examine the scope and appropriateness of the proposed Order under 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.<sup>14</sup> On 3 April 2008 we issued a press notice setting out the scope of our inquiry and inviting written submissions from interested parties.

11. The Committee heard oral evidence from the Parliamentary Under-Secretary of State, Wales Office, and from officials of the Wales Office and the Department for Children, Families and Schools. We also heard evidence from the Deputy Children's Commissioner for Wales, and received a number of written submissions.

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<sup>11</sup> Q 55

<sup>12</sup> Q 101

<sup>13</sup> 2<sup>nd</sup> Report by the Welsh Affairs Committee, *The proposed Legislative Competence Order in Council on additional learning needs* (HC 44, Session 2007-08), conclusions 1-3

<sup>14</sup> Welsh Affairs Committee press notice, 3 April 2008 (Ev 19-20)

# 1 The proposed Order relating to vulnerable children

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## Purpose

12. The Explanatory Memorandum to the proposed Order notes that it would confer enhanced legislative competence on the Assembly to reform the law in relation to vulnerable children and child poverty to:

- (i) rationalise and consolidate existing provisions for vulnerable children;
- (ii) reform the law to provide the legal framework for the implementation of key components of the Welsh Assembly Government's policies for vulnerable children in Wales;
- (iii) take action to place duties on public bodies to demonstrate their contribution to ending child poverty; and
- (iv) create a statutory right for free child care for two year olds in greatest need.<sup>15</sup>

## The scope of the proposed Order

13. The Welsh Assembly Government's Explanatory Memorandum notes:

... the principal enhancement is in the field of social welfare, although there are related matters in the fields of education and training, and sport and recreation ... . Cross border duties in relation to England and Wales are preserved.<sup>16</sup>

14. Reporting on the proposed Order as revised, the Deputy Minister wrote in a letter to the Chair of the Assembly Committee:

... I can assure you that ... the scope of the LCO remains broad and will allow [the Welsh Assembly Government] to deliver on [its] policy in *One Wales* and more widely.<sup>17</sup>

And, in evidence to us:

The scope is wide. It will cover children and young people from birth up to the age of 25. The scope of the LCO, I believe, is wide enough to allow measures of a wide range to be introduced.<sup>18</sup>

## Use of the Legislative Competence Order in Council procedure

15. We asked the Deputy Minister in evidence whether the Legislative Competence Order in Council procedure was the most appropriate way for the Welsh Assembly Government

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<sup>15</sup> Ev 30 (para 15)

<sup>16</sup> *ibid* (para 19)

<sup>17</sup> Letter of 18 March 2008 from the Deputy Minister to the Chair of the Assembly Committee (not printed here)

<sup>18</sup> Q 57

to pursue its policy objectives in this area rather than the use of framework powers in a Westminster Bill, for example the Children and Young Person's Bill. Mr Mike Lubienski, a lawyer for the Welsh Assembly Government who accompanied the Deputy Minister, explained:

There is a Children and Young Person's Bill going through [Parliament] at present, but that has a much narrower focus and would not really have accommodated the type of Legislative Competence Order that is sought here.<sup>19</sup>

The Parliamentary Under-Secretary of State supported this view:

If there has been an entirely appropriate Bill that would have given us that ability to really work at the Welsh aspects of this then we would have considered that, but I do not think it quite fitted with the legislative programme from last year.<sup>20</sup>

16. A number of children's organisations questioned whether new laws were what was required, rather than more resources and better implementation of the Assembly Government's existing powers; for example, Gofal Cymru:

We are obviously keen to see improvements to mental health services for children and young people, but feel that more resources, rather than more legislation, is the key to achieving this. Whilst we would therefore welcome any future legislation that would improve mental health and well-being, we would urge the Welsh Assembly Government to prioritise putting adequate funding in place to implement existing strategies ...<sup>21</sup>

To which the Deputy Minister responded:

... it is not always a question of resources, but it is being able to introduce legislation that makes sense to the situation we are dealing with in Wales.<sup>22</sup>

**17. Given that there was no appropriate Westminster Bill which would have provided an opportunity for the Welsh Assembly Government to pursue its objectives in this policy area, we agree that the Legislative Competence Order in Council procedure is the appropriate route for the Welsh Assembly Government to pursue in this case.**

## **The proposed Order and existing Welsh Assembly Government policy**

18. The Welsh Assembly Government's Explanatory Memorandum cites four key publications which underpin its policy for children and young people: its overarching policy document, *Rights to action*; the ten-year strategy for social services in Wales, *Fulfilled lives, supportive communities; Towards a stable life and a brighter future*; and the

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<sup>19</sup> Q 67

<sup>20</sup> Q 104

<sup>21</sup> Evidence to the Assembly Committee (not printed here)

<sup>22</sup> Q 62

*Child poverty implementation plan*.<sup>23</sup> The Memorandum lists the Assembly Government's core aims in respect of vulnerable children and child poverty, and states that the proposed Order is "a necessary vehicle to deliver these commitments".<sup>24</sup>

19. The Welsh Assembly Government noted in its Explanatory Memorandum its "commitment to developing Wales-specific solutions to child poverty"<sup>25</sup> and "the need for Wales to acquire the powers to tackle Welsh priorities and issues".<sup>26</sup> The Deputy Children's Commissioner agreed noting that, "It is a principle of good governance that we have local solutions for local problems".<sup>27</sup> This view was supported by the Parliamentary Under-Secretary of State, who said in evidence:

... in immediate terms the issue of Child Trust Fund accounts is a very intelligent way forward to deliver additionality that does not rely on the Treasury to do it but relies on the Welsh Assembly Government working with local authorities to actually put subscriptions into the Child Trust Fund ... Free childcare places for two year-olds in the greatest need is an immediately identified issue that comes out of this LCO. Requiring local authorities to provide services to support parents as well in terms of the wellbeing of children is immediate. In the longer term, what comes out of this LCO is ensuring the welfare of children and young people in Wales right up to 25 years-old with Wales-manufactured solutions to recognise that there are differences in policy and strategy ...<sup>28</sup>

20. **We agree that the proposed Order is consistent with established Welsh Assembly Government policy and existing commitments.**

## The "identifiable need" for the proposed Order

### *The rationalisation of existing legislation*

21. One justification given in evidence to us of the need for this Order was the rationalisation of existing legislation. The Welsh Assembly Government's Explanatory Memorandum notes that the proposed Order is drawn so as "... to enable the Assembly to reform and consolidate existing legislation for children in need ...".<sup>29</sup> The Memorandum states:

There now exists a large volume of legislation relating to the welfare of children and young people that is fragmented and has been amended by many Acts of Parliament and various Orders and Regulations ... There are also inconsistencies between areas of legislation ... The Order will allow the reform and consolidation of existing

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<sup>23</sup> *Rights to action*, Welsh Assembly Government 2005; *Fulfilled lives, supportive communities – a strategy for social services in Wales over the next decade*, Welsh Assembly Government 2007; *Towards a stable life and a brighter future*, Welsh Assembly Government 2007; *Child poverty implementation plan*, Welsh Assembly Government

<sup>24</sup> Ev 28 (para 6)

<sup>25</sup> *ibid*

<sup>26</sup> Ev 29 (para 11)

<sup>27</sup> Q 3

<sup>28</sup> Q 103

<sup>29</sup> Ev 30 (para 17); Q 58

legislation in relation to vulnerable children, bringing together and rationalising provisions made over the years.<sup>30</sup>

22. The Deputy Minister assured us that those parts of existing legislation which contain powers and defined terms which overlap with those contained in the proposed Order would be disapplied in relation to Wales:

When the Assembly Measures are made under the scope provided by this Order, then the sections of the England and Wales Acts which they replace will be amended to disapply them in relation to Wales. They will of course remain in force in relation to England.<sup>31</sup>

23. The Deputy Minister explained in evidence to us that it was the responsibility of the Children’s Minister to ensure that the Assembly Government’s own policy and legislation in respect of vulnerable children was consistent and coherent,<sup>32</sup> and that complex legislation relating to children was “joined up” into a single framework which rationalised all the different aspects of the law.<sup>33</sup> Donna Davies, Head of Vulnerable Children Policy, Welsh Assembly Government, told us:

... bringing together and consolidating and rationalising the law, in particular for practitioners on the ground, would be very, very helpful because it is very convoluted and can lead to children not always having the services they are entitled to because of misunderstanding. More importantly, within Wales it is to allow us to take forward the partnership agenda so that we would be able to get better co-operation against the partnerships about functions that we would place on them in respect of children.<sup>34</sup>

24. This was supported by the Parliamentary Under-Secretary of State, who told us that:

... sometimes actually streamlining and clarifying exactly the way the legislation works can be of immense advantage to agents out in the field delivering these services.<sup>35</sup>

**25. We agree that the consolidation and rationalisation of existing legislation in relation to vulnerable children in Wales is a laudable aim of the proposed Order which would do much to advance clarity and understanding of the current situation, as well as to help reduce gaps in service provision.**

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<sup>30</sup> Ev 29 (para 13)

<sup>31</sup> Ev 33

<sup>32</sup> Q 68

<sup>33</sup> *ibid*

<sup>34</sup> Q 72

<sup>35</sup> Q 103

### *Tackling child poverty*

26. The Welsh Assembly Government's Explanatory Memorandum also cites tackling child poverty as a reason for bringing forward the proposed Order:

The Order will also provide a legal framework for the Welsh Assembly Government to take forward its proposals to tackle child poverty, in particular to underpin arrangements to provide a top-up payment to the Child Trust Fund accounts for certain categories of children and specific arrangements for Welsh local authorities to boost the savings of children in Wales.<sup>36</sup>

27. However, no specific reference is made to "child poverty" on the face of the proposed Order, although Matter 15.1 refers to "reducing inequalities in well-being between children and young persons". The Assembly Committee's Report concluded:

... we feel that the concept of 'child poverty' is so central a theme of the proposed Order that it should be recognised by the inclusion of the term on the face of the legislation, especially in light of the Assembly Government's target to eradicate child poverty in Wales by 2020. We therefore recommend that provision be made within the body of proposed Order for "child poverty", for example, by the addition of a further Matter relating expressly to this ... We further recommend that corresponding provision be made in the Interpretation section of the proposed Order for "child poverty" ...<sup>37</sup>

28. However, Mr Mike Lubienski, a lawyer for the Welsh Assembly Government, explained in evidence to us the reasons why the Welsh Assembly Government had not included the term "child poverty" in the face of the proposed Order:

"Child poverty" is a term which is used in different contexts but very commonly to do with relative poverty, so there was a danger of giving it a connotation which was limited and not broad enough. In many regards, given the fact that the word itself might have a connotation of being only about material poverty, and again that might not suit the breadth of the Assembly's agenda, it was better to have a phrase, such as "reducing inequalities" which, again, chimes with UK law as well and covers the full scope of any agenda on poverty that the Assembly will develop.<sup>38</sup>

**29. While we agree with the Assembly Committee that child poverty is a central theme of the proposed Order, we do not concur with that Committee's recommendation that the term "child poverty" be included on the face of the Order, for example by the introduction of an additional Matter. Although we agree that child poverty is a central theme, we agree with the Welsh Assembly Government that the inclusion of terms such as "reducing inequalities" clearer and more appropriate, and, being consistent with other UK statutory provisions, better suited for purpose.**

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<sup>36</sup> Ev 30 (para 16)

<sup>37</sup> Assembly Committee Report, para 88, pp 24-25

<sup>38</sup> Q 81

### **Current legislative constraints**

30. In its Memorandum, the Welsh Assembly Government refers to “current legislative restrictions” and constraints which prevent it from using its existing powers to achieve the desired policy outcomes contained in the proposed Order.<sup>39</sup> The Memorandum continues:

Limitations on the current settlement restrict our ability to bring forward the range of coherent provisions that we would like to see and that would make a difference for vulnerable children in Wales, based on a stronger focus on preventative action and on support for parents as well as children.<sup>40</sup>

31. When asked to provide specific examples of such legislative constraints, the Deputy Minister said:

The current settlement may not always concur or provide for a Wales approach. For example, we do not have children’s trusts in Wales; we work on a partnership basis instead. The LCO therefore would allow us to place greater responsibility on the partners – public bodies that are devolved, of course – in discharging their functions to support children and their families.<sup>41</sup>

32. Donna Davies, Head of Vulnerable Children Policy for the Welsh Assembly Government, identified the following examples:

We want to be able to extend some of our support; in particular, in the area of children with disabilities, up to 25 years of age and, more generally, to extend our children and young people policies to children up to 25 years of age, which does not exist in current legislation.<sup>42</sup>

**33. We thank the Deputy Minister and Welsh Assembly Government Officials for setting out in evidence to us what they identify as the main legislative constraints operating upon the Welsh Assembly Government’s ability to legislate in this area.<sup>43</sup> We believe that in future it would be helpful, where existing legislative constraint is cited as a reason for introducing a proposed Order, for a comprehensive explanation of the legislative constraints to be included in the Explanatory Memorandum.**

### **Exceptions to Matters**

34. The proposed Order, as revised, changes the list of excepted Matters that fall outside the Welsh Assembly’s legislative competence as currently set out in Schedule 5 of the Government of Wales Act 2006. In particular, articles 1(3) and 6 make changes to the list of excepted Matters relating to highways and transport under field 10. While these changes are merely technical in their effect, they are entirely unrelated to the subject of vulnerable children and there is little explanation of why these changes need to be made.

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<sup>39</sup> Ev 30 (para 15)

<sup>40</sup> *ibid* (para 11)

<sup>41</sup> Q 60

<sup>42</sup> Q 63

<sup>43</sup> Qs 60-64

**35. We discourage proposed Orders that address a specific subject, such as vulnerable children, from being used as an opportunity to make changes to entirely unrelated fields. Where this practice can not be avoided, we emphasise the importance of including an adequate explanation of those changes in the Explanatory Memorandum.**

### ***Cross-border issues***

36. A recent study commissioned by the Welsh Assembly Government found considerable use of English services for those vulnerable children ordinarily resident in Wales, and vice-versa.<sup>44</sup> At the time of the study, of the 317 Welsh-resident children placed in specialist residential units, one third were placed in Wales and two thirds in England. Both the Welsh Assembly Government and the Deputy Children's Commissioner referred in evidence to the diversification of policy in the delivery of services for children and young people in England and Wales,<sup>45</sup> indicating that the proposed Order does raise cross-border issues. However, the Deputy Children's Commissioner went on to say:

I think the cross-border issues, as important as they are, when we look at the numbers, are very, very few, compared to the 700,000 children in Wales and the 4,000 children in Wales in care.<sup>46</sup>

37. This view was supported by the Deputy Minister, who told us that the extent of cross-border issues in this area would not be affected by the introduction of the proposed Order.<sup>47</sup>

38. However, the Deputy Commissioner cautioned that under the terms of the proposed Order there was a potential for cross-border issues to increase,<sup>48</sup> and that:

... both countries need to liaise very closely ... and come up with some form of agreement about who is going to be funding, who is going to be giving a service to the child, and what service they are going to get.<sup>49</sup>

### ***Devolved and non-devolved responsibilities***

39. Some areas of responsibility, although non-devolved, nevertheless impinge upon the care of children and young people - for example the police and probation services, youth justice and the prison estate. There is already close co-operation with the Children's Commissioner for Wales in those areas for which responsibility is retained at Westminster. The Deputy Children's Commissioner told us in evidence that while the proposed Order had the potential to improve the current situation and could raise the

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<sup>44</sup> *Children in specialist placements – an all-Wales study*, Dr Heather Payne, Ian Butler, Pat Smail, Anne Crowley, Dr Eddy Street, Dr Hilary Barton, December 2003, based on research commissioned by the Welsh Assembly Government

<sup>45</sup> Ev 29 (para 10); Q 3

<sup>46</sup> Q 48

<sup>47</sup> Q 86

<sup>48</sup> Qs 15-16

<sup>49</sup> Q 16

standard of services provided,<sup>50</sup> at present this relied on very close cross-border liaison based on protocol, policy frameworks and guidance:

... if we go to our powers, we cannot use some of our functions within those areas. We can liaise, we can negotiate, we can mediate, we can have access where we are allowed access, but we cannot use some of our other powers.<sup>51</sup>

40. The Deputy Children's Commissioner continued:

... over the last six or seven years we have come across the most appalling treatment of children in those areas where we have not been able to use our full functions to assist them, and neither has the English Commissioner been able to assist them because he is precluded from assisting individual children. There is that gap there that children are falling down.<sup>52</sup>

...we know where it is not working and we know which children are falling through the gap. To sit here and say it objectively is one thing, but when you are meeting these children and seeing the impact on them, you would not believe that these things are happening in the UK and there is not an organisation which is able or empowered to properly champion their rights.<sup>53</sup>

41. The Deputy Commissioner believed that the most effective way of addressing this would be by way of an over-arching legal framework, rather than the current reliance on liaison, protocols, agreements and policy frameworks.<sup>54</sup> However regarding the proposed Order, the Deputy Commissioner said that she would welcome the inclusion of reference to other bodies concerned with the well-being of children into Matter 15.5 such as the UK Border Agency and the Fire and Rescue Services.

**42. We note with concern the Deputy Children's Commissioner's evidence that the split in responsibilities between England and Wales for safeguarding and promoting the well-being of children and young people has resulted in vulnerable children not receiving the services they need. We recognise that this proposed Order would not address the gaps in provision, and note the view of the Deputy Children's Commissioner that one way of addressing this issue would be by way of an over-arching legal framework for England and Wales. However, in the absence of such a framework, we recommend that Matter 15.5 of the proposed Order be expanded to include reference to other bodies which work with vulnerable children such as the UK Border Agency and the Fire and Rescue Services.**

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<sup>50</sup> Q 18

<sup>51</sup> Q 43

<sup>52</sup> Q 44

<sup>53</sup> Q 49

<sup>54</sup> Qs 19-26

## 2 Definitions of terms used in the proposed Order

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### The definition of “vulnerable children”

43. An addition to the proposed Order when published in its revised form was the inclusion of a definition of the term “vulnerable children”,<sup>55</sup> as follows:

“vulnerable children” means children –

- (a) who are unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for them of social care services,
- (b) whose health or development is likely to be significantly impaired, or further impaired, without the provision for them of social care services,
- (c) who have a physical or mental impairment,
- (d) who are in the care of a public authority, or
- (e) who are provided with accommodation by a public authority in order to secure their well-being.

44. The Explanatory Memorandum notes:

Vulnerable children are defined within the Order ... to relate to the needs of a diverse range of children: any child in need (including disabled or very sick children), children on the periphery of care, in care, or who have left care. It is drafted so as to include support to parents who may need help for their mental health, substance misuse, learning disability, poverty or other problems that may affect a child’s opportunities and wellbeing.<sup>56</sup>

45. The Deputy Children’s Commissioner, while concerned that the definition contained in the Explanatory Memorandum was too narrow,<sup>57</sup> said in evidence to us that she was now “broadly satisfied” with the definition contained in the revised Order itself.<sup>58</sup> **We believe that the inclusion of a definition of the term “vulnerable children” is a significant improvement to the proposed Order as revised, and agree with the Deputy Children’s Commissioner that the definition provided is satisfactory.**

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<sup>55</sup> Ev 23, *Interpretation of this field*

<sup>56</sup> Ev 29 (para 12)

<sup>57</sup> Memorandum from the Children’s Commissioner to the Assembly Committee (not printed here)

<sup>58</sup> Q 52

## Safeguarding children from harm and neglect

46. As originally published, Matter 15.1 of the proposed Order referred to “safeguarding children from harm and neglect”, which some argued would have enabled the National Assembly to make it an offence to smack a child or to remove the current common law defence (in relation to England and Wales) of “reasonable chastisement”.<sup>59</sup> Legal advice to the Assembly Committee stated:

... it could be argued that this LCO could be the gateway to legislation which makes all smacking of children in Wales unlawful and illegal.<sup>60</sup>

47. The Welsh Assembly Government’s view, as the Deputy Minister set out in a letter to the Chair of the Assembly Committee, is as follows:

In our view, a power for the Assembly to legislate so as to protect children from harm caused by parents or people with parental responsibility physically punishing them could relate to an appropriately worded matter in the social welfare field – a field which is in Schedule 5.<sup>61</sup> There is an important distinction between criminal justice in general – which is not devolved – and criminal sanctions, which may or may not be devolved.<sup>62</sup>

48. The Deputy Minister told us in evidence that the Assembly Government remained committed to this agenda, and that its view was that the defence of reasonable chastisement in Section 58 of the Children Act 2004 ought to be removed, “so that children and young people enjoy the same level of protection in law as adults do”.<sup>63</sup> The Deputy Minister confirmed that in the Welsh Assembly Government’s view, this matter was primarily a children’s rights issue.<sup>64</sup>

49. The UK Government’s position is that this is not the case as the matter relates to criminal justice, a non-devolved area of policy, rather than to social welfare or the protection of children.<sup>65</sup> The Parliamentary Under-Secretary of State told us:

The UK Government firmly considers that a ban on smacking would not fall within field 15 of social welfare or any other field. Our view is that a prohibition on smacking would relate to criminal justice, which is not represented in Schedule 5 [of the Government of Wales Act 2006].<sup>66</sup>

50. The proposed Order which was published following Whitehall clearance amended Matter 15.1 so that it now refers to the “Functions of public authorities” relating to safeguarding children from harm and neglect. The Deputy Minister noted that:

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<sup>59</sup> Children Act 2004, Section 58

<sup>60</sup> Assembly Committee Report, para 97, p 27

<sup>61</sup> Government of Wales Act 2006

<sup>62</sup> Letter of 22 January 2008 from the Deputy Minister to the Chair of the Assembly Committee (not printed here)

<sup>63</sup> Q 90

<sup>64</sup> *ibid*

<sup>65</sup> Head of Legislative Policy, Wales Office, email to the Committee (not printed here)

<sup>66</sup> Q 119

... the amendments to the proposed Order ... meet the UK Government's insistence that it should not confer legislative competence on the Assembly to enable the removal of the defence of reasonable punishment in relation to the physical punishment of children.<sup>67</sup>

51. The UK Government's position remains as explained to us by the Parliamentary Under-Secretary of State:

... a prohibition on smacking would relate primarily to the substantive issue of criminal law as opposed to social welfare fields, and that is where our position remains on this. ... we essentially believe that it is an issue of criminal law rather than social welfare.<sup>68</sup>

52. **We note that this particular controversy over smacking has highlighted the potential for different interpretation of the scope of devolved and reserved matters. We note the assurance of the Deputy Minister and the Parliamentary Under-Secretary of State<sup>69</sup> that the revised proposed Order would not enable the Welsh Assembly Government to introduce a Measure removing the defence of "reasonable chastisement" relating to the punishment of children. This assurance that because this Order deals with the functions of public authorities it can not be used to make changes in the criminal law has been confirmed as correct by the Wales Office and by Parliamentary Counsel.<sup>70</sup>**

53. **To ensure that there is no doubt, we propose the addition of a resolution at the time of passage saying, "Nothing in this resolution shall be interpreted as giving a competence that is not explicitly given by this Order."**

## The definition of "well-being"

### *Play*

54. The definition of "well-being" given in the proposed Order, taken from the Children Act 2004, includes reference to "education, training and recreation".<sup>71</sup> In its revised form the Order has not been amended to take account of one of the Assembly Committee's recommendations, that it be expanded to include the word "play". The Deputy Minister noted in a letter to the Chair of the Assembly Committee that:

The concept of play ... is not solely connected to recreation. For example, a child's play is connected to his or her physical, mental health and emotional well-being, education and recreation. As such the view is that there is no added value or reason

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<sup>67</sup> Letter of 18 March 2008 from the Deputy Minister to the Chair of the Assembly Committee (not printed here)

<sup>68</sup> Q 118

<sup>69</sup> Q 122

<sup>70</sup> Letter of 19 June 2008 from the Parliamentary Under-Secretary of State, Wales Office, to the Chairman (Ev 40)

<sup>71</sup> Ev 24, *interpretation of this field*

to include the word “play” ... Indeed if we add the word “play” the courts may seek to attach meaning to it ...<sup>72</sup>

55. This was supported by the Parliamentary Under-Secretary of State, who told us:

... we would anticipate that play would fall within the fields that we have extended it to, which include recreation and so on, and certain professional bodies ... would interpret it that way as well.<sup>73</sup>

**56. We agree with the Deputy Minister that the reference to “education, training and recreation” in the proposed Order should not be expanded to include reference to the word “play”, as “play” is already implicit in the definition given. To include specific reference to “play” could restrict the scope of the definition of “well-being” rather than add to it.**

### ***Securing the rights of individuals and the United Nations Convention on the Rights of the Child***

57. To the definition of well-being taken from the Children Act 2004, the proposed Order adds the further category, that of “securing their rights”.<sup>74</sup> The Explanatory Memorandum notes that this is to:

... place greater emphasis on the voice of the child as paramount to his/her well-being and recognises the important concept of rights in the United Nations Convention on the Rights of the Child on which all the Assembly Government’s policies and programmes for children and young people are based.<sup>75</sup>

58. The proposed Order does not contain an express reference to the United Nations Convention on the Rights of the Child (UNCRC), although in evidence to the Assembly Committee this was supported by Children in Wales, Save the Children and the British Association for Adoption and Fostering. One of the Assembly Committee’s recommendations in its Report was that:

... the United Nations Convention on the Rights of the Child ... is of such importance as to merit inclusion on the face of the proposed Order ...

59. However, in written evidence to the Assembly Committee, the Deputy Minister stated that “Express reference to the UNCRC ... is likely to lead to uncertainty both for the Assembly, the Welsh Assembly Government and the UK Government”.<sup>76</sup>

**60. We note the view of the Deputy Minister that it would prove “constitutionally difficult for a constituent part of the United Kingdom to incorporate the [United Nations Convention on the Rights of the Child] into its law”.**

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<sup>72</sup> Note of 17 December 2007 from the Deputy Minister to the Chair of the Assembly Committee (not printed here)

<sup>73</sup> Q 110

<sup>74</sup> Ev 24, *Interpretation of this field (f)*

<sup>75</sup> Ev 32 (para 32)

<sup>76</sup> Note accompanying a letter of 17 December 2007 from the Deputy Minister to the Chair of the Assembly Committee (not printed here)

## Conclusion

61. We welcome the assurance by Mr Mike Lubienski, a lawyer for the Welsh Assembly Government, that in drafting the proposed Order:

...very great care has been taken in the words that have been chosen so that where there are particular phrases which have reference points in UK legislation, those are clear and apparent. ... A great deal of thought has been given to try and marry up language and phrases ... to ensure that the concepts are clear.<sup>77</sup>

**62. We believe that, as with all proposed legislation, clarity of the terms used and of the definitions given is crucial to its eventual effectiveness. It is particularly the case that terms used in Welsh legislation which are also used in the same policy area in English legislation are consistent. We are assured that where there are differences, these will not cause practical problems when they are implemented.**

## 3 The Children’s Commissioner for Wales

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### Accountability

63. Matter 15.7 gives the Assembly power to legislate in relation to the Office of the Children’s Commissioner for Wales. Provision in the Government of Wales Act 2006 now means that the Commissioner reports to the Welsh Assembly Government rather than to the Assembly. In written evidence to the Assembly Committee, the Children’s Commissioner stated:

We are of the opinion the Children’s Commissioner for Wales should report to the National Assembly and not the Welsh Assembly Government.<sup>78</sup>

Any office or body concerned with safeguarding and promoting the well-being of children or young persons would be able to carry out this role more effectively and independently if their budget is controlled by the National Assembly rather than a Government Department as it is now.<sup>79</sup>

And, in oral evidence to the Assembly Committee:

The Scottish Commissioner is accountable to the Scottish Parliament as opposed to the Scottish Government. It falls within the Paris principles on best practice for human rights institutions, and we are a human rights institution.<sup>80</sup> As well as lending more independence, it lends more transparency.<sup>81</sup>

64. In evidence to us, the Deputy Children’s Commissioner cited “independence, transparency, accountability”<sup>82</sup> as justification for this preference, continuing:

Currently we are attached to a Department – the Education Department in the Assembly – and our budgets are set there ... Best international practice ... is that it is sliced separate from any department and it is set by the whole of the Assembly. I think it is really to secure ... that independence and to be seen to be independent.<sup>83</sup>

65. The Deputy Minister told the Assembly Committee that “it is entirely open for a future Measure to provide for the ... Commissioner to be accountable to the National Assembly for Wales”.<sup>84</sup> Other evidence submitted to the Assembly Committee by witnesses including the British Association for Adoption and Fostering and Save the Children supported the principle that the Children’s Commissioner be accountable to the National

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<sup>78</sup> Children’s Commissioner, written evidence to the Assembly Committee, p 9 (not printed here)

<sup>79</sup> *ibid*, p 11 (not printed here)

<sup>80</sup> United Nations-endorsed standards governing independent human rights institutions

<sup>81</sup> Maria Battle, evidence to the Assembly Committee, 6 November 2007 (Q 72) (not printed here)

<sup>82</sup> Q 30

<sup>83</sup> *ibid*

<sup>84</sup> Deputy Minister Gwenda Thomas AM, evidence to the Assembly Committee, 29 November 2007 (Q 103) (not printed here)

Assembly rather than to the Welsh Assembly Government, which was also supported by the Assembly Committee's conclusion in its Report:

We seek assurances from the Welsh Assembly Government that the arrangements for lines of accountability, functions and remit of the Children's Commissioner for Wales will be considered in a future Measure ...

However, in evidence to us the Deputy Minister said that "this is not an issue at the moment".<sup>85</sup>

**66. We welcome the fact that this proposed Order would enable the Welsh Assembly Government to bring forward a Measure so that the Children's Commissioner for Wales would be accountable to the National Assembly rather than to the Welsh Assembly Government. We concur with the Deputy Commissioner's view that this would enhance the Commissioner's independence, ensure transparency and increase accountability, and we fully support the Assembly Committee's recommendation urging the Welsh Assembly Government to bring forward such a Measure.**

## Whistleblowing

67. Under the Public Interest Disclosure Act 1998, the Office of the Children's Commissioner for Wales is a prescribed regulator for whistleblowers.<sup>86</sup> The Deputy Commissioner told us that between four and six cases were reported annually, which provided very important information.<sup>87</sup> The Children's Commissioner has described complaints, advocacy and whistleblowing as his "essential safeguards in promoting and safeguarding the rights and welfare of children".<sup>88</sup> However, although the proposed Order refers to advocacy services and to complaints, whistleblowing is not referred to on the face of the revised Order.<sup>89</sup> In a memorandum to the Assembly Committee, the Commissioner stated, "... it is vital that this function is retained".<sup>90</sup>

68. The Children's Commissioner noted that the Explanatory Memorandum to the proposed Order states:<sup>91</sup>

Matter 15.7 covers the functions of the Children's Commissioner for Wales including the office's specific role in relation to reviewing and monitoring of complaints, advocacy and whistleblowing arrangements of public bodies in Wales ...<sup>92</sup>

69. The Deputy Minister's view to the Assembly Committee was that whistleblowing was outside the scope of the devolution settlement as changes to the law to offer protection to

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<sup>85</sup> Q 92

<sup>86</sup> Q 34

<sup>87</sup> *ibid*

<sup>88</sup> Children's Commissioner, written evidence to the Assembly Committee (not printed here)

<sup>89</sup> Ev 23, Matter 15.7

<sup>90</sup> Memorandum from the Children's Commissioner for Wales to the Assembly Committee, p 12 (not printed here)

<sup>91</sup> Ev 34; Ev 32 (para 32)

<sup>92</sup> Ev 32 (para 32)

the whistleblower were matters of employment law,<sup>93</sup> although she later said in evidence to us:

I do not see that the LCO as it is presented would exclude any measures in the future that would be to do with whistleblowing.<sup>94</sup>

70. Mr Mike Lubienski, a lawyer for the Assembly Government who accompanied the Deputy Minister, confirmed that whistleblowing did come within the scope of the proposed Order:

There are a number of aspects of the matters by which it might be covered. It is an aspect of safeguarding children from harm and neglect in 15.1. In relation to social care services it might be a requirement that will be placed on the providers of social care services ... The reason that the word itself has not been used in the Order is that it does not have a statutory definition.<sup>95</sup>

On the occasions that there are references to the activity of whistleblowing, such as in statutes like the Public Interest Disclosure Act, there is a fairly lengthy set of wording to describe the breadth and scope of what the activity is and, therefore, in a kind of Order of this sort where we are trying to set out in relatively few words the legislative scope, it was felt that it was not necessary because that type of activity was clearly covered by the wording at present.<sup>96</sup>

71. In its Report on the proposed Order as originally published, the Assembly Committee concluded that it was “unconvinced” by the reasons put forward by the Deputy Minister for not making specific reference to whistleblowing in Matter 15.7 (and to advocacy – reference to which was subsequently included in the revised Order).<sup>97</sup>

**72. We recognise and appreciate the Children’s Commissioner’s description of whistleblowing as one of his “essential safeguards in promoting and safeguarding the rights and welfare of children”. While the term “whistleblowing” itself has no statutory definition, we recommend that the proposed Order be amended to make it clear that the Order will do nothing to weaken the Children’s Commissioner’s existing powers in relation to whistleblowing.**

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<sup>93</sup> Deputy Minister, oral evidence to the Assembly Committee, 29 November (not printed here)

<sup>94</sup> Q 96

<sup>95</sup> Q 94

<sup>96</sup> Q 95

<sup>97</sup> Assembly Committee Report, para 46

## 4 Conclusion

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**73. We support this proposed Order, as revised, and agree that it should be proceeded with. We agree with the Deputy Children's Commissioner's comment in evidence to us:**

**Obviously the real test will be how this makes a difference in the lives of those children in Wales who are vulnerable and who are living in poverty.<sup>98</sup>**

## Conclusions and recommendations

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1. We do not believe that the process for the scrutiny of this proposed Order has been satisfactory, or that it has worked as intended. We would again urge the Welsh Assembly Government to synchronise the publication and referral of a proposed Order to an Assembly Committee with its referral to Parliament by the Secretary of State. Failure to do so represents the single biggest obstacle to the effective scrutiny of proposed Orders and, coming as it does at the very beginning of the process, it adversely affects all subsequent arrangements. (Paragraph 9)
2. Given that there was no appropriate Westminster Bill which would have provided an opportunity for the Welsh Assembly Government to pursue its objectives in this policy area, we agree that the Legislative Competence Order in Council procedure is the appropriate route for the Welsh Assembly Government to pursue in this case. (Paragraph 17)
3. We agree that the proposed Order is consistent with established Welsh Assembly Government policy and existing commitments. (Paragraph 20)
4. We agree that the consolidation and rationalisation of existing legislation in relation to vulnerable children in Wales is a laudable aim of the proposed Order which would do much to advance clarity and understanding of the current situation, as well as to help reduce gaps in service provision. (Paragraph 25)
5. While we agree with the Assembly Committee that child poverty is a central theme of the proposed Order, we do not concur with that Committee's recommendation that the term "child poverty" be included on the face of the Order, for example by the introduction of an additional Matter. Although we agree that child poverty is a central theme, we agree with the Welsh Assembly Government that the inclusion of terms such as "reducing inequalities" clearer and more appropriate, and, being consistent with other UK statutory provisions, better suited for purpose. (Paragraph 29)
6. We thank the Deputy Minister and Welsh Assembly Government Officials for setting out in evidence to us what they identify as the main legislative constraints operating upon the Welsh Assembly Government's ability to legislate in this area. We believe that in future it would be helpful, where existing legislative constraint is cited as a reason for introducing a proposed Order, for a comprehensive explanation of the legislative constraints to be included in the Explanatory Memorandum. (Paragraph 33)
7. We discourage proposed Orders that address a specific subject, such as vulnerable children, from being used as an opportunity to make changes to entirely unrelated fields. Where this practice can not be avoided, we emphasise the importance of including an adequate explanation of those changes in the Explanatory Memorandum. (Paragraph 35)

8. We note with concern the Deputy Children’s Commissioner’s evidence that the split in responsibilities between England and Wales for safeguarding and promoting the well-being of children and young people has resulted in vulnerable children not receiving the services they need. We recognise that this proposed Order would not address the gaps in provision, and note the view of the Deputy Children’s Commissioner that one way of addressing this issue would be by way of an overarching legal framework for England and Wales. However, in the absence of such a framework, we recommend that Matter 15.5 of the proposed Order be expanded to include reference to other bodies which work with vulnerable children such as the UK Border Agency and the Fire and Rescue Services. (Paragraph 42)
9. We believe that the inclusion of a definition of the term “vulnerable children” is a significant improvement to the proposed Order as revised, and agree with the Deputy Children’s Commissioner that the definition provided is satisfactory. (Paragraph 45)
10. We note that this particular controversy over smacking has highlighted the potential for different interpretation of the scope of devolved and reserved matters. We note the assurance of the Deputy Minister and the Parliamentary Under-Secretary of State that the revised proposed Order would not enable the Welsh Assembly Government to introduce a Measure removing the defence of “reasonable chastisement” relating to the punishment of children. This assurance that because this Order deals with the functions of public authorities it can not be used to make changes in the criminal law has been confirmed as correct by the Wales Office and by Parliamentary **Counsel**. (Paragraph 52)
11. To ensure that there is no doubt, we propose the addition of a resolution at the time of passage saying, “Nothing in this resolution shall be interpreted as giving a competence that is not explicitly given by this Order.”. (Paragraph 53)
12. We agree with the Deputy Minister that the reference to “education, training and recreation” in the proposed Order should not be expanded to include reference to the word “play”, as “play” is already implicit in the definition given. To include specific reference to “play” could restrict the scope of the definition of “well-being” rather than add to it. (Paragraph 56)
13. We note the view of the Deputy Minister that it would prove “constitutionally difficult for a constituent part of the United Kingdom to incorporate the [United Nations Convention on the Rights of the Child] into its law”. (Paragraph 60)
14. We believe that, as with all proposed legislation, clarity of the terms used and of the definitions given is crucial to its eventual effectiveness. It is particularly the case that terms used in Welsh legislation which are also used in the same policy area in English legislation are consistent. We are assured that where there are differences, these will not cause practical problems when they are implemented. (Paragraph 62)
15. We welcome the fact that this proposed Order would enable the Welsh Assembly Government to bring forward a Measure so that the Children’s Commissioner for Wales would be accountable to the National Assembly rather than to the Welsh Assembly Government. We concur with the Deputy Commissioner’s view that this

would enhance the Commissioner’s independence, ensure transparency and increase accountability, and we fully support the Assembly Committee’s recommendation urging the Welsh Assembly Government to bring forward such a Measure. (Paragraph 66)

16. We recognise and appreciate the Children’s Commissioner’s description of whistleblowing as one of his “essential safeguards in promoting and safeguarding the rights and welfare of children”. While the term “whistleblowing” itself has no statutory definition, we recommend that the proposed Order be amended to make it clear that the Order will do nothing to weaken the Children’s Commissioner’s existing powers in relation to whistleblowing. (Paragraph 72)
17. We support this proposed Order, as revised, and agree that it should be proceeded with. We agree with the Deputy Children’s Commissioner’s comment in evidence to us:

Obviously the real test will be how this makes a difference in the lives of those children in Wales who are vulnerable and who are living in poverty.  
(Paragraph 73)

# Formal Minutes

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**Tuesday 17 June 2008**

Members present:

Dr Hywel Francis, in the Chair

Nia Griffith

Alun Michael

Mrs Siân James

Albert Owen

Mr David Jones

Draft Report (The proposed National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008, proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 73 read and agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to the House.

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

[Adjourned until Monday 23 June at 4.00 p.m.]

## Witnesses

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### Thursday 15 May 2008

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<b>Gwenda Thomas AM</b> , Deputy Minister for Social Services, <b>Mike Lubienski</b> , Assembly Lawyer and <b>Donna Davies</b> , Head of Vulnerable Children Policy, Welsh Assembly Government	Ev 7
<b>Huw Irranca-Davies MP</b> , Parliamentary Under-Secretary of State, <b>Geth Williams</b> , Head of Legislative Policy, Wales Office and <b>Bruce Clark</b> , Cafcass	Ev 14

## List of written evidence

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12	Supplementary memorandum submitted by the Children’s Commissioner for Wales	Ev 39
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## List of Reports from the Committee during the current Parliament

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### 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
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Fourth Report	The proposed National Assembly for Wales (Legislative Competence) Order in the field of social welfare 2008	HC 257
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
Second Special Report	Energy in Wales – follow-up inquiry: Government Response to the Committee's First Report of Session 2007-08	HC 435
Third Special Report	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	HC 715

### 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

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Second Report	Proposed Restructuring of the Police Forces in Wales	HC 751
Third Report	Energy in Wales	HC 876-I
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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 Report of Session 2005-06, Proposed Restructuring of the Police Forces in Wales	HC 1431
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

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## Taken before the Welsh Affairs Committee

on Thursday 15 May 2008

Members present

Dr Hywel Francis, in the Chair

Nia Griffith  
Mr David Jones  
Alun Michael

Hywel Williams  
Mark Williams

*Witnesses:* **Ms Maria Battle**, Deputy Children's Commissioner for Wales, and **Mr Gareth Jones**, Policy Officer, Children's Commissioner for Wales, gave evidence.

**Q1 Chairman:** Welcome to the Welsh Affairs Committee. For the record, would you please introduce yourselves.

**Ms Battle:** My name is Maria Battle. I am the Deputy Children's Commissioner for Wales.

**Mr Jones:** I am Gareth Jones, Policy Officer, Children's Commissioner for Wales.

**Q2 Chairman:** Perhaps I could begin by asking you, as the independent champion for Children in Wales, what your opinion of this proposed Order is.

**Ms Battle:** We welcome this Order, particularly as it is one of the first LCOs that have come from the National Assembly and it is concentrating on vulnerable children and poverty—which is at the very heart of what we do. Our statutory aim is to safeguard and promote the rights and the welfare of all children in Wales, so we welcome the Order. We think it is very important that the legislation within this area is consolidated and is clear. We also welcome the breadth of the Order: going from the emphasis on early intervention and support for children and their families, as well as for children who are in care, children who have left care, and the broad poverty agenda. We believe it has the potential to make a difference. It is only the beginning, but it is a very important beginning. We do support the potential of it and the intention behind it. Obviously the real test will be how this makes a difference in the lives of those children in Wales who are vulnerable and who are living in poverty. As an organisation, it really is part of our role to scrutinise whatever Measures, if this does go through, do arise from the Assembly and how they are implemented.

**Q3 Chairman:** Is it your view that these powers should be given to the Assembly Government in perpetuity? Would that be in the best interests of children?

**Ms Battle:** Yes, I do believe that. Since devolution, we know as a fact that the policy agenda, as it has grown and as it has moved forward, has diversified within this field from the English agenda. It is a principle of their good governance that we have local solutions for local problems. We are working closely with the children and young people in Wales. We

have found we are more able to influence the policy agenda on behalf of children and young people in Wales because everything is more open and more accessible to us. I think these powers are absolutely crucial for the children and young people in Wales.

**Q4 Alun Michael:** I certainly would share your welcome for the emphasis on the interests of children, particularly vulnerable children, and on poverty. The question we need to ask in scrutinising this is what difference it will make. In the evidence you gave to the Assembly Committee previously you said, "At the moment we have a huge deficit between aspirations in policy and law and the actual experience of children and young people . . . in accessing services?" How is this Order going to help to close that gap? There are many sayings about the law not always doing what it is set out to do.

**Ms Battle:** Absolutely.

**Q5 Alun Michael:** What we have here is a piece of legislation. Why will passing this Legislative Competence Order help to close that gap which you have identified in your evidence?

**Ms Battle:** I think it has the potential to help close the gap, but it cannot be the only thing. As you quite rightly say, we could have a piece of legislation which does not make a difference, if not enacted. Within this field—it is quite a complex field, there are lots of different Acts, *et cetera*—it is important to have a clear framework. It is important to specify exactly what the duties on the statutory authorities are. For example, in that Field of early intervention, in the Field of children in need, it is discretionary at the moment whether or not a local authority intervenes and helps. If there was a duty within the legislation, then it would perhaps be easier for us as a body to help to enforce that or to influence the enforcement; it would be easier for families and parents to know what rights they have. But that is only one part of it. I think it needs to be a lot broader than that. If we really are going to close the gap between legislation policy and practice, then we have to look at a lot of other things. We have to look at resources. We have to look at the reconfiguring of resources. We have to look at the training of staff, the culture that we have, the support of staff—as we

get staff who are desensitised. We have to look at the management's values—the basic values, going back to the United Nations Convention. We have to support all those who are in the frontline. They need to know what the guidance is and what the policy is. There needs to be enough of them and they need to be resourced in order to respond to the needs of children and young people.

**Q6 Alun Michael:** I agree with everything you have said there. The question is: How will passing this Legislative Competence Order help to make sure that those things happen?

**Ms Battle:** Obviously it is the LCO and everything will be in the Measures. It will be the Measures that will enable us to scrutinise in more detail. I would hope that the Measures would specify clearly and transparently what the duties on local authorities are and what the duties on statutory agencies are.

**Q7 Alun Michael:** Forgive me, at a later stage it is for the Welsh Assembly Government to bring them forward for the Assembly to then scrutinise those Measures. But at the moment we have to ask why bringing this Legislative Competence Order to the Assembly will lead to the results that you are saying.

**Ms Battle:** I think there is the potential there for the Welsh Assembly Government to legislate within this competence, which would make it clearer what the duties are. Because there are not many LCOs or the ability to make legislation in Wales, I think we have the potential for the Welsh Assembly Government to respond more quickly than perhaps if it went through a parliamentary process and, also, to respond to the needs within the Welsh context of the children and young people.

**Q8 Alun Michael:** It is partly the flexibility.

**Ms Battle:** The flexibility, the timing, and the knowledge within the Welsh context.

**Q9 Alun Michael:** You also made this comment to the Assembly Committee, "I do not think it should be redrafted; it should be drafted as widely as possible." We have heard in the supplementary report of the Assembly Committee that they do not feel that they have been able to scrutinise the Legislative Competence Order as effectively as they would have liked. That is a bit of a puzzle to us—indeed, we think they should be able to scrutinise it properly. Do you have any concerns about the drafting as it now stands, as it is before us?

**Ms Battle:** We are broadly satisfied with how it stands. We are broadly satisfied with the definition of vulnerable children and I think that reflects the common opinion of most of the bodies who have responded to the LCO. We have a few suggestions which we would like to pick up. For example, the bodies that we believe should be included in the duty to co-operate, we think could be broadened.

**Q10 Alun Michael:** Perhaps I could say at this stage, because I do not want to delay the Committee, that a number of times in your response to my questions you have said "for example" and if there are specific

elements that would help to ground this in improvements for the quality of life for children, it might be helpful for your evidence to be supplemented.

**Ms Battle:** Absolutely. We would welcome that. Thank you.

**Q11 Mr David Jones:** You say you are broadly satisfied. The inference I take from that is that there may be some respects in which you are not satisfied. Any further memorandum should indicate, please, those respects in which you are not satisfied with the draftsmanship of the Order.

**Ms Battle:** We have some details that we think should be included—and I would be more than willing to submit that to you in writing: the inclusion of various bodies which have been left out, particularly in the co-operation—but broadly we are satisfied with it.

**Q12 Mr David Jones:** I do not think any of us would want to detain you now, but if you could let us have a memorandum that would be very helpful.

**Ms Battle:** We would welcome that.<sup>1</sup>

**Q13 Hywel Williams:** Looking at your role as the champion of rights and interests of children in Wales, do you think the proposed Order would help or hinder you in the performance of your duties?

**Ms Battle:** That will obviously depend on the Measures and also the implementation of those Measures. I think it could assist in three aspects: first, if the LCO and the subsequent Measures do improve the welfare and the rights of vulnerable children and children in poverty in Wales, then it would also result in us as an organisation not having to intervene as often as we intervene now. Obviously our aim would be that every single child in Wales was out of that category of vulnerability and poverty and then you could abolish the Office of the Children's Commissioner. If that happened, it would impact upon us. Second, it is getting back to the first question really: if it is clearly defined what the duties are on statutory authorities, both in the realms of vulnerability and poverty, it would make our work much easier to accomplish because we can hold them to account. At the moment, in the discretionary Fields, we find it is more difficult to get access to children for the services that they obviously require but there is that discretion. Third, within our own powers contained in this LCO there are some improvements that can be made<sup>2</sup> for consolidation of the legislation—which is quite confusing. There are simple things; for example, us accessing information that we need to represent children, without starting a formal review which is unnecessary. We have submitted a full paper on that. The things that will not impact upon our ability to help vulnerable children is the fact that this LCO does not and cannot cover our ability to assist children in the fields which are not devolved. We assist many children in very restricted circumstances

<sup>1</sup> Ev 39

<sup>2</sup> Note by Witness: (In the consolidation of the existing legislation).

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in the field of asylum and in the field of youth justice. We feel, on principle—and it is international minimum standards—that every child in every country should be able to go to their own commissioner for everything that they need. That is not the case at the moment. We do assist as much as we can but that will not be taken care of within this LCO.

**Q14 Mr David Jones:** Cross-border issues arise under the terms of this LCO. A study commissioned by the Welsh Assembly in 2004 indicated that, of the 317 children placed in specialist residential units, one-third were placed in Wales and two-thirds in England, so there are significant cross-border issues at play here. How do you anticipate that different policies and procedures will play out in practice?

**Ms Battle:** I think that is a very important question. In our experience in the last seven years, we have assisted children and young people in cross-border circumstances, both children from England who have been placed in Wales and children from Wales who have been placed in England, through education, health, or social services. We find, for example, that English children who are placed in Wales do not have the access to the same advocacy provision which children in Wales have, which is a really important safeguard for children who are living away from home. We, as an office, fill in that gap and we advocate for children who are in Wales at the time. Similarly, for children and adolescents with mental health problems or eating disorders, we find that for children from Wales who are placed in England there are restrictions in Welsh policy which will not fund the children for a sufficient length of time for the English institutions to accept them. We intervene there and we advocate on behalf of the children to try to get agreement in the funding. I think perhaps there is a potential with the LCO that these issues will increase.

**Q15 Mr David Jones:** I am sorry, I do not understand. These issues will increase?

**Ms Battle:** Cross-border issues.

**Q16 Mr David Jones:** As a consequence—

**Ms Battle:** There is a potential, depending on the way the Measures go. If, for example, the support for children in Wales is more intense, is more appropriate for care leavers than perhaps a care leaver in England, and that English child is in Wales, what happens to that child? Do they get a lesser service than the child from Wales? Similarly a child in Wales who goes over to England, what service are they going to get if they are placed in England when the Welsh legislation and guidance is different from the English? I think that both countries need to liaise very closely on this and come up with some form of agreement about who is going to be funding, who is going to be giving a service to the child, and what service they are going to get.

**Q17 Mr David Jones:** Do they liaise at present?

**Ms Battle:** Yes and no. As an organisation which tends to become involved in situations where things are not going the way they should do, we tend to pick up on issues which are not working effectively and then we negotiate and we bridge that gap.

**Q18 Mr David Jones:** Frankly, from what you are describing it seems to me that there is potential for this LCO to make matters worse rather than better.

**Ms Battle:** If this LCO can make matters better for the children and young people of Wales—and I firmly believe it has the potential to do that—it may then have a knock-on effect and raise the services for children and young people in England, rather than to have difficulties.

**Q19 Mr David Jones:** The initial question was: How do you anticipate that different policies will play out in practice? Is it fair to say that you do not really know at this stage? It depends how things develop.

**Ms Battle:** It does depend on how things develop, but if you use the practice that is happening at the moment it is really about close co-operation, close communication, and there are safeguards in place—being ourselves and the English Commissioner. We liaise very closely when children cross the borders.

**Q20 Mr David Jones:** This is a question of protocol rather than law.

**Ms Battle:** Yes.

**Q21 Mr David Jones:** Would you welcome an overarching framework?

**Ms Battle:** There is some policy which does state clearly what needs to be in place before a child goes over the border; for example, the Welsh guidance Brighter Futures. That goes quite some way towards addressing that. So yes, I do think it would help if it were addressed more clearly.

**Q22 Mr David Jones:** In a legal framework?

**Ms Battle:** Or in a policy framework or a guidance framework.

**Q23 Mr David Jones:** The difficulty with a guidance framework, of course, is that it is unenforceable.

**Ms Battle:** Yes.

**Q24 Mr David Jones:** Would you welcome a law?

**Ms Battle:** As a lawyer, I would say yes.

**Q25 Mr David Jones:** As a lawyer I welcome that.

**Ms Battle:** Also, as someone who tries daily to get people to do what they should be doing, it is a definite yes.

**Q26 Mr David Jones:** Just to summarise, you would appreciate an overarching legal framework that would set out the position for the child—who, after all, we are concerned with here—in cross-border situations such as this.

**Ms Battle:** Yes, with a caveat that we should not throw the baby out with the bathwater.

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**Q27 Mr David Jones:** I am not sure, when you are talking about vulnerable children, that is the right expression.

**Ms Battle:** Sorry. This has such potential to improve the lives of very vulnerable children.

**Q28 Mr David Jones:** You have touched on a large range of cross-border issues. Do you anticipate any cross-border issues arising, for example, in connection with the Youth Justice Board or the police or the court service?

**Ms Battle:** On the face of this LCO, no. We do have our own youth justice policy, which, we are proud to say, puts children first. I cannot say how this particular LCO will impact on those non-devolved areas. As I did say in the answer to the question about our own powers, again it does not impact upon our own powers within those areas either.

**Q29 Mr David Jones:** We have already invited you to submit an additional memorandum. If you have any suggested additional clauses or amendments, could you submit those as well?

**Ms Battle:** Absolutely. Thank you.

**Mr Jones:** Thank you.<sup>3</sup>

**Q30 Mark Williams:** Turning now to the issue of accountability and your role. A provision in the Government of Wales Act 2006 specifies that the Commissioner reports directly to the Welsh Assembly Government rather than to the Assembly. You have argued that the reporting process should be to the Assembly itself. What is the rationale behind that?

**Ms Battle:** The rationale is independence, transparency, accountability. Currently we are attached to a department—the Education Department in the Assembly—and our budgets are set there, and it takes away then from other education budgets within that broad budget. Best international practice, similar to an ombudsman—because we are a children’s ombudsman, in reality—is that it is sliced separate from any department and it is set by the whole of the Assembly. I think it is really to secure, more so, that independence and to be seen to be independent.

**Q31 Mark Williams:** Has a budgetary issue been a problem specifically?

**Ms Battle:** Currently we have been flat-lined for the next three years. That will obviously cause problems, because staff costs will increase which means our operational budget will decrease.

**Q32 Mark Williams:** Not least with the passing of this LCO you envisage a greater increase in your responsibilities.

**Ms Battle:** Absolutely, and a greater increase in our ability perhaps to make a difference.

**Q33 Mark Williams:** What discussions have you had with the Assembly Government on this point? More fundamentally, what has been the reaction?

**Ms Battle:** It has been raised in the Assembly. There is a lot of support within the Assembly, the Members themselves, for this to happen. We have raised it collectively. There is a UN report this year, as well, and we expect to raise it there, because, as I say, it is a fundamental principle of independence. The response that we had a couple of years ago was that we were to stay within the Education Department but our budget would be seen clearly within the lines of the budget. That is as far as it has gone really.

**Q34 Mark Williams:** In defence of the Deputy Minister, she has been given evidence which has at least opened the door to a possible future Measure on the issue. Turning now to the issue of whistleblowing, in evidence you gave to the Assembly Committee you expressed surprise and concern that no reference was made to whistleblowing. The proposed Order refers to advocacy and to complaints. How concerned are you at the absence of whistleblowing?

**Ms Battle:** Whistleblowing is one of the main areas which was identified by Sir Ronald Waterhouse in *Lost in Care* to be the duty or power that a Children’s Commissioner should have. The three powers to safeguard those most vulnerable children, who are the children in children’s homes, were whistleblowing, advocacy and complaints procedures, so we have specific powers within which to undertake reviews within those three areas, and we have done. We have undertaken reviews into whistleblowing, complaints and advocacy in education and in social services. This has resulted in some changes within Wales and continues to do so. A recent framework for advocacy has been announced. That is already enshrined in the Care Standards Act 2000. When we saw on the face of the LCO that neither advocacy nor whistleblowing were included, I wondered whether it was a drafting error or whether there was an intention to take away one of our responsibilities which we already have at the moment. We are also a prescribed regulator under the Public Interest Disclosure Act for whistleblowers. As well as undertaking reviews, we do receive reports annually from, I would say, between four and six whistleblowers. It is a very difficult thing to do: it is a very lonely place to be but it is also very important information. They come to us confidentially and alert us to issues which we should be investigating to protect children. It did not seem to sit logically that whistleblowing was not included on the face of the LCO, when it is an area in which we are currently active—and it came from Sir Ronald Waterhouse and from Parliament.

**Q35 Mark Williams:** You have set the scene of either a drafting issue or something more substantive, and obviously you are concerned about that. What were the responses from the Assembly Government to your concerns?

**Ms Battle:** That it was not a devolved area. We are hoping that the consolidation of our legislation will retain the whistleblowing that we already have. That is what we are hoping for.

<sup>3</sup> Ev 39

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**Mr Jones:** That is explained in the Explanatory Memorandum. It does state whistleblowing within the memorandum attached to the LCO; that there is the expectation that the Commissioner will take that whistleblowing function forward. It is just surprising to us that it is not on the face of the LCO as it is drafted currently.

**Q36 Mark Williams:** It would be useful to have a further note on that, as one of the concerns that Mr Jones has suggested you might write to the Committee about.

**Ms Battle:** Yes. Thank you.<sup>4</sup>

**Q37 Alun Michael:** There are a number of areas coming together in this questioning. There are areas where very clearly there has to be co-operation between those operating in non-devolved areas and those operating in devolved areas. The work with young offenders is an obvious area. Indeed, we have references to the police and probation areas within Wales here. Those are not devolved areas. They are not the responsibility of the Welsh Assembly but in your memorandum you welcome the inclusion of those. Which other bodies would you like to see included? You have implied there are bodies which are not included that you would like to see included.

**Ms Battle:** We would like to see included the UK immigration agency, the UKBA.

**Mr Jones:** The Fire and Rescue Services.

**Q38 Alun Michael:** That makes clear the sort of area you are talking about. It is where there is a non-devolved area which impinges on the care of children and young people.

**Ms Battle:** Absolutely.

**Q39 Alun Michael:** Given that non-devolved areas, like the Probation Service, are included, and of course the National Assembly for Wales has a responsibility to co-operate with non-devolved areas in the reduction of crime, for instance, and for the rehabilitation of young offenders, I am not entirely clear why the line is proving a problem.

**Ms Battle:** I am sorry, I do not understand the question.

**Q40 Alun Michael:** You seem to say that you could not operate as the Commissioner in relation to non-devolved areas but you have to. The Assembly has to co-operate with non-devolved areas: it has a legal responsibility to do so.

**Ms Battle:** I understand.

**Q41 Alun Michael:** There is not a line there, is there, that is that absolute?

**Ms Battle:** I totally agree with you. We do operate in non-devolved areas. We have the power to make representations on any matter that affects any child in Wales to the National Assembly for Wales, and we do that. Obviously for those children within the non-devolved areas—in particular youth justice and those seeking asylum—all the other services they

receive are devolved: social services, accommodation, education, *et cetera*. We do assist those children in those areas. We go into the secure estate. We go to Parc Prison every six weeks.

**Q42 Alun Michael:** To give another example: might you make representation on the way things are working to the Youth Justice Board?

**Ms Battle:** Yes, we do. We meet with the Youth Justice Board. We have been on the NOMS pathways group.

**Q43 Alun Michael:** They are not devolved areas.

**Ms Battle:** They are not devolved areas. The issue is that if we go to our powers, we cannot use some of our functions within those areas. We can liaise, we can negotiate, we can mediate, we can have access where we are allowed access, but we cannot use some of our other powers. Some of the greatest changes that we have made for children in Wales have been as a result of the use of, for example, the power of public inquiry. I will give you an example. There has never, as you know, been a public inquiry into deaths of children in the Youth Justice System. We were asked by the English Commissioner perhaps to consider doing a joint public inquiry. I do not think we have the power to do that in Wales. Yes, we go in, we assist children to get accommodation when they are leaving prison, we assist children to get the CAMHS service, but we cannot use our other powers.

**Q44 Alun Michael:** I think I am starting to understand what you are getting at here. It does not necessarily mean that there has to be a Legislative Competence Order in order for you to go into those areas, does it? It would require the UK Government to see you as having a competence in that area rather than duplicate where there is an overlap in Wales.

**Ms Battle:** It is not within this LCO, I agree with you. It could be through the UK Government. It is arguable it could even be through the Secretary of State for Wales. But over the last six or seven years we have come across the most appalling treatment of children in those areas where we have not been able to use our full functions to assist them, and neither has the English Commissioner been able to assist them because he is precluded from assisting individual children. There is that gap there that children are falling down. I could cite many examples—and I am willing to put them into a memorandum if it would assist the Committee—where children are experiencing horrendous breaches of fundamental rights.<sup>5</sup>

**Q45 Alun Michael:** Personally, Chairman, I think it would help us enormously. We need to be clear what the problem is before we look at the solution, rather than looking at the solution first and then working backwards to the problem.

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<sup>4</sup> Ev 39

<sup>5</sup> Ev 39

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*Ms Battle:* Yes, I would welcome that.

**Q46 Chairman:** Have these points been made at all at any time?

*Ms Battle:* Yes, they have. I met with the Under Secretary of State for Wales to air them. I also met with the Minister for Children in England. I have met with the Minister for Children in Wales. I did a presentation to the All-Party Committee on Children in Wales and met with some Welsh MPs. I obviously liaise very closely with the English Commissioner, who finds it equally frustrating, but he cannot assist individual children or assist those children we ask him to assist. We will continue to raise these points.

**Hywel Williams:** This Committee in fact questioned the Minister Margaret Hodge on this very issue when the Children's Commission for England was being set up. The split in responsibilities between Wales and England was examined about five years ago—and it must be within the records of this Committee.

**Alun Michael:** Only the older members would remember.

**Q47 Mr David Jones:** Again, I am questioning whether this LCO is the proper vehicle. I really do wonder whether what you really need is overarching English and Welsh legislation, joined-up legislation.

*Ms Battle:* For the Commission or for vulnerable children?

**Q48 Mr David Jones:** In respect of the issues you have just been identifying, the cross-border issues. You are identifying real problems here. I am doubtful as to whether the LCO is the proper vehicle for addressing the matter. It seems to me you really need primary English and Welsh legislation to address this problem.

*Ms Battle:* When it comes to the Commission, if we put that to one side, yes, I agree, but today we are looking at vulnerable children and poverty in the Welsh context and I absolutely think this has the potential to make a huge change for children and young people in Wales if it is used well. I think the cross-border issues, as important as they are, when we look at the numbers, are very, very few, compared to the 700,000 children in Wales and the 4,000 children in Wales in care. I think this is an opportunity for us to be able to do this in Wales more quickly within our context. I agree, when it comes to the Commission's powers, that we should look in a parliamentary way at that.

**Q49 Mr David Jones:** That is the point I was making. I am not criticising the LCO on those grounds, but it seems to me that you have identified a number of issues which do need primary parliamentary legislation for England and Wales.

*Ms Battle:* Absolutely. I have also taken independent legal opinion that it may be within the power of the Secretary of State for Wales, although I think that is debatable, having read it. I think there is an opportunity, now that we are using those powers which Parliament has given us for the last seven years: we know where it is not working and we know which children are falling through the gap. To sit here and say it objectively is one thing, but when you are meeting these children and seeing the impact on them, you would not believe that these things are happening in the UK and there is not an organisation there which is able or empowered to properly champion their rights.

**Q50 Mr David Jones:** Because there is no legal framework.

*Ms Battle:* Absolutely. We really do need that. We have a paper, which I am more than willing to share, and I can give concrete examples as well within that paper of Welsh children and English children who are falling through the net.<sup>6</sup>

**Mr David Jones:** That would be helpful.

**Q51 Chairman:** You are absolutely right. We are really talking about your powers at the moment, when we should be talking about the LCO.

*Ms Battle:* Absolutely.

**Q52 Nia Griffith:** I would like to come back now to the definition of vulnerable children. In your evidence to the Assembly Committee you expressed your concern that the definition of vulnerable children may be too narrow as expressed in the Explanatory Memorandum. Are you now content that the expanded definition contained in the revised Order meets the criticisms that you levelled?

*Ms Battle:* Yes, we are. We are broadly satisfied with that. We agree with the Deputy Minister that all children are vulnerable by their very age, but, yes, we are happy with the revised definition.

**Q53 Nia Griffith:** How do you see this working in practice? Do you think it will be clear to everybody what is meant? Do you see any potential for confusion?

*Ms Battle:* I think the answer to that will unfold once we see the meat on the Measures, what is contained within the Measures.

**Chairman:** May I thank you very much for your evidence today. We look forward to the other new memorandum which you have promised to produce for us. Thank you very much.

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<sup>6</sup> Ev 39

*Witnesses:* **Gwenda Thomas**, Assembly Member, Deputy Minister for Social Services, **Mr Mike Lubienski**, Assembly lawyer, and **Ms Donna Davies**, Head of Vulnerable Children Policy, Welsh Assembly Government, gave evidence.

**Q54 Chairman:** A very warm welcome to you from the Welsh Affairs Committee. For the record, could you introduce yourselves, please.

**Ms Thomas:** I am Gwenda Thomas AM, Deputy Minister for Social Services.

**Mr Lubienski:** I am Mike Lubienski, Assembly lawyer from Welsh Assembly Government legal services.

**Ms Davies:** I am Donna Davies. I head the policy on vulnerable children in the Welsh Assembly Government.

**Q55 Chairman:** Could I begin by asking you a question about process. There has been a great deal of speculation about process here and in the Assembly. Do you think that publishing the proposed Order and referring it to an Assembly Committee for pre-legislative scrutiny prior to its clearance by Whitehall has helped or hindered the LCO process in this case?

**Ms Thomas:** It is my personal view that if there is agreement before the scrutiny process commences, then that facilitates the process.

**Q56 Chairman:** Do you foresee that this situation will arise again?

**Ms Thomas:** Hopefully, in the main we all have the same aim; that is to promote social welfare. A good example of an LCO being given a fair wind is the Domiciliary Care LCO, where there was agreement before the process started and that LCO is now ready to be presented to the National Assembly next week.

**Q57 Hywel Williams:** Good afternoon. Is the scope of the revised Order broad enough to implement all the policies that the Assembly Government may seek to pursue under *One Wales*?

**Ms Thomas:** I think it is. I think that was one of the main aims, to have as wide a scope as possible, so that any Measures that any future Welsh Assembly Government would wish to present would be covered by the LCO. The scope is wide. It will cover children and young people from birth up to the age of 25. The scope of the LCO, I believe, is wide enough to allow Measures of a wide range to be introduced.

**Q58 Hywel Williams:** Could you give us something more appropriate in terms of the ways that the legislation would make a difference to the rights of vulnerable children in terms of what the Assembly Government can do?

**Ms Thomas:** One of the main aims would be to reform and consolidate the law in relation to the welfare of all children and young people. That would be a major step forward and work on that could start from day one. The Child Trust Funds—not the concept of the fund itself—that is not devolved—but certainly contributions or subscriptions into that fund—could be legislated for, and, also, we could be introducing Measures such as free childcare places.

**Q59 Mr David Jones:** I find your last proposal quite remarkable. Putting money into Child Trust Funds?

**Ms Thomas:** Indeed. Yesterday we had an announcement in the Welsh Assembly where the Welsh Assembly Government is going to increase its contributions from £50 a year to £100 a year for children who are being looked after. The UK Government, I am delighted to say, has also decided to contribute another £100 on a UK basis. Therefore, children being looked after in Wales, so long as they have been in care for a year from 1 April last year—so they are at the point where there has been a year now—for each year that the children are being looked after, £200 will be paid into the Child Trust Fund account so long as they qualify for that fund in the first place.

**Q60 Hywel Williams:** Looking at the limitations of the current settlement, can you give the Committee specific examples where those limitations have prevented the Assembly Government from achieving its objectives?

**Ms Thomas:** Some of the limitations are quite obvious but it might help if I explain the way the policies and structures for children's services in Wales differ. The current settlement may not always concur or provide for a Wales approach. For example, we do not have children's trusts in Wales; we work on a partnership basis instead. That requires the co-operation of all partners. The LCO therefore would allow us to place greater responsibility on the partners—public bodies that are devolved, of course—in discharging their functions to support children and their families.

**Q61 Hywel Williams:** Can the Committee take this as an indication of what the Assembly Government are planning to do if the proposed Order were approved? This is one example, the responsibility on public bodies.

**Ms Thomas:** Yes, indeed.

**Q62 Mark Williams:** Minister, good afternoon. Turning again to the existing powers you already have, how do you respond to those challenges that more could have been done through existing powers and increased resources? I refer, for instance, to the general theme in Gofal Cymru's evidence that better implementation of resources would be a more appropriate way forward rather than new legislation. How do you respond to that?

**Ms Thomas:** One would never say that more resources would not help any situation, I am sure, but I would like to say that we aim to bring Welsh solutions to Welsh situations. The devolution settlement does offer this. The second Government of Wales Act does provide for this to happen. I do think it is not always a question of resources, but it is being able to introduce legislation that makes sense to the situation we are dealing with in Wales.

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**Q63 Mark Williams:** In terms of the whole process of pre-legislative scrutiny, you have talked a lot about the legislative constraints under the present legislation. Do you think it would help pre-legislative scrutiny if we were to have in the Welsh Assembly Government's Explanatory Memorandum details of those legislative constraints which would justify the Order?

**Ms Thomas:** There is a memorandum of agreement. That is included in the papers, I believe.

**Ms Davies:** Within the terms of legislation currently between England and Wales there are variations in terms of the way we set out the legislation and some of the areas in the organisational structures the Minister mentioned in terms of the partnerships. For example, in Wales, we would want—and it would enable us to do it where we have had limitations in the past—to be able to give support to families in greater areas on child poverty and vulnerable children strategy side of things. We want to be able to extend some of our support; in particular, in the area of children with disabilities, up to 25 years of age and, more generally, to extend our children and young people policies to children up to 25 years of age, which does not exist in current legislation

**Q64 Mark Williams:** That is very positive. Some of us would like to see the Assembly have that role and obviously support those goals very strongly. It would be useful, as part of the scrutiny process, not just having those positive goals you have in mind but also an outline of the constraints that lead you to that direction. That would be very helpful, over and above what is already there.

**Ms Thomas:** I am sure we can supply the Committee with that information. I do not know if Mike can help out on the issue of constraint.

**Mr Lubienski:** With regards to the plan to have a consolidation and a rationalisation of childcare law, there are some aspects where we feel the current legislation is insufficiently flexible. An example of that is the fact that children who need to have respite care are treated in the same way as children who are fostered or looked after by local authorities over the long term. Another example is the fact that children who are placed with family or friends are treated in the same way as those who are in foster placements. There is no differentiation between the kind of vetting approach that there is for foster carers and families and friends with whom a child might be placed, and that leads to inflexibility. There are aspects of the law where later amendments have superseded the need for the complexity of the original provision. I cite as an example of that the provision which is in the Children Act around children's homes which has been superseded by the Care Standards Act to a large degree. In another way, legislation has become fragmented over time. I cite as an example of that the fact that the Assembly's Cymorth programme, by which social disadvantage for children and young persons is dealt with as one of the Assembly's major policies, is provided for by a power under the Education Act 2002. A rationalisation of the law to bring together

these kinds of powers in a more comprehensible way is something which not only would be more understandable for the public bodies which are operating the system but, also, professionals and, indeed, service users and end users would benefit from the entitlements given.

**Ms Davies:** I mentioned earlier the partnerships. One key area, for example, is that the way legislation is currently constructed, the responsibility and functions for lots of the areas is on the local authority. Under the new partnership agenda that we have, we would want to be using these powers to specify the functions that currently are on local authorities on to the local health boards and the trusts within Wales, for example, and different public devolved bodies within Wales. It would allow us to bring the partnership agenda together and, in relation to some of the issues you mentioned earlier in terms of resourcing, it would allow a greater pooling of resources as well.

**Ms Thomas:** Perhaps an interesting example would be the rights given to young carers. The UK Government is currently reviewing its strategy for carers and we are waiting to see what that comes up with. To have a means of legislating for anything that we identify in that review would be extremely useful.

**Q65 Chairman:** Given that review is about to report in June, is there a question of timing here that would benefit you? I am not suggesting the use of the word "tardy" at all, but there are a couple of weeks more to wait for that review.

**Ms Thomas:** I think we need to be well prepared for the results of that review. I myself have met extensively with groups of young carers and carers generally. I met with the all-Wales representative group of young carers who presented me with a ten-point plan—and I am sure many adult carers would not quarrel with the ten points in that plan I am committed to responding to that in the first week of June, which, coincidentally, is also Carers Week. We need to be able to respond very quickly to what young carers and other carers are telling us.

**Q66 Mr David Jones:** Why did you decide to adopt the LCO route rather than to seek framework powers under the Westminster legislation?

**Mr Lubienski:** There are times when it is convenient to use a framework power in a Westminster bill but it depends very much on what the particular opportunities are in terms of the bills going forward at that particular time, what the legislative programme is of the Assembly Government, and within what timescale the Assembly Government seeks to achieve its means.

**Q67 Mr David Jones:** There were no opportunities in the Westminster legislative programme for you to slot this particular proposal in?

**Mr Lubienski:** There is a Children and Young Person's Bill going through at present, but that has a much narrower focus and would not have really accommodated the type of Legislative Competence Order that is sought here.

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**Q68 Alun Michael:** You have made some reference to the fragmentation and inconsistency in the law in what you have said already. How will you make sure that your own policy and legislation, in other words the way you use the potential for Measures as a result of the Legislative Competence Order, in respect of vulnerable children is consistent and coherent?

**Ms Thomas:** Well, children and young people policy is a cross-portfolio responsibility and you will know that the Welsh Assembly Government does have a Children's Minister whose role is to co-ordinate and have responsibility for children's matters right cross the portfolios. We also, of course, have a dedicated Sub-Committee of Cabinet for children and young people on which the First Minister sits. This group meets monthly and discusses issues, the aim of which are to ensure that policies and their delivery are joined up across portfolios. Children's legislation is complex, of course, and cast across a number of statutes, updating and reforming the law, therefore, into a single framework and rationalising all of the different aspects of the law, I think, is very important indeed.

**Q69 Alun Michael:** Indeed. It is a question of how that is achieved because you have been critical of the current situation, understandably so, for its fragmentation and in scrutinising the proposal that we have before us in this Legislative Competence Order we are saying what difference will it make? How will you use the powers in the Order to make sure there is consistency and a lack of fragmentation in the future?

**Ms Thomas:** I think that rationalising the laws should ensure that there is at least less fragmentation and I would certainly see that as a way forward. You will know that I chaired a group looking at services for vulnerable young children and one of the issues that arose there quite clearly was that it is quite difficult to identify and understand how implementation of various laws has panned out. We need to be able to do that. We need to know what we have implemented and what we have not, and that is only the first step I would think.

**Q70 Alun Michael:** Indeed, we both have some experience in working with young people within the system and know how difficult it is to get that consistency. Let me put it the other way around as well then: we have areas which are not devolved where there is an interface with the Assembly's responsibilities and local government responsibilities, so you have the Youth Offending Teams, the Youth Justice Board is not devolved, nor is criminal justice generally, but clearly there is an interface with the Assembly's responsibilities and those of local authorities within Wales for which they account to the Assembly. How would you see this Legislative Competence Order helping in the joint working in those areas?

**Ms Thomas:** I think that will remain a matter for all of us in ensuring that we work together. There is a competence that the National Assembly has got already as I understand it, and I am sure the lawyers

here will say if I am wrong, that although we do not have competence on criminal justice we are already able to create criminal offences insofar as they offend against laws that we have devolved to us. I can see that there is scope there to look at introducing new laws and thereby perhaps defining the issue of children's services and the rights of children and young people more clearly.

**Q71 Alun Michael:** There is also a responsibility on the Assembly, of course, to co-operate with non-devolved bodies for the reduction of crime and things like that.

**Ms Thomas:** Indeed. The United Nations Charter on the Rights of the Child is a very good example of that where the Charter does not place non-devolved issues and the Charter was adopted many years ago by the UK Parliament and underpins the seven core aims of children's policy in Wales. It is a very good example and the Charter itself should be able to allow us to work together to try and seek agreement as far as is possible on non-devolved issues.

**Ms Davies:** In terms of you mentioned about the interface with non-devolved bodies, like Youth Justice, the LCO does allow for co-operation with these clearly as the existing law does and that still would be the case under our protocols. What we clearly could not do under this Legislative Competence Order is impose new functions, but there are duties of co-operation and clearly there would have to be that ongoing interface.

**Q72 Alun Michael:** It is a two-way process.

**Ms Davies:** It is a two-way process. In terms of safeguarding and wellbeing, that could not be achieved without the co-operation of devolved and non-devolved bodies. In terms of what I mentioned earlier about how we would take things forward in a different way to the benefit of Wales, in a practical sense no-one would deny, even our colleagues in England, that bringing together and consolidating and rationalising the law, in particular for practitioners on the ground, would be very, very helpful because it is very convoluted and can lead to children not always having the services they are entitled to because of misunderstanding. More importantly, within Wales it is to allow us to take forward the partnership agenda so that we would be able to get better co-operation against the partnerships about functions that we would place on them in respect of children.

**Q73 Alun Michael:** That is very helpful. Can you say whether there are powers that would be given to the Assembly in this Order, or as a result of this Order, which you cannot foresee being used at least in the short-term?

**Ms Thomas:** Within the legislative competence we will be defining Measures and those individual Measures will be considered when they are presented and on their own merits, but I cannot see that I would identify any issue.

**Ms Davies:** Clearly, as we said, if our principal aim first of all is to have consolidation and a new piece of legislation for children it means it has to be

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broad because it has to restate the law as we see it today, what the short-term vision is, but also provide enough flexibility for developing policy to the long-term vision and what we can achieve.

**Q74 Chairman:** Just to sum up this area, is it the case, Minister, that the intention will be to actually achieve an overall strategy for vulnerable children?

**Ms Thomas:** Indeed. Very shortly, I will be introducing a wide consultation process in Wales with a view to establishing a strategy for vulnerable children.

**Ms Davies:** The intention is later this summer to consult on a strategy for vulnerable children, but clearly this is not just vulnerable children in one context, this would cover legislation for all children. Clearly there are linked strategies on how we want to take poverty forward in Wales, and this LCO will cover a lot of areas on that. The ultimate aim is the new Act and how we recast it for Wales to allow us, as I said earlier, to have functions on public bodies other than local authorities.

**Q75 Alun Michael:** I just want to be clear about this because clearly this is an area where it is very important for the two aspects to be complementary. On the one hand, there are the needs of vulnerable children, which essentially the Assembly is in the lead on and is seeking to have a situation where you can bring things together and be coherent, and the other side of that equation is dealing, for instance, with young offenders who may actually increase their vulnerability as a result of their offending as well as increasing the vulnerability of the community on which the Assembly has a responsibility under the 1998 Act to assist and co-operate in the reduction of offending. There is a two-way process there, is there not, where the two things have to dovetail: the Assembly in its policies as well as its development has to assist with the crime reduction approaches and, on the other hand, you are looking to non-devolved bodies to assist the Assembly in work with vulnerable children. Have I expressed that correctly?

**Ms Thomas:** Yes, I think so. To me, this is a very important aspect. It is crucial that we do work together on this issue because clearly the responsibility on youth justice rests with the UK Parliament, but once the children are returned to their communities then the Assembly's responsibility kicks in. We need continuity and we need to try and ensure there is an overlap and they are not under one responsibility one day and another the next day. We need to talk about the bridge between one and the other.

**Q76 Mr David Jones:** Ms Davies, you referred a moment ago to this issue of co-operation and, in fact, I think the matter we are talking about is Matter 15.5. I do not know whether you want to look at it. You probably remember it.

**Ms Davies:** Bodies, yes.

**Q77 Mr David Jones:** The expression is not simply "co-operation" but "co-operation and arrangements". What does that expression, "arrangements" mean?

**Ms Davies:** This is a restated position that currently exists in the Children Act 2004. It is the arrangements, for example, on which there are some things we would not want to depart from in England and Wales in terms of between the Assembly Government and the partners in terms of local safeguarding boards and safeguarding children. The arrangements are the actual practical procedures and the interface between how those bodies are set up and set up different panels. For example, on local safeguarding boards within different areas in England and Wales we would have to make sure that the police and youth services are involved. It is actually the statutory arrangements that you agree with both parties on how you take forward the functions of those boards.

**Q78 Mr David Jones:** There is no suggestion that might cause conflict with non-devolved areas?

**Ms Davies:** No, no more than would be the position now because that has been happening for several years.

**Q79 Nia Griffith:** If I could turn to the question of definitions now, if I may. We have touched on some of these issues. What reassurance can you give the Committee that the terms used in the proposed Order will not cause confusion or difficulty because of different usage of the same terms in legislation which is pertaining to England and Wales? One of the examples we have is the use of "wellbeing" where you include the idea of children's rights in that whereas it is not in the England and Wales legislation.

**Mr Lubienski:** If I can help as far as I can on that one. Very great care has been taken in the words that have been chosen so that where there are particular phrases which have reference points in UK legislation, those are clear and apparent. Even though in the example you cite of "wellbeing", you are correct to say that the last line of "securing [the] rights" is added on, nevertheless the fact that it replicates exactly the other elements means that it is flagged up very clearly as something which equates to the same concept of "wellbeing" in the Children Act 2004 in England and Wales and equally, in fact, in the Childcare Act 2006. A great deal of thought has been given to try and marry up language and phrases of that sort to ensure that the concepts are clear.

**Ms Davies:** I would just like to build on that. It was a decision of the National Assembly Committee with ourselves to add rights because, as we know, within Wales we have a rights-based agenda for all our policies and programmes and we thought that was very, very important to bring greater strength to everything that we do because all of our structures—I feel as though I am talking about the partnerships

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all the time—whose formulation is to have the voice of the child involved in everything they do. We are putting that on the statute to make very clear what our intentions are.

**Q80 Nia Griffith:** If I could turn to the issue of vulnerable children. Matter 15.1 of the revised Order now refers to “safeguarding and promoting the wellbeing of vulnerable children”. There is also a broad definition of “vulnerable children” in the interpretation section. Are you content with these changes and, if so, what were the reasons for excluding any reference to “vulnerable children” in the original Order? Would you like to explain why this has been put in like this?

**Mr Lubienski:** When we came to recast 15.1 to make it apply to the functions of public authorities as opposed to having an open remit, there were a number of adjustments that had to be made. We wanted to ensure that we included the idea of safeguarding and promoting the wellbeing of children but, given the breadth of the definition of “wellbeing”, if we had been safeguarding and promoting wellbeing across all the different aspects of it, including education and health, we would have been overlapping into the education and health fields which we did not intend to do. Therefore, we have focused in relation to that aspect, on the particular vulnerable children that we are seeking to address in that way. Having said that, by the same token there were certain elements of our intended scope that were excluded and, therefore, we wanted to include as well “safeguarding children from harm and neglect” which applies to all children because, in a sense, all children are vulnerable to harm and neglect in some measure. The third strand of reducing inequalities was in the original draft of the LCO but was one of the last Matters at 15.6 or 15.8, and was phrased as “promoting equality” and, again, we altered the wording slightly of that, but that theme was there before. That is how we arrived at the three strands in 15.1 in the current draft.

**Q81 Nia Griffith:** Then there is the issue of child poverty and the Assembly Committee’s recommendation is that there should be a specific reference to “child poverty” on the face of the Order. Would you agree with that? If not, why not?

**Mr Lubienski:** The difficulty was that there was some thought about whether the words “child poverty” should be used. “Child poverty” is a term which is used in different contexts but very commonly to do with relative poverty, so there was a danger of giving it a connotation which was limited and not broad enough. In many regards, given the fact that the word itself might have a connotation of being only about material poverty, and again that might not suit the breadth of the Assembly’s agenda, it was better to have a phrase, such as “reducing inequalities” which, again, chimes with UK law as well and covers the full scope of any agenda on poverty that the Assembly will develop.

**Q82 Nia Griffith:** Yet you have got the term “vulnerable children”. Can you perhaps explain a little bit more to us why you have gone for the one term but you are not using the other one, as it were?

**Mr Lubienski:** In a sense it is about what happens to work. I do not think I can give you a neat answer as to why one was used and one was not. It is about a process of trying and testing and working out what the scope of particular words means with the references they have to other legislation. I am not sure I can give a neat easy answer to that.

**Q83 Nia Griffith:** They both raise this question of what is exactly meant by them, do they not, and people will probably find them quite difficult to understand.

**Ms Thomas:** I know Donna wants to come in as well, but from a lay person’s point of view, perhaps, what I am content about is that the LCO as it is laid will allow us to look at child poverty issues and that is the important thing. Rather than perhaps make it too narrow a definition, I feel much happier and more comfortable with the LCO as it is and that will allow us to look at the issues that you raise.

**Ms Davies:** Probably the easiest way is to make two distinctions. If you look at poverty on its own, “poverty” in the LCO was just a title for the LCO. We wanted to be broad and trying to define it in the LCO would have restricted us. Through Measures we can define there are different aspects now, today and in the future of what we may want to do to assist in the poverty agenda we mentioned earlier today. To define that now would restrict what could do. In terms of “vulnerable children”, as Mike just said about some of the definitions, it is quite important because the change in that had to be linked into how we constructed 15.1 where under the three ways it is set out it suggests this applies to all children, it applies to children who are vulnerable, so we had to define what “vulnerable” is because the services to them and different parts of the Matters in terms of some of the social care services would apply to them, but then we have got another leg that deals with reducing inequalities which would cover children who, if they did not have extra services, would be disadvantaged, for example, through poverty or disability or some reason like that. It was quite important that we defined that within this.

**Q84 Mr David Jones:** Reverting to the definition of “vulnerable children”, there seems to be a bit of an inconsistency between paragraph (b) and paragraph (c) there. (b) defines vulnerable children *inter alia* as those whose health or development is likely to be “significantly impaired” without provision for them of social care, whereas in (c), where we are still talking about a health condition, a physical or mental impairment, the word “significant” or “significantly” does not appear. Can you explain that?

**Mr Lubienski:** Again, this is a definition where the reference point has been as the definition of “children in need” in section 17 of the Children Act. Section 17 of the Children Act refers to children with a disability and defines them in relation to their

physical or mental impairment. That is the reference point that has been taken as the basis of the scope for the children who will be covered by this Order.

**Q85 Mr David Jones:** Is there not an inconsistency though? In one case you have got “significant impairment” and in the other you have not. It does seem inconsistent.

**Ms Davies:** My recollection of the view of Welsh Legislative Counsel on this is that one is to cover, as Mike just said, the strict definition of children who are disabled and in need and the other one was for those potentially sick children who are not disabled, if they are children with cancer for example, where if they were not having a service they potentially would be significantly impaired without the service. There is quite a distinction between the two. We are quite happy to write to you to give you a fuller explanation on that.<sup>7</sup>

**Mr David Jones:** That would be helpful.

**Q86 Hywel Williams:** Can I turn now to some cross-border issues. You say in your memorandum that there is: “an increasing difference in approach between England and Wales in the policy planning and delivery of services for children and young people”. What are the most significant differences?

**Ms Thomas:** I think cross-border issues have always been with us and that will not change at all with this LCO. The movement of children between local authorities and between Wales and England is there and traditionally we have dealt with those as they arise. This LCO will not change at all the fundamental responsibility of an authority that places the child in the first place, that responsibility will clearly stay with the placing authority wherever the child is placed. We are seeing more movement of children from England to Wales than we are the other way, but I do not think that is either here nor there in regard to this LCO. We all have the same aims to seek to ensure the welfare of those children, and I will ask for the opinion of lawyers here but I do not see that cross-border issues will be any different when this LCO is a reality than they are now.

**Q87 Hywel Williams:** So there would not be any significance affecting the way that policies and procedures are managed in practice from day-to-day?

**Ms Thomas:** I do not think so. These have been done by way of contractual agreements or voluntary agreements between authorities, but with the introduction of that legal responsibility of the placing authority I think that in itself safeguards the child that is being looked after.

**Q88 Alun Michael:** Can I just ask a supplementary on that before I ask my question. There are some issues around and one example that we have had recently has been the issue of specialist physiotherapy services for children with muscular dystrophy, which is not a criticism of the Assembly because similar problems exist between the

availability of services in different regions of England as well. It is a problem of making sure that a child gets the appropriate specialist service that they need. Will the powers that you are given under this Legislative Competence Order help you in making sure that children get the appropriate specialist service, whether it happens to be within Wales or outside Wales?

**Ms Davies:** The Order and other Measures that we are securing through the Bill means we will be looking to secure more provision locally that is specialist provision. We can never deny that there will be a need for children to be placed across borders for the reasons you have just said. Clearly, in doing that, in current law it will be restated in the consolidation, there are quite clear duties, for example, a child from Wales placed in England having secondary care or tertiary care, which you have just explained, depending how it is commissioned, it would be the responsible Local Health Board in Wales that would remain responsible for covering the cost, as is the case within the PCTs in England.

**Q89 Alun Michael:** The end result of this is both to place the power and responsibility on both the Assembly and the bodies that are responsible for this?

**Ms Davies:** Absolutely. More recently, as we said in relation to cross-border issues, we have just changed the law within that area with the Department of Health to try and strengthen those arrangements to make sure that lines of accountability in terms of resourcing for these children are very clear.

**Q90 Alun Michael:** Thank you. Thank you for the indulgence of the Chairman. Can I come on to the issue I want to ask about which is the scope of the proposed Order in respect of reasonable punishment. Unless I am mistaken, I thought that this issue had been dealt with at a fairly early stage with the Presiding Officer making it clear what the legal advice was, which is that is not a devolved issue and would not be an issue that was dealt with through this LCO. In your letter to the Chair of the Assembly Committee on 22 January you said: “In our view, a power for the Assembly to legislate so as to protect children from harm caused by parents or people with parental responsibility physically punishing them could relate to an appropriately worded Matter in the social welfare field . . .”. Is this still the Assembly Government’s view and what exactly does it mean?

**Ms Thomas:** As you know, in the Assembly there has been majority cross-party support for the Measure to ban corporal punishment in all settings, including, of course, in the home, as well as for the promotion of positive parenting. The present Assembly Government remains committed to this agenda and it is our view that the defence of reasonable punishment enshrined in section 58 ought to be removed so that children and young people enjoy the same level of protection in law as adults do. We see this primarily as a children’s rights issue. To relate that to this LCO, you know that the

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part of the LCO that referred to reasonable punishment was dropped and my view, and that of the Assembly, was that the remainder of the LCO was well worth salvaging. That is important. The issue of reasonable punishment is a matter for another day, and that is not before us today, but the LCO as it stands is still worth pursuing.

**Q91 Alun Michael:** I raise it partly because there was a reference to it in the Assembly Scrutiny Committee's secondary report. Might it not be sensible to make sure that the Explanatory Memorandum makes clear the situation that you have just stated, which is admirably clear?

**Ms Thomas:** I think we can do that or provide it.

**Q92 Mr David Jones:** Is there any intention to change the line of accountability for the Children's Commissioner to the Assembly rather than to the Welsh Assembly Government?

**Ms Thomas:** No, I would not say so at present. To the very best of my knowledge, this is not an issue at the moment. The LCO in itself in the future could look at this, I suppose, as it could look at anything else by way of a Measure, but I am not aware at the moment that that is an issue.

**Ms Davies:** In terms of the LCO, as you said, this gives quite broad powers and devolved powers to the Commissioner for Wales and clearly we do know, and I am sure the Deputy Commissioner must have mentioned this, they have been having a review about looking at extending their role and remit and the Assembly will have to consider that in the future. At the moment it is broad enough to cover all the functions that currently exist or any new functions that the Welsh Assembly Government wishes to place on the Commissioner. That is clearly something for a Measure in the future.

**Q93 Mr David Jones:** Yes, I understand, but the Committee would like to know if there is any intention to do so. I understand from Ms Thomas' reply that at present there is no such intention.

**Ms Thomas:** That is to the very best of my knowledge.

**Q94 Mr David Jones:** The Children's Commissioner called for an express reference in the Order to whistleblowing and there is reference to "advocacy services" but not to whistleblowing *per se*. Can you explain why that was excluded from the draft?

**Mr Lubienski:** Whistleblowing is covered by the LCO. There are a number of aspects of the matters by which it might be covered. It is an aspect of safeguarding children from harm and neglect in 15.1. In relation to social care services it might be a requirement that will be placed on the providers of social care services to have relevant procedures and

so on to deal with it. The reason that the word itself has not been used in the Order is that it does not have a statutory definition.

**Q95 Mr David Jones:** I appreciate that, but it should be possible to put it into some form of legalistic language so it could be used in the LCO.

**Mr Lubienski:** On the occasions that there are references to the activity of whistleblowing, such as in statutes like the Public Interest Disclosure Act, there is a fairly lengthy set of wording to describe the breadth and scope of what the activity is and, therefore, in a kind of Order of this sort where we are trying to set out in relatively few words the legislative scope, it was felt that it was not necessary because that type of activity was clearly covered by the wording at present.

**Q96 Mr David Jones:** Was there any consultation with the Children's Commissioner on this particular issue?

**Ms Thomas:** The Children's Commissioner has been involved in the process of scrutiny in the National Assembly. I do not see that the LCO as it is presented would exclude any Measures in the future that would be to do with whistleblowing. I cannot see why it is necessary to itemise issues that might arise when the LCO would obviously embrace all of the issues that are to do with child welfare, and whistleblowing obviously, as we know from the Waterhouse report, the Adrienne Jones report, all of these reports mention whistleblowing. I cannot see that the issue of whistleblowing is in any way excluded as is any other issue because the LCO is wide in its scope.

**Q97 Mr David Jones:** The Children's Commissioner is sending us a memorandum which I think will touch, among other things, on this particular issue and we may well need to revert on that.

**Ms Thomas:** We would be grateful if you would share that with us.

**Q98 Chairman:** Thank you very much for your very helpful evidence. The Committee looks forward to receiving a further memorandum.<sup>8</sup> Could I also place on record my intention to speak with the Chair of the Committee that has been dealing with this in the Assembly, Karen Sinclair, to discuss with her what we have been discussing today, not only the important issues you have raised but also the points that they have raised in their Committee Report.

**Ms Thomas:** Yes.

**Q99 Chairman:** I think it needs to be said and placed on record that we are very committed to working with you and the Committee to ensure that the very best LCO is achieved and that vulnerable children will benefit as a consequence of our work here and your work in the Assembly.

**Ms Thomas:** I very much welcome those remarks.

**Chairman:** Thank you very much.

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*Witnesses:* **Huw Irranca-Davies MP**, Parliamentary Under-Secretary of State, **Mr Geth Williams**, Head of Legislative Policy, Wales Office; and **Mr Bruce Clark**, Cafcass, gave evidence.

**Q100 Chairman:** Welcome to the Welsh Affairs Committee once again. Could I ask you to introduce yourself and your colleagues, please.

**Huw Irranca-Davies:** Thank you, Chairman. It is a pleasure to be here with you again on this scrutiny role. As well as myself, the Junior Minister in the Wales Office, we have to my right here, Bruce Clark, formerly of DCFS, only three weeks ago, in fact, now seconded to Cafcass and he was the lead official from DCFS on this Order, so he is an expert in many ways. To my left is another expert, Geth Williams, Head of Legislation and Policy. Hopefully Chairman, between the three of us we should be able to answer most questions.

**Q101 Chairman:** Thank you for that. Could I begin by saying that we welcomed the response of the Secretary of State when he appeared before us some months ago now when we were discussing the LCO process that he was prepared to institute a review so that we can all learn from the very early experiences that we have had in this process. As someone once said to my late father when he was elected to a trade union position as a young man, “Congratulations, all your experience is in front of you”. I think we can all learn from that advice. To begin with, this proposed Order is different from the version originally laid before the Assembly and scrutinised by the Assembly Committee. Do you share our hopes that this practice will be avoided in future and, if so, how?

**Huw Irranca-Davies:** I do indeed. As we have learnt through this process, one of the things we are coming to be aware of is that it would be better if through all the various partners, Welsh Affairs Select Committee being one of the main ones, but also Welsh Assembly Government, Whitehall Departments, Wales Office, that we bring forward these Orders in a way that is planned and programmed in order that there can be effective scrutiny, but more effective joint scrutiny. That need not necessarily mean sitting in the same room together, but certainly more simultaneous scrutiny so that we end up with the same points at certain milestone paths of the Order in Council. Certainly, as you mentioned, the Secretary of State has made clear and, in fact, has instigated already at least one meeting with MPs to look at how we can better improve the process of scrutiny on Orders in Council. He is also very interested, I have to say, in hearing from the experiences and the insights of the Welsh Affairs Select Committee, and we would welcome your general and detailed input as to how we take the process forward. Your point is well made. In terms of this particular LCO, I should say that whilst I would also prefer to have those milestones and that programme in place now, the improvements that have been made on this Order as it faces you today are undoubtedly improvements. It is a good LCO that sits in front of you, but that is for us to scrutinise today.

**Q102 Chairman:** We welcome that commitment and the commitment of the Secretary of State. Could you very briefly outline the differences between the original and the revised Order and explain why these changes were made.

**Huw Irranca-Davies:** Indeed. I am happy to do so, Chairman. One of the main changes and improvements has been a stronger focus on the functions of public authorities. To bring clarity to this there has been a lot of goodwill between Welsh Assembly Government officials, the Wales Office and DCFS officials on what is the intent of this, what is it trying to do, what does it say on the tin, what does it really mean by this. One of the things that became increasingly clear was to put this in the realm of public authorities and their duties towards social welfare, issues of child poverty and so on, were very much where it should be framed. There is a much clearer definition within the Order at Matter 15.1 relating to the functions of local authorities and other relevant public agencies. There are also two further Matters relating to facilities for social and physical training and educational activities, 5.18, and recreational facilities and activities because of the bearing that they have also within sport, recreation and leisure on the wellbeing and social welfare of children and young people. Also, the inclusion of special guardianship support services and adoption services—I put the emphasis on “services” rather than simply “adoption”—in Matter 15.2, which again extends slightly the scope, but extends it appropriately to cover those areas that should fall within this remit of the social welfare of children and young people. Other aspects, very briefly, are the emphasis on “reducing inequalities” rather than “promoting equalities” in wellbeing between children and young people. This is because the terminology “reducing inequalities” is consistent with the terminology with other UK statutory provisions and policy initiatives. Also, changes to the very definitions of “vulnerable children”, which I am happy to go further on, and “persons formerly looked after”, modifying those definitions. Those are the main changes and they are, as I say, to put it in a colloquialism, to make sure that the scope of this Order is right, one of the roles of the Wales Office in liaison with Welsh Assembly Government, neither too broad nor too narrow, and it does what it says on the tin.

**Q103 Hywel Williams:** Good afternoon, Minister. Looking at the fundamental need for this LCO you heard evidence earlier on this afternoon that some people are of the opinion that perhaps it is a resource question rather than a competence question. Could you just say what the principal purpose of the proposed Order is? What does it enable the Assembly to do that it cannot currently do?

**Huw Irranca-Davies:** Yes, indeed. I am very happy to answer that. Certainly we are looking at devolved areas and questions are asked about what is the value-added that this brings forward, and I know in her evidence to you the Welsh Assembly Government Minister has talked about the pulling together of what is currently quite a fragmented series of legislation that has built up over years relating to children and young people. That is one aspect. On its own, you could well ask me what difference will that make, but I think the ability to give that clarity and to

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bring up to speed all the legislation applying to children and young people in the devolved areas in Wales will be a significant advantage, not only to those who might be looking to the Children's Commissioner as to what their rights are but also in terms of delivery. As we know, as legislators, sometimes actually streamlining and clarifying exactly the way the legislation works can be of immense advantage to agents out in the field delivering these services. I can go further as well to clarify. Certainly, in immediate terms the issue of Child Trust Fund accounts is a very intelligent way forward to deliver additionality that does not rely on the Treasury to do it but relies on the Welsh Assembly Government working with local authorities to actually put subscriptions into the Child Trust Fund is a very inventive way that can immediately happen, or in the immediate future, in the very short-term. Free childcare places for two year-olds in the greatest need is an immediately identified issue that comes out of this LCO. Requiring local authorities to provide services to support parents as well in terms of the wellbeing of children is immediate. In the longer term, what comes out of this LCO is ensuring the welfare of children and young people in Wales right up to 25 years-old with Wales manufactured solutions to recognise that there are differences in policy and strategy on the floor, placing duties on public authorities within Wales to demonstrate their contribution to ending child poverty and tackling poverty and social exclusion, and we know in Wales, as you indeed will know, that there are additional ways in which the Welsh Assembly Government is committed and has shown on the ground it is committed to tackling child poverty.

**Q104 Hywel Williams:** Can we move on to the question of an LCO rather than framework powers. There has been a debate as to which way would be most appropriate, particularly in respect of the whole smacking children issue, of course. You are certain the LCO is the way we should be going rather than using the framework powers in a Westminster Bill, for example there is the Children's and Young Persons Bill which is now going through? Would that not have sufficed?

**Huw Irranca-Davies:** Not quite. It is always a moot point as to can you find an appropriate England and Wales Bill currently going through that would fit exactly this. I think the level of detail that has gone behind this and the stage we are at now with what I think is quite a very well-defined and well-worked LCO in front of us has been of great benefit. If there had been an entirely appropriate Bill that would have given us that ability to really work at the Welsh aspects of this then we would have considered that, but I do not think it quite fitted with the legislative programme from last year. This has given us the opportunity, and hopefully will give the Welsh Affairs Committee and the National Assembly for Wales respective committee, to really get under the skin of this, which is, as I think I explained in my introductory remarks, a very Welsh approach to tackling the issues of vulnerable children.

**Mr Clark:** It strikes me, looking at recent years given that there is not a UK Government Bill relating to children and social welfare in every session, that colleagues in Wales are always left waiting and looking for an opportunity and wanting to test out the potential scope of planning legislation within the Westminster legislative programme in order to achieve changes that it wants to achieve. It does not seem to me to be inherently desirable from the Welsh Assembly Government's or the UK Government's points of view to have to always be looking for, "Is there a match this session or do we have to wait yet another year?" In future, neither will be beholden to the other and both can achieve things within the timescales that are appropriate for them.

**Huw Irranca-Davies:** But that would not preclude, if there were an appropriate Bill coming along, looking at that to see whether that could be made to fit, but on this occasion, no.

**Q105 Alun Michael:** You mentioned a few moments ago, Minister, that the consistent use of language is quite important. I think there have been some concerns that the use of terms in different ways in the proposed Order and use of terminology in legislation pertaining to England could raise a degree of difficulty, and of course we have been looking at cross-border issues in recent months as a Committee. Are you absolutely clear that there is no danger of confusion in terms of differences of language?

**Huw Irranca-Davies:** Yes, I believe we are. I believe we are because of the amount of work that has gone into this point. If I can explain some of the main definitions it might be of help. In terms of "vulnerable children", where does that reworked definition come from? It draws together existing definitions from various pieces of legislation. For example, paragraphs (a) and (b) closely follow the wording of section 17 of the Children Act 1989 and captures those children currently within the scope of the definition of "children in need". Paragraph (c) covers those children who in section 17 of the Children Act are referred to as "disabled", but uses the more up-to-date description taken from the Disability Discrimination Act, the phrase "physical or mental impairment".

**Q106 Alun Michael:** This demonstrates exemplary command of the legal language.

**Huw Irranca-Davies:** Yes.

**Q107 Alun Michael:** But you have looked at it with this point of view in mind to make sure that there is no danger of potential misinterpretation or nuances of meaning causing legal problems?

**Huw Irranca-Davies:** We are very confident. I think you are right to raise this issue. It is always an issue of concern, particularly with LCOs and devolution of powers, to make sure that the legal interpretation of what we are putting through is correct. We are confident, as confident as you ever can be with legal draftsmanship, that these are the correct definitions and terminology.

**Q108 Alun Michael:** In Matter 15.1 of the revised Order there is a reference to “safeguarding and promoting the wellbeing of vulnerable children” and there is a new and broad definition of “vulnerable children” in the interpretation section. Obviously we are conscious that there have been changes for various reasons. What do those amendments do? Do they add to the scope of the revised Order compared to the previous Order? Do they change anything, in fact?

**Huw Irranca-Davies:** I am just checking the actual point. Yes, they build on what I began by mentioning, pulling together definitions that make sure that we extend the scope of the definition of “vulnerable children” to as wide and appropriate a group of children as possible, and that includes children in care or subject to care orders and children looked after by local authorities as well. Within that section you are referring to we are confident that covers, to go back to what I said before, what it says on the tin, it does not go any further than it should.

**Q109 Alun Michael:** Finally, should the concept of “play” be included within the definition of “wellbeing”? As you will be aware, the importance of play under the UN Convention on the Rights of the Child is considerable and in Wales there has always been a considerable emphasis on the place of play within children’s development. Should that be made explicit, do you think?

**Huw Irranca-Davies:** There was great discussion and debate over this, including within the National Assembly for Wales Committee which was looking at this. I must declare an interest as a former member, and honorary member, of the Institute of Leisure and Amenity Management, in which we regularly and professionally argued the case that play was encompassed within the field of recreation, and so on.

**Q110 Alun Michael:** You are not saying your background is limited to language, are you?

**Huw Irranca-Davies:** No, it is far wider. Certainly we would anticipate that play would fall within the fields that we have extended it to, which include recreation and so on, and certain professional bodies, he says from his own past, would interpret it in that way as well. It is an important point because play falling within recreation needs to be within here.

**Q111 Alun Michael:** Just a thought. It might be useful for that be made clear within the Memorandum, for instance, for the avoidance of doubt in the future.

**Huw Irranca-Davies:** Yes.

**Q112 Mr David Jones:** This is again on the definitions. I think you were here, Minister, when I asked the previous witnesses about what appears to me to be an inconsistency between paragraph (b) and paragraph (c) in the definition of “vulnerable children”. I appreciate you are saying that you are effectively duplicating current definitions, but it does seem to me, notwithstanding, to be an inconsistency

and I find it hard to see why the word “significant” or “significantly” is used in the one paragraph but not in the other when in both cases we are talking about health.

**Huw Irranca-Davies:** If it may be of help, Mr Jones, my reading of this would be that they are not mutually exclusive. However, if it is of help—

**Q113 Mr David Jones:** No, I appreciate that.

**Huw Irranca-Davies:** If it is of help, what I am quite happy to do is to get our officials to write and clarify why what I am saying is correct, that they are not mutually exclusive.

**Q114 Mr David Jones:** I do appreciate that, Minister, it just seems to me not mutually exclusive but rather inconsistent. A note of that sort would be very helpful.

**Huw Irranca-Davies:** We will do that.<sup>9</sup>

**Q115 Nia Griffith:** I would like to address cross-border issues. Obviously there are cases where vulnerable children in Wales receive services in England and *vice versa*, and I would just like to know how these cross-border issues will be addressed, particularly in the context of the Assembly Government’s enthusiasm for perhaps widening some of the differences of approaches between England and Wales.

**Huw Irranca-Davies:** Indeed. It is a fair question and I applaud the work of the Welsh Affairs Select Committee in looking at various cross-border issues at the moment. It is an area of quite right concern to see that it works properly. What I would say is it is undoubtedly the case that even at present there are established ways of working, conventions, protocols, that make it work. Both the Welsh Assembly Government Ministers in most areas and the Whitehall departments and the various public authorities on both sides of the border would find it bizarre and strange if that close co-operation on cross-border issues were not to continue. It might be worth mentioning that whilst this Order mainly confers function in relation to authorities in Wales, 15.5, for example, includes the British Transport Police. I use that as one example because within this LCO what it refers to, and I think it is has been referred to before on this Committee in your scrutiny, is the issue of “co-operation and arrangements”. We see that this is within the LCO, this is very much in the spirit of what is going on at the moment and we would not only expect it to continue but, frankly, we would be amazed if it did not continue as well.

**Q116 Nia Griffith:** If legislation and policy do diverge in England and Wales, do you see any issues on equality of provision arising?

**Huw Irranca-Davies:** There might well be, and this does depend on the Measures brought forward. There might well be issues of differences of policy that result in different practical experiences for individual children and young people on the ground,

<sup>9</sup> Ev 40; Ev 33

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that is undoubtedly true, and I believe the Children's Commissioner in her evidence mentioned that possibility as well. What we are looking at within this LCO is the impact upon children and young people that primarily come under public authorities in Wales. As such, there could be a divergence of policy. The discussion with English authorities will continue to go on, but under a devolutionary situation you cannot ignore the fact that, yes, there may be Welsh solutions for Welsh children and Welsh young people. They may well be different, there may be a contrast with individual experiences of people, but that is part of the benefit of devolution as well in that the Welsh Minister can bring forward solutions that recognise a different strategy and a different approach within Wales.

**Q117 Nia Griffith:** The scope of the proposed Order has implications for the Youth Justice Board, the police and the courts. What effect will the proposed Order have on each of these bodies, and how will the interface between them be managed?

**Huw Irranca-Davies:** There will certainly be no direct impact on the functioning of Youth Justice and other similar bodies which are retained areas of authority. Even though there are aspects of a local authority's duties for youth justice which touch on the safeguarding of people who come into the criminal justice system and preventing children and young people from coming into the youth justice system, the essence of the local authority's duties is in relation to assistance around sentencing. Youth justice is, therefore, outside the scope of this Order and it is important to be clear on that to the extent that it is possible to isolate individual provisions, such as the local authority's function under section 38 to provide persons to act as appropriate adults, for example, which it could be argued are more about safeguarding than protecting others or sentencing. It is worth saying, Chairman, that there is no Measure that comes out of this LCO that can impact upon a Minister of the Crown function without their consent.

**Q118 Mark Williams:** We had a very clear answer earlier on from the Assembly Minister on the scope of the proposed Order in respect of "reasonable punishment", in fact to smacking. Could you add to that clarity, please, Minister?

**Huw Irranca-Davies:** Yes, if it is of help to the Committee, because I know this has been an area that has had a lot of attention around this LCO and that is why I think it is important to re-emphasise that this is a very good LCO, that it does very much what it says on the tin. This is quite a specific, well-defined LCO that gives a competence to the Assembly to really make a difference to children and young people's lives, but it does not touch on the issue of smacking and reasonable chastisement. I know there are people who will continue to push forward that argument but it does not fall within this LCO. If it would help, the UK Government's position in respect of this LCO is that a prohibition on smacking would relate primarily to the substantive issue of criminal law as opposed to social

welfare fields, and that is where our position remains on this. That should not deviate from what is a very good, very effective, potential LCO here. It does not touch on that area and that is the reason why, we essentially believe that it is an issue of criminal law rather than social welfare.

**Q119 Mr David Jones:** Minister, you are assuring the Committee, are you, that this LCO and, indeed, no LCO could ever be used to devolve powers that conflicted with non-devolved areas, such as what we have just been discussing, social policy, criminal justice and the proposed ban on smacking?

**Huw Irranca-Davies:** Indeed, yes. I can give you that assurance from a UK Minister's perspective. It is something we discussed in some detail at the earlier stages with Ministers and, of course, you have had representations from the National Assembly for Wales Assembly Members as well. The UK Government firmly considers that a ban on smacking would not fall within field 15 of social welfare or any other field. Our view is that a prohibition on smacking would relate to criminal justice, which is not represented in Schedule 5. If you are asking for a degree of confidence that this LCO cannot do that, this LCO is very much fit-for-purpose but it is not that purpose.

**Q120 Mr David Jones:** What if after the making of the LCO the Assembly Government took a different view and attempted to introduce a ban on smacking? Would the UK Government then intervene?

**Huw Irranca-Davies:** That would be another day.

**Q121 Mr David Jones:** Yes, but what is your view now? It is quite clear that there is pressure within the Assembly for that, is it not?

**Huw Irranca-Davies:** At that stage, if it did ever come to that, having expressed the clear opinion of the UK Government here and now, and it has been our consistent view, then it would be an issue for legal decision and for the Attorney General to look at and make a decision.

**Mr Williams:** In any event, the smacking ban could not be implemented by the National Assembly via this LCO. Matter 15.1 relates to the functions of public authorities in relation to the safeguarding of children from harm and neglect, not to anyone else.

**Q122 Mr David Jones:** So we have your utter assurance, do we, Minister, 100% copper-bottomed assurance?

**Huw Irranca-Davies:** Yes.

**Q123 Mr David Jones:** That could come back to haunt you!

**Huw Irranca-Davies:** No.

**Q124 Mr David Jones:** What powers will be retained by the Government, that is the UK Government, in relation to vulnerable children and child poverty, other than, of course, the smacking ban that we have just discussed?

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**Huw Irranca-Davies:** All of the Crown functions. I have already mentioned issues like youth justice and the criminal justice system. There is an interplay at the fringes with Welsh Assembly Government, but those areas will not be touched by this LCO whatsoever. In fact, it would be a standard response in terms of all of the LCO process of devolution of powers that no Crown functions could be impinged on. Other aspects would include benefits. For example, whilst we are looking at a very intelligent way of delivering additionality into Child Trust Funds, this LCO does not give power over the wider benefit system. Child Support is another example. There are clear retained areas that are not included within this LCO.

**Q125 Mr David Jones:** And you very helpfully set them out in the table attached to the LCO.

**Huw Irranca-Davies:** Yes.

**Q126 Mr David Jones:** Do you consider that those retained powers will cause any difficulty to the Assembly Government?

**Huw Irranca-Davies:** I do not believe so. There is certainly a desire, both from the UK Government and the Welsh Assembly Government, on a range of matters, whether it is to do with child poverty or

elsewhere, to make sure that our combined policies are most effective. The nature of where we are with the Government of Wales Act means that there is clarity with retained powers and clarity with devolved powers, and that is part of the role of the scrutiny that the Welsh Affairs Select Committee is doing so very well. Collaboration, co-operation, looking at what works best, but also a recognition that there are powers that remain at the Westminster end and powers that are rightly put down closer to the people in Wales.

**Q127 Chairman:** Thank you very much for your evidence today. Can I place on record our particular appreciation as a Committee for your very positive remarks at the beginning of this session. I also wish to place on record the fact that we, as a Committee, intend to produce a memorandum for the Secretary of State when he is reviewing the process. That memorandum will include my discussions with various Assembly Members who have been, so to speak, at the coalface of this process and we will certainly value their comments to us and that is in the spirit of the co-operation and co-ordination that we are all committed to achieving here on this Committee.

**Huw Irranca-Davies:** Thank you, Chairman.

**Chairman:** Thank you very much.

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# Written evidence

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## Letter from Rt Hon Paul Murphy MP, Secretary of State, Wales Office to the Chairman

### PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED ORDER IN COUNCIL DEALING WITH VULNERABLE CHILDREN

I am writing to invite you and your committee to undertake pre-legislative scrutiny of the proposed Order in Council dealing with Vulnerable Children. 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 (CM7343) 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 and Members who speak regularly on Welsh matters 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 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 as well as those matters under consideration as a result of this Order.

May I take this opportunity to once again 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.

*19 March 2008*

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## Letter from the Chairman to Rt Hon Paul Muprhy MP, Secretary of State, Wales Office

### PROPOSED LEGISLATIVE COMPETENCE ORDER REGARDING VULNERABLE CHILDREN

Thank you for your letter of 19 March inviting the Welsh Affairs Committee to conduct pre-legislative scrutiny on the proposed Legislative Competence Order dealing with vulnerable children.

I circulated your letter to my colleagues on the Committee for consideration at our meeting earlier this week, 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 has today issued a press notice calling for evidence and outlining the broad areas on which it expects to focus.

*3 April 2008*

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### Welsh Affairs Committee Press Notice

#### PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED LEGISLATIVE COMPETENCE ORDER IN COUNCIL DEALING WITH VULNERABLE CHILDREN

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 (LCO).

At its meeting on 31 March the Welsh Affairs Committee decided formally to accept the Secretary of State's invitation to the Committee to conduct pre-legislative scrutiny of the proposed Order dealing with vulnerable children. The proposed Order, together with an explanatory memorandum by the Welsh Assembly Government, was published as a Command Paper by the Wales Office in March (Cm 7343) and can be found on the Wales Office website at:

[http://www.walesoffice.gov.uk/wpcontent/uploads/2008/03/cm\\_7343\\_fifth\\_proof1.pdf](http://www.walesoffice.gov.uk/wpcontent/uploads/2008/03/cm_7343_fifth_proof1.pdf)

**The Welsh Affairs Committee invites written submissions on the proposed Order, which should be received by 24 April. 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 vulnerable children”.

The Committee also expects to hear formal oral evidence in this inquiry, and will announce details of this as soon as the programme has been agreed.

**The Committee would particularly welcome comments on 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?
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

*3 April 2008*

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

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DRAFT STATUTORY INSTRUMENTS

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**2008 No.**

**CONSTITUTIONAL LAW**

**DEVOLUTION, WALES**

**The National Assembly for Wales (Legislative Competence)  
(Social Welfare and Other Fields) Order 2008**

*Made* - - - - 2008

*Coming into force in accordance with articles 1(2) and (3)*

At the Court at Buckingham Palace, the day of 2008

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, commencement and interpretation**

**1.—**(1) This Order may be cited as the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008.

(2) This order comes into force on the day after the day on which it is made, subject to paragraph (3).

(3) If the Local Transport Act 2008 has not been passed before the day on which this Order is made, the following provisions come into force on the day after the day on which the Local Transport Act 2008 is passed—

- (a) article 6(c);
- (b) the reference “, 10.1” in paragraph 7 of the table with the title “Highways and transport”, inserted by article 5.

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

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(1) 2006 c.32.

**Amendments relating to the field of education and training**

2. In field 5 (education and training) of Part 1 of Schedule 5 to the 2006 Act, after matter 5.17 insert—

*“Matter 5.18*

The provision of any of the following for children or young persons—

- (a) facilities for social or physical training;
- (b) educational activities.

In this matter “children” and “young persons” have the same meaning as in field 15.”

**Amendments relating to the field of social welfare**

3. In field 15 (social welfare) of Part 1 of Schedule 5 to the 2006 Act insert—

*“Matter 15.1*

Functions of public authorities relating to—

- (a) safeguarding children from harm and neglect;
- (b) safeguarding and promoting the well-being of vulnerable children;
- (c) reducing inequalities in well-being between children or young persons.

This matter applies to the functions of public authorities whose principal functions relate to any one or more of the fields in this Part.

*Matter 15.2*

Adoption services and special guardianship support services.

*Matter 15.3*

Fostering.

*Matter 15.4*

Social care services for any of the following—

- (a) children;
- (b) persons who care for, or who are about to care for, children;
- (c) young persons;
- (d) persons formerly looked after—
  - (i) who have attained the age of 25, and
  - (ii) who, immediately before attaining that age, have been pursuing, or intending to pursue, education or training.

*Matter 15.5*

Co-operation and arrangements to safeguard and promote the well-being of children or young persons.

This matter applies to—

- (a) public authorities whose principal functions relate to any one or more of the fields in this part;
- (b) police authorities and chief officers of police for police areas in Wales;
- (c) the British Transport Police Authority;
- (d) local probation boards for areas in Wales;

- (e) the Secretary of State, in relation to the Secretary of State's functions under sections 2 and 3 of the Offender Management Act 2007, or any provider of probation services under arrangements made under section 3(2) of that Act;
- (f) youth offending teams for areas in Wales;
- (g) the governors of prisons, young offender institutions or secure training centres in Wales (or, in the case of contracted out prisons, young offender institutions or secure training centres or contracted out parts of such institutions, their directors);
- (h) persons other than public authorities who are engaged in activities relating to the well-being of children or young persons.

*Matter 15.6*

Planning by local authorities for the discharge of their functions relating to the well-being of children or young persons.

*Matter 15.7*

Continuing, dissolving or creating an office or body concerned with safeguarding and promoting the well-being of children or young persons; the functions of such an office or body, including in particular—

- (a) reviewing the effect on children or young persons of the exercise by any person of functions related to their well-being;
- (b) reviewing and monitoring—
  - (i) advocacy services;
  - (ii) arrangements for dealing with complaints and representations made by, or on behalf of, children or young persons in respect of persons with functions related to their well-being or persons providing them with social care services;
- (c) examining cases of particular children or young persons;
- (d) considering, and making representations about, any matter affecting the well-being of children or young persons.

*Interpretation of this field*

In this field—

“children” means persons who have not attained the age of 18;

“development” means physical, intellectual, emotional, social or behavioural development;

“health” means physical or mental health;

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

“persons formerly looked after” means persons who, at any time before attaining the age of 18—

- (a) have been in the care of a public authority, or
- (b) have been provided with accommodation by a public authority in order to secure their well-being;

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

“vulnerable children” means children—

- (a) who are unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for them of social care services,

- (b) whose health or development is likely to be significantly impaired, or further impaired, without the provision for them of social care services,
- (c) who have a physical or mental impairment,
- (d) who are in the care of a public authority, or
- (e) who are provided with accommodation by a public authority in order to secure their well-being;

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

- (a) 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;

“young persons” means persons who have attained the age of 18 but not the age of 25.”

**Amendments relating to the field of sport and recreation**

4. In field 16 (sport and recreation) of Part 1 of Schedule 5 to the 2006 Act, insert—

*“Matter 16.1*

The provision of recreational facilities and activities for children and young persons.

In this matter “children” and “young persons” have the same meaning as in field 15.”

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

5. In Part 1 of Schedule 5 to the 2006 Act, after field 20 insert—

**“EXCEPTIONS TO MATTERS**

The exceptions specified in the first column of each table below are not included within the matters specified in the corresponding entry in the second column.

**TABLE – Highways and transport**

<b>Column 1 Exceptions</b>	<b>Column 2 Matters to which the exceptions relate</b>
<b>1.</b> The regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used.	Matters 5.10, 5.17
<b>2.</b> Road traffic offences.	Matters 5.10, 5.17
<b>3.</b> Driver licensing.	Matters 5.10, 5.17
<b>4.</b> Driving instruction.	Matters 5.10, 5.17
<b>5.</b> Insurance of motor vehicles.	Matters 5.10, 5.17
<b>6.</b> Drivers’ hours.	Matters 5.10, 5.17
<b>7.</b> Traffic regulation on special roads, pedestrian crossings, traffic signs (apart from the placing and maintenance of traffic signs within the meaning of section 177 of the Transport Act 2000) and speed limits.	Matters 5.10, 5.17, 10.1

8. Public service vehicle operator licensing.	Matters 5.10, 5.17
9. The 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 (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.	Matters 5.10, 5.17
10. Transport security.	Matters 5.10, 5.17
11. Shipping, apart from financial assistance for shipping services to, from or within Wales.	Matters 5.10, 5.17
12. Navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation.	Matters 5.10, 5.17
13. Technical and safety standards of vessels.	Matters 5.10, 5.17
14. Harbours, docks, piers and boatslips apart from those used or required wholly or mainly for communication between places in Wales.	Matters 5.10, 5.17
15. Registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.	Matters 5.10, 5.17

TABLE – Social welfare

Column 1 Exceptions	Column 2 Matters to which the exceptions relate
1. Child support.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.7
2. Child trust funds, apart from subscriptions to such funds by— (a) the council of a county or county borough council in Wales, or (b) the Welsh Ministers.	Matters 15.1, 15.3, 15.4
3. Tax credits.	Matters 15.1, 15.3, 15.4
4. Child benefit and guardian's allowance.	Matter 15.1, 15.3, 15.4
5. Social security.	Matters 15.1, 15.2, 15.3, 15.4, 15.5, 15.6, 15.7
6. Independent living funds.	Matters 15.1, 15.4, 15.5, 15.6, 15.7
7. Motability.	Matters 15.1, 15.4, 15.5, 15.6, 15.7
8. Vaccine Damage Payments	Matters 15.1, 15.4, 15.5, 15.6, 15.7
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.	Matters 15.1, 15.2

<b>10.</b> The Children’s Commissioner established under the Children Act 2004.	Matters 15.1, 15.2, 15.3, 15.4, 15.7
<b>11.</b> 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.	Matters 15.1, 15.2, 15.3, 15.4
<b>12.</b> Welfare foods	Matters 15.1, 15.4, 15.5, 15.7 ”.

**Consequential amendments**

**6.** Part 1 of Schedule 5 to the 2006 Act is amended as follows—

- (a) in matter 5.10 omit the words from “This does not include” to the end of that matter;
- (b) in matter 5.17 omit the words from “This matter does not include” to the end of that matter;
- (c) in matter 10.1 omit the words from “This does not include” to the end of that matter.

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.

Article 2 inserts matter 5.18 into field 5 (education and training) of Part 1 of Schedule 5 to the 2006 Act. The matter is about the provision of facilities for social or physical training and educational activities for children and young people.

Article 3 inserts matters 15.1 to 15.7 and interpretation provisions into field 15 (social welfare) of Part 1 of Schedule 5 to the 2006 Act.

Matter 15.1 is about the functions of public authorities relating to—

- (a) safeguarding children from harm and neglect;
- (b) safeguarding and promoting the well-being of vulnerable children;
- (c) reducing inequalities in well-being between children or young persons.

Matter 15.2 is about adoption services and special guardianship support services.

Matter 15.3 is about fostering.

Matter 15.4 is about social care services for—

- (d) children;
- (e) persons who care for, or who are about to care for children;
- (f) young persons;
- (g) persons formerly looked after by a public authority who—
  - (i) have attained the age of 25, and
  - (ii) who, immediately before attaining that age, have been pursuing, or intending to pursue, education or training.

Matter 15.5 is about co-operation and arrangements to safeguard and promote the well-being of children or young persons.

Matter 15.6 is about local authority planning for the discharge of their functions relating to the well-being of children or young persons.

Matter 15.7 is about the continuance, dissolution, creation and functions of an office or body concerned with safeguarding and promoting the well-being of children or young persons. This matter includes the role and functions of the Children’s Commissioner for Wales.

Article 4 inserts matter 16.1 into field 16 (sport and recreation) of Part 1 of Schedule 5 to the 2006 Act. The matter is about recreational facilities and activities for children or young persons.

Article 5 inserts provision about exceptions to matters at the end of Part 1 of Schedule 5 to the 2006 Act. The exceptions are set out in two tables: one table sets out exceptions relating to highways and transport and the other sets out exceptions relating to social welfare. The exceptions specified in the first column of each table specify the things that are not included within the matters specified in the corresponding entry in the second column.

Article 6 makes amendments to the 2006 Act that are consequential to the amendments made by article 5.

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

**Welsh Assembly Government Explanatory Memorandum**

**CONSTITUTIONAL LAW: DEVOLUTION, WALES**

**PROPOSAL FOR A LEGISLATIVE COMPETENCE ORDER RELATING TO  
VULNERABLE CHILDREN AND CHILD POVERTY**

**INTRODUCTION**

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

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

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

**BACKGROUND**

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

5. The Welsh Ministers have wide-ranging responsibilities relating to the field of social welfare. Local authorities and their statutory partners in Wales have a responsibility to safeguard, promote and secure the wellbeing of all children and young people, including those who may be vulnerable—particularly those in need; looked after children and care leavers. The Welsh Assembly Government has sought, through specific provision for Wales in Parliamentary bills and by using its subordinate legislation powers, to develop a distinct approach which responds to Welsh circumstances and the needs of children in Wales.

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

7. Rights to Action<sup>1</sup> is the Welsh Assembly Government overarching policy for all Children and Young People. It is underpinned by seven core aims, that children and young people:

- have a flying start in life;
- have a comprehensive range of education and learning opportunities;
- enjoy the best possible health and are free from abuse, victimisation and exploitation;
- have access to play, leisure, sporting and cultural activities;
- are listened to, treated with respect, and have their race and cultural identity recognised;
- have a safe home and a community which supports physical and emotional wellbeing; and
- are not disadvantaged by poverty.

*These are based on a number of core themes:*

- foundation of principle in the UN Convention on the Rights of the Child;
- entitlements to services based on the needs of the child or young person;
- listening to and acting on the views of children, young people and families;
- giving the highest priority to those most in need, recognising children in care as being a particularly disadvantaged group; and
- a commitment to partnership working between different local organisations as the only way in which these aspirations can be achieved.

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

8. *Fulfilled Lives, Supportive Communities*<sup>2</sup>, a 10 year strategy for social services in Wales and *Towards A Stable Life and A Brighter Future*<sup>3</sup>, set out the Welsh Assembly Government's policy intentions and early actions towards progressive reforms to modernise service delivery for vulnerable children and to accelerate improvements in policies and outcomes for looked after children.

9. The *Child Poverty Implementation Plan* and associated milestones and targets paper—*Eradicating Child Poverty in Wales—Measuring Success*—set out specific solutions and actions to integrate policies and programmes to eradicate child poverty in Wales by 2020, building on existing anti-poverty programmes such as Flying Start, Cymorth and Communities First. Tackling poverty and social exclusion among children and young people is central to the Welsh Assembly Government's broader strategy to improve quality of life, promote social inclusion and equality of opportunity for every community in Wales.

10. There is an increasing difference in approach between England and Wales in the policy, planning and delivery of services for children and young people. The Children Act 2004 marked a step change to a tailored approach in Wales to meet our distinct agenda for children and young people. There are no Children's Trusts in Wales, and Welsh local authorities have not been required to create a single director for children's services. Instead, lead directors and members in local government and the NHS have responsibility for partnership working through the Children and Young People's Partnerships. The welfare and provision of services to vulnerable children in Wales is the responsibility of 22 local authorities that work coterminously with 22 local health boards and 14 National Health Service (NHS) Trusts in the assessment and planning of local needs across their respective areas. The Directors of Social Services and Chief Education Officers are responsible for provision of service delivery in their areas. Children and Young People's Partnerships (22) are the main bodies responsible for coordinating and overseeing the development of a strategic, single plan on how the wellbeing of children in their area will be improved to inform the delivery, commissioning, pooling of resources and services across the partnership. The Children & Young People's Partnerships have no responsibility for the direct provision of services.

11. The Welsh Assembly Government policy "Towards A Stable Life", implemented from this July, is a unique policy for children in care in Wales tailored to reflect local circumstances and solutions. It further demonstrates the need for Wales to acquire the powers to tackle Welsh priorities and issues. Limitations on the current settlement restrict our ability to bring forward the range of coherent provisions that we would like to see and that would make a difference for vulnerable children in Wales, based on a stronger focus on preventative action and on support for parents as well as children.

12. The Order covers the welfare of all children and young people in Wales up to the age of 25 years old, with minor exceptions in relation to certain care leavers. Vulnerable children are defined within the Order which has broad scope to relate to the needs of a diverse range of children: any child in need (including disabled or very sick children), children on the periphery of care, in care, or who have left care. It is drafted so as to include support to parents who may need help for their mental health, substance misuse, learning disability, poverty or other problems that may affect a child's opportunities and wellbeing. Local authorities currently provide direct services for around 24,000 children in need and other children and families are supported through area-based programmes such as Flying Start and Cymorth. "Looked after children" includes children in local authority care in Wales (4,800) and care leavers (1,600) where the Assembly Government and local authorities have unique responsibilities as corporate parents of this particularly vulnerable group. Some 28% (170,000) of children in Wales live in poverty, in households with incomes below the 60% median.

13. There now exists a large volume of legislation relating to the welfare of children and young people that is fragmented and has been amended by many Acts of Parliament and various Orders and Regulations, made on an England and Wales or Wales only basis. There are also inconsistencies between areas of legislation, meaning that different groups of young people receive different levels of service based on their status rather than need. The Order will allow the reform and consolidation of existing legislation in relation to vulnerable children, bringing together and rationalising provisions made over the years. It will enable the Welsh Assembly Government to bring about greater clarity for local government and its partners as to their duties to promote social welfare for all children and young people, in particular the most vulnerable, including children in poverty.

14. Building on the Welsh Assembly Government's 10 year strategy for social services, the intention is to consult (in 2008) on proposals for legislation to implement a strategy for vulnerable children operating in the context of the new statutory Children and Young People's Partnerships.<sup>4</sup> The Order will enable the Welsh Assembly Government to bring forward coherent proposals for legislation in the knowledge that the Assembly will have the necessary powers to implement changes in the law relating to the welfare of children and young people, in particular so as to achieve the stronger focus on supporting families and on preventative action which has already been identified as a key theme.

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

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

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

15. Enhanced powers in this area are needed in order to overcome the current legislative restrictions and to enable Welsh solutions to be brought forward to deliver on the commitments set out above. Current legislative constraints have limited the development and improvement of looked after children policies to meet Welsh needs, which has resulted in objectives not always being fully achieved. The Order will confer enhanced legislative competence on the Assembly to reform the law in relation to vulnerable children and child poverty to:

- (i) *rationalise and consolidate existing provisions for vulnerable children;*
- (ii) *reform the law to provide the legal framework for the implementation of key components of the Welsh Assembly Government's policies for vulnerable children in Wales;*
- (iii) *take action to place duties on public bodies to demonstrate their contribution to ending child poverty; and*
- (iv) *create a statutory right for free child care for two year olds in greatest need.*

16. The Order will also provide a legal framework for the Welsh Assembly Government to take forward its proposals to tackle child poverty, in particular to underpin arrangements to provide a top-up payment to the Child Trust Fund accounts for certain categories of children and specific arrangements for Welsh local authorities to boost the savings of children in Wales.

#### *Scope*

17. The Order seeks to confer powers on the National Assembly for Wales (NAfW) to make Assembly Measures in relation to the welfare of all children and young people including vulnerable children and to tackle child poverty in Wales, by adding matters to Schedule 5 of the 2006 Act. The scope of the Order is drawn so as to enable the Assembly to reform and consolidate existing legislation for children in need, including looked after children and care leavers. It would enable changes to support the welfare of broader groups of children (up to 25 years of age), not just those who are categorised as “looked after” or “children in need”. It will, for example, cover any child and their carer (parent) who is in receipt of social care services and may range from childminding to parenting classes and all services provided under Flying Start and Cymorth. It is also drawn so as to encompass support to families of children who would be at risk of becoming in need had they not had a service. It includes local authorities' and their partners' general duties for safeguarding and promoting the wellbeing of all children in their area including specific provisions and actions in relation to tackling child poverty.

18. The matters set out in the Order would in the main cover services currently provided under Parts 2 and 3 and Schedule 2 of the Children Act 1989. They would also extend to local authorities' responsibilities for pre-school and other child minding and childcare services currently provided under the Flying Start and Cymorth programmes. Other legislation relating to vulnerable children which is within the scope of these matters are the powers to make grants for welfare purposes under the Education Act 2002, the Adoption and Children Act 2002, Care Standards Act 2000, the Children Act 2004 and community care legislation in so far as these relate to the functions of local authorities in relation to disabled children and those caring for them and also to children who are themselves carers of disabled adults.

19. As outlined above, the principal enhancement is in the field of social welfare, although there are related matters in the fields of education and training, and sport and recreation which evidence shows are key components to a child and young person's development and social wellbeing. Cross border duties in relation to England and Wales are preserved. When considering matters, it is important to recognise that these matters are linked and must be considered in the round as services and functions relating to vulnerable children and young people which may be covered by one or more of the matters across the following three fields.

#### *Field 5—Education and Training*

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

#### *Field 15—Social Welfare*

21. Matters 15.1 and 15.5 relate to the general duties of safeguarding and promoting the well-being of all children and young persons and support to their families. This will cover local authorities' and statutory partners' (and individuals') broad and specific responsibilities and duties of co-operation (on individuals and bodies) for safeguarding, and promoting the welfare of all children in Wales and reducing inequality to ensure they are safe and have optimum life chances. 15.1 covers the functions of public authorities: this would include organisations or persons carrying out those functions directly or on behalf of a public authority (for example voluntary and independent sector) in discharging their functions to safeguard and promote the wellbeing of children and young people in their area.

22. 15.1(c) relates specifically to the wellbeing of any child or young person who may require support necessary to ensure they are not disadvantaged by aspects of child poverty or inequality of different groups; for example, services to a disabled child, support for “independent living” for younger disabled persons.

23. The line after 15.1(c) makes clear that matter 15.1 does not extend to the functions of public bodies that are non-devolved for example; Youth Justice Board, Police and the Courts. It does however recognise that matter 15.5 achieves the co-operation of those non-devolved bodies listed to ensure their co-operation in safeguarding and promoting the wellbeing of children and young people. The listed partners in matter 15.5 (b) to (d) restate the current provision in sections 25 and 28 of the Children Act 2004 (co-operation arrangements) and extends only to duties of co-operation. 15.5(a) relates to devolved bodies such as NHS, Local Health Boards etc. Matter 15.5 does not give scope to impose any new functions on those bodies; it does however provide scope to modify the arrangements for co-operation in consultation with the listed bodies.

24. In addition to the above matter, 15.6 in particular, covers the duties on the statutory Children and Young People’s Partnerships to ensure that strategic plans take into account their duties to promote wellbeing and include any new arrangements for child poverty proofing. This includes provision of services such as child minding and day care and specific duties in relation to vulnerable children in care including education and health but provides sufficient flexibility for different support and other arrangements that the Welsh Assembly Government may want to bring forward in Wales.

25. Matter 15. 3 Fostering—covers all functions in respect of public and private arrangements for fostering including regulation and inspection of services and individuals working in the service including changing the way that foster carers are regulated and supported.

26. Matter 15.2 Adoption Services and Special Guardianship Support Services—includes all devolved functions in relation to adoption: public and private arrangements including regulation and inspection of services and individuals working in the service, post adoption support. It does not cover any change to court processes for adoption or the law in relation to placement for adoption. This is to ensure we preserve the unified concept and system for adoptions across England and Wales. It covers the full scope of the duties of local authorities in relation to support services to which those involved in the new special guardianship arrangements are entitled.

27. Matter 15.4—Social Care Services—sets out the range of people to whom the public authority agencies may provide services to safeguard and promote wellbeing. This includes all children and young people up to 25 years old (in need and others) who are currently provided for under the statutory children and young people single plans (section 26, Children Act 2004). It is not limited to traditional functions performed by the local authority social services departments and provides for broad social care provision across a range of public bodies which carry out functions on their behalf. More broadly matter 15.4 relates to local authorities’ duties to those who are in care or who have been cared for (including children temporarily accommodated under youth justice arrangements) and/or who are provided with accommodation (not necessarily by local authorities: this extends to private arrangements), in foster care, residential care (children homes, schools etc), secure care and other settings, including those in care under a court order and/or voluntary arrangements. Matter 15.4 (d) extends support beyond 25 years to care leavers in circumstances where they are undertaking a course of education or training. It also covers local authorities’ duties to provide a range of support and services (including accommodation) to care leavers including financial assistance and living costs for care leavers seeking employment or engaged in education and training. Services for care leavers include access to a personal advisor to maintain a pathway plan and wider support in relation to contributions towards expenses and accommodation for those who are undertaking education or training.

28. Matter 15.4 taken with 15.1 and 15.5 also covers the duties of local authorities and their partners under section 24 of the Children Act 1989 to provide advice and assistance to a category of children and young people, which overlaps with those who have been looked after but which is broader, including those who have been in local authority accommodation but for an insufficiently long period, those who have been looked after by or on behalf of voluntary organisations, those who have been cared for by one of a number of different health bodies for a period of more than three months, those who have been subject to a special guardianship order and those who have been privately fostered.

29. The matters also extend to the regulation and inspection of services (existing or new) and the workforce in children’s homes, foster services and other services whether provided by individuals and organisations. Coverage is given for the functions of ensuring safeguards and quality of care, ie functions of the Local Safeguarding Vulnerable Children’s Board and those currently undertaken by the Care and Social Service Inspectorate Wales and the Care Council for Wales. Matter 15.4 (b) can include support to the wider family and friends who are carers (commonly known as kinship care) and foster carers. It also covers direct support to parents where the child may be at risk had the service not been provided; for example, reunification of a child in care with their birth family.

30. These matters also cover broad welfare support to children and families under the preventative and poverty reduction agenda, where the child would potentially be deemed to be in need had the service not been provided to the family or sibling/s. They embrace local authorities' support for pre-school child minding, childcare and services currently provided under Flying Start and Cymorth. They also provide scope for local authorities to make financial assistance including contributions to Child Trust Fund accounts and free childcare places for all, or for prescribed categories of children in Wales.

31. Matter 15.6 covers any planning by local authorities for all children and young people in relation to discharging their wellbeing functions; in particular the "single plan for children and young people" in relation to their wellbeing under the Children Act 2004. Matter 15.5 will draw heavily on 15.4 duties of statutory partners to co-operate and to contribute to the plan to ensure the wellbeing of children and young people; it also provides for child poverty proofing plans.

32. Matter 15.7 covers the functions of the Children's Commissioner for Wales including the office's specific role in relation to reviewing and monitoring of complaints, advocacy and whistleblowing arrangements of public bodies in Wales, largely local authorities but also the NHS and Local Health Boards. It covers the Commissioner's broad responsibility to all children and young people's welfare and individual cases that may be considered by the Commissioner.

#### *Interpretation*

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

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

34. Where a matter could otherwise be construed as covering a topic in relation to which it is not intended that the Assembly should have legislative competence, it is necessary to define the matter so as to exclude that topic. One way to do this is by listing those topics as exceptions. The first column of the tables at paragraph 5 sets out exceptions from the matters listed in the second column. The table on Highways and Transport restates exceptions that currently exist in Schedule 5 to the 2006 Act as amended.

35. The table of exceptions for social welfare clarifies what is *not* included in the matters listed in this Order. These exceptions include; child support (ie arrangements for the provision of maintenance by both parents of a child), tax credits, child benefit, guardian's allowance, social security, Motability, Vaccine Damage Payments, Independent Living Funds and Welfare Foods. Matters 15.1, 15.3 and 15.4 do not include the general scheme of Child Trust Funds but they do include the making of payments into Child Trust Fund accounts by Welsh Ministers or local authorities in Wales. This will enable the Welsh Assembly Government to deliver a pre-election commitment to make the payment of contributions by Welsh local authorities into the Child Trust Fund accounts of looked-after children a statutory duty (it is currently in operation as a voluntary scheme, funded by the Welsh Assembly Government); and will also cover the arrangements necessary to deliver a manifesto commitment relating to contributions to long-term savings for children in relation to child poverty.

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

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

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

37. Section 93 of the 2006 Act provides that no Assembly measure will be law if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the measure effective, provision enabling the provisions of the measure to be enforced and to make consequential amendments to other legislation.

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

*Minister of the Crown Functions*

39. There are a number of areas of legislation relating to the welfare of vulnerable children that remain the responsibility of UK Ministers, such as the requirements for those deemed unfit to work with children to go on a list maintained by the Secretary of State under the Protection of Children Act 1999. By virtue of part 2 of Schedule 5 to the 2006 Act, the Assembly may not by measure alter any function of a Minister of the Crown without the consent of the Secretary of State. Therefore even where they do not fall within the specific exceptions listed above, the Assembly will still not be able to legislate so as to alter those functions without the consent of the UK Government.

*Conclusion*

40. For the reasons outlined above, the Welsh Assembly Government wishes to propose that legislative competence should be conferred on the National Assembly for Wales in relation to vulnerable children, in the terms of the proposed draft Order attached.

*March 2008*

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**Letter from Gwenda Thomas AM, Deputy Minister for Social Services, Welsh Assembly Government**

**VULNERABLE CHILDREN AND CHILD POVERTY ORDER IN COUNCIL**

Thank you for inviting me to give evidence to the Welsh Affairs Committee on the proposed draft Vulnerable Children and Child Poverty Order in Council on Thursday 15 May. At that session I undertook to write to the Committee to clarify the definition of vulnerable children, in particular the distinction between children in 15(1)(b) and (c). A further point has also been raised with the Committee Clerk and this is also covered.

*“Where are the different elements in the definition of ‘vulnerable children’ drawn from and why are there different thresholds used?”*

The definition of “vulnerable children” in matter 15.1(b) is made up of different elements. The question relates to the fact that paragraph (b) of the definition refers to “significantly impaired” whereas paragraph (c) refers only to “impairment” and the reason behind these different thresholds.

Paragraphs (a), (b) and (c) are all drawn closely from the definition of “children in need” in section 17 of the Children Act 1989. We have not sought to re-analyse the types of children covered in the three parts of the definition in section 17. Instead we have used wording to show that we are seeking to follow the formulation in that section. The phrase in (c) referring to children “who have a physical or mental impairment” covers those children who in section 17(10) are referred to as “disabled”. Subsection (11) of section 17 contains a definition of “disabled” for the purposes of the Act but it is not a fixed definition. It contains within it provision for the definition to be broadened to include “such other disability as may be prescribed”. For that reason it was important that the formulation used in the Order in Council provided flexibility to accommodate any form of disability that might subsequently be added to the scope of section 17.

The formulation in paragraph (c) is therefore broad and broader than the way that disability is likely to be defined in a measure. This is consistent with the need for Orders setting scope by prescribing the matters in Schedule 5, to establish sufficient breadth for the subsequent legislation to be seen to be clearly within that scope.

Paragraph (d) of the definition covers those who are in care and paragraph (e) covers those who are accommodated on a voluntary basis and include children looked after by health authorities as well as by local social services and education authorities.

*“Does the Welsh Assembly Government intend to repeal those parts of existing legislation which contain powers and defined terms which overlap with those contained in the proposed Order?”*

When the Assembly Measures are made under the scope provided by this Order, then the sections of the England and Wales Acts which they replace will be amended to disapply them in relation to Wales. They will of course remain in force in relation to England.

I trust the above clarifies the position. If I can be any further assistance in respect of the Committee’s scrutiny of this order, please let me know. I would also like to thank the Committee members for their work in considering this very important area, which aims to provide the legislative framework for the future welfare of vulnerable children in Wales.

*22 May 2008*

## Memorandum submitted by the Children's Commissioner for Wales

### INTRODUCTION

The Children's Commissioner for Wales welcomes the wide policy intentions behind this Legislative Competence Order. We welcome the proposal to develop Welsh solutions to child poverty and to place a duty on public bodies to demonstrate their contribution to ending child poverty. In previous annual reports, the Children's Commissioner for Wales has expressed concerns at the additional costs to families associated with education such as costs for uniforms and school trips with education. We also welcome the proposal to use this Legislative Competence Order to simplify and rationalise and consolidate the existing provision for vulnerable children.

The proposals signal a welcome change in priorities for service providers which is evidenced by:

- The proposed extension of social care provision for care leavers until 25.
- The delivery of social care services not just to children but also to their families and those that care for them in an attempt to reduce the number of children entering care.

The Children's Commissioner for Wales provided both written and oral evidence to the National Assembly for Wales' Vulnerable Children and Child Poverty Legislative Competence Order Committee in Autumn 2007.

### RESPONSE

The Children's Commissioner for Wales' primary role is to "safeguard and promote the rights and welfare of children".<sup>5</sup> Given this role, we wish to focus our evidence on the scope of the proposed legislative competence order rather than aspects of the devolution settlement. We have therefore not addressed each of the Welsh Affairs Committee's questions published in the call for evidence.

### RESPONSE TO SPECIFIC QUESTIONS

The Children's Commissioner for Wales believes that the LCO is in the spirit and scope of the devolution settlement.

The Children's Commissioner for Wales believes that the use of an LCO is more appropriate than the use of framework powers in a Westminster Bill. Framework powers have been understood, however there is a need for there to be clear Welsh legislation in the area of vulnerable children as this would aid the understanding of those working with children in Wales. The present situation with primary legislation, subordinate legislation and framework powers can be confusing for professionals.

There is a clear demand for legislation on the matters in question and this was confirmed by the written evidence submitted to the initial National Assembly for Wales Committee during its consideration of the legislative competence order.

### OTHER COMMENTS

The National Assembly for Wales' Vulnerable Children and Child Poverty Legislative Competence Order Committee recommended that within Matter 15.7 there should be specific reference to both the Children's Commissioner for Wales' power to review and monitor advocacy and whistleblowing.

We welcome the fact that the current draft of the Legislative Competence Order does refer specifically to advocacy. However whistleblowing has not been included within the proposed powers of the Commissioner. We note the evidence provided by the Deputy Minister for Health and Social Services, Gwenda Thomas AM, that whistleblowing is outside of the current devolution settlement.<sup>6</sup> However, the accompanying memorandum does make reference to the Commissioner retaining the power to review and monitor arrangements for whistleblowing:

*32. Matter 15.7 covers the functions of the Children's Commissioner for Wales including the office's specific role in relation to reviewing and monitoring of complaints, advocacy and whistleblowing arrangements of public bodies in Wales, largely local authorities but also the NHS and Local Health Boards. It covers the Commissioner's broad responsibility to all children and young people's welfare and individual cases that may be considered by the Commissioner.*

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<sup>5</sup> Children's Commissioner for Wales Act 2001, 2 *Principal aim of the Commissioner.*

<sup>6</sup> National Assembly for Wales (2008) Proposed Vulnerable Children LCO Committee, Paragraph 43.

The Children's Commissioner for Wales Regulations 2001 provide the Commissioner with the power to review and monitor the arrangements for whistleblowing: *The Commissioner's functions and powers include the review and monitoring of arrangements for dealing with complaints, "whistleblowing" and advocacy arrangements; the examination of particular cases; and providing assistance, including financial, to a child in making a complaint or in other proceedings.*<sup>7</sup>

We would therefore question whether the omission of whistleblowing has been an oversight in the drafting of this current version of the legislative competence order? We would seek to ensure that the legislative competence order does not in future weaken the Commissioner's powers in relation to whistleblowing.

We welcome the inclusion of police authorities and probation areas in Wales within Matter 15.5. However, we would question the omission of fire and rescue services, Local Authority Secure Children's Homes, Local Service Boards and the Independent Safeguarding Authority from the duties to co-operate and make arrangements to safeguard and promote the well-being of children and young people.

We would question why if the governors of prisons, young offender institutions and secure training centres are included, the United Kingdom Border Agency is not included within Matter 15.5.

## CONCLUSION

The Children's Commissioner for Wales will be following the progress of this Legislative Competence Order with considerable interest given the wide ranging implications for vulnerable children and tackling child poverty in Wales.

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### Memorandum submitted by The Fostering Network Wales

The Fostering Network Wales welcomes legislation for Wales that gives maximum flexibility for policy development to improve the lives of children looked after.

The picture for vulnerable children in Wales is bleak and legislation to address the poor outcomes for children looked after is needed.

There has been a year on year increase of looked after children and subsequently an increase in children cared for by foster carers.

	<i>Looked after children</i>	<i>Children in foster care</i>	<i>Children who ceased to be looked after aged 16 or over year ending 31 March No GCSE</i>	<i>Children who ceased to be looked after aged 16 or over year ending 31 March 5 or more GCSE A*-G</i>
2004-05	4,380	3,195	395	15
2005-06	4,530	3,355	380	30
2006-07	4,640	3,465	370	30

#### Welsh Local Government Data Unit

Children who are looked after are, perhaps, the most vulnerable of children, having required an intervention which has separated them from their families. Many of these children have been abused or rejected by their families. Outcomes for this group of children and young people are notoriously poor. They are recognised by the Assembly Government as "young people who are in greatest need" (*Rights to Action p 5*).

Three quarters of the children looked after in Wales are in foster care. Improving foster care is, therefore, crucial to improving outcomes for looked after children. The purpose of the Fostering Network is to ensure that all children and young people who are fostered get the best possible care. Fostering Network also works to support children "on the edge of care" and care leavers.

The figures quoted above from the Welsh Local Government data unit illustrate the urgent need for action for this group of vulnerable children and The Fostering Network Wales would urge that there is the minimum of delay in the legislative process.

18 April 2008

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<sup>7</sup> National Assembly for Wales (2001) Children's Commissioner for Wales Regulations *Part ii Review and monitoring of arrangements.*

### **Memorandum submitted by The Welsh Local Government Association**

The Welsh Local Government Association is pleased to be able to submit evidence at this stage of the LCO development and welcomes a continued dialogue with the Welsh Affairs Committee during this important legislative process.

The WLGA's written evidence to the Proposed Vulnerable Children LCO Committee, dated 7 November 2007, is attached and outlines the WLGA's view on the proposed LCO. Also attached is the WLGA's response to the eight questions set out by the Welsh Affairs Committee.

The WLGA would like to stress, that whilst we welcome the proposed deferment of additional legislative competence to the Welsh Assembly any resulting measures must be adequately resourced and additional duties accompanied by appropriate funding. Additionally, we would advocate that during scrutiny the responsibilities placed on local authorities and the implication on staffing and resources are fully considered.

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

The devolution settlement has evolved to include the Government of Wales Act 2006, which includes the mechanism of an LCO—it is therefore within the scope of the statutory settlement.

Welsh Ministers already have wide ranging executive responsibilities in the field of social welfare as do local authorities through their statutory duties to safeguard, promote and secure the wellbeing of all children and young people, including those in need, in care and care leavers. The WLGA supports the LCO as further strengthening these powers by adding legislative competence to the current executive responsibilities and thereby providing accountability to the National Assembly for future legislative change. This would be within the scope of the devolution settlement.

*2. Is the use of the LCO mechanism in accordance with the Government of Wales Act 2006?*

The Act provided the mechanism to devolve legislative competence, as such the use of the LCO is entirely within the scope and order of the Government of Wales Act 2006, by definition the one is in accord with the other.

*3. Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill?*

The mechanisms for adding to the legislative competence of the National Assembly include both the LCO mechanism and the potential for framework clauses in Westminster Bills. The two mechanisms are complementary. If a Bill was in prospect which covered the scope of the proposed legislative competence there would be a good case for employing that Bill to achieve the intended objective through a framework clause. No such bill is in prospect and it is for this circumstance that the LCO mechanism was introduced by the 2006 Act; it appears therefore to be entirely appropriate for the LCO mechanism to be used in this case.

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

The WLGA supports the pursuance of this LCO as providing increased legislative competence within the field of social welfare of children and young people to the Assembly Government. We support in principle the stated objective of the Welsh Assembly Government to employ the enhanced competence to achieve the legislative coherence necessary to work towards the ambitions set out in the policy document "*Towards a Stable Life*". There will need to be a substantial consideration and consultation in developing measures within the scope of this LCO and the WLGA will be a full contributor to those considerations. There is no need at this stage to anticipate the detail of those measures.

*5. To what extent might the transfer of functions proposed have wider implications for the UK budget?*

There is no connection between the devolution of additional legislative competence to the Welsh Assembly and the UK budget. The allocation of grant to the Welsh Assembly Government is calculated through the Barnett formula and takes no account of any change in legislative competence. The Block Grant only changes as a result of changes in executive competence, a transfer of function, and this is not proposed in this case.

6. *To what extent might the transfer of functions impact on reserved functions?*

As set out in the answer to the previous question this proposed order does not alter the functions for which the Welsh Assembly Government is responsible. It proposes only to enhance the legislative competence which the National Assembly will have in the exercise of those existing functions. It is possible that in the exercise of this enhanced legislative competence there may in time be a greater policy diversity between Wales and England but we do not believe that such diversity will have an impact on the execution of any reserved matter.

7. *Are there any cross-border issues relating to the LCO? (Would legislation subsequently be required in England?)*

Welsh local authorities procure services for vulnerable children from providers in England and local authorities in England procure services from providers in Wales. Enhanced legislative competence may result in greater divergence in the standards required in those services. In so far as future Measures may alter the regulation of services for vulnerable children in Wales this will manifest itself in the contracts that Welsh local authorities make with providers in England. The cross border flow of service users, and the variation of standards, will be managed through the contractual relationships. There is nothing new in this arrangement in that different local authorities in both England and Wales can already make different requirements in their contracts and providers already respond to such differences.

Currently through the amendment of secondary legislation and the development of distinct policy frameworks, divergence between England and Wales already exists and the WLGA works in partnership with border authorities to ensure effective service delivery.

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?*

An LCO cannot form or abolish anything; it provides competence for the Assembly to legislate on some defined matters. Whilst we do not anticipate that a measure deriving from this particular competence will lead to a measure proposing the formation or abolition of any particular institution, should such a measure be proposed its vires would be tested against the competence provided by this LCO.

28 April 2008

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**Memorandum submitted by Professor Keith Patchett, Special Adviser to the Committee**

**Art 1(1):** change of title, to identify the subject matter and delete any reference to the Order number.

**Art 1(2):** (new) inclusion of a commencement provision.

**Art 1(3):** (new) a provision with respect to the commencement date for the addition, in a new table of exceptions added by Art 5 to Schedule 5 (in relation to Highways and transport), of an exception to Matter 10.1. Matter 10.1 will be added to Schedule 5 consequent upon the enactment of cl.115 of the Local Transport Bill concerned with trunk road charging in Wales. It is unrelated to vulnerable children. (See further paras 18 & 19, above).

**Art 2:** (new) inclusion of an additional Matter (5.18) to Field 5 (Education and training) relating to the provision of facilities for social and physical training and education activities.

**Art 3: Matter 15.1** (substantially replaced) now directed to the functions of public authorities relating to safeguarding children and young persons against harm and neglect, and expanded to cover the functions of reducing inequalities in their well-being and of safeguarding and promoting the well-being of vulnerable children.

**Matters 15.2 & 15.3** (replacing Matter 15.2) now refer separately and more specifically to adoption services and special guardianship support services, rather than just “adoption”, and, as previously, to fostering.

**Matter 15.4** (replacing 15.3 & 15.4) now refers to social care services, rather than social care and spells out more fully the categories of persons to whom those services relate.

**Matter 15.5** (expanded replacement of Matter 15.5) now specifies eight categories of the persons and bodies whose cooperation over well-being may be provided for and clarifies the purpose for which well-being arrangements are to be provided.

**Matter 15.6** (minor alteration) deletes the qualification “strategic” in the reference to local authority planning of well-being functions.

**Matter 15.7** adds a specific reference to reviewing and monitoring advocacy services. Complaints and representation that may be reviewed or monitored are no longer confined to services provided by those with well-being functions or providing social care services, but may relate to the providers themselves.

**(Original Matter) 15.8** concerned with the promotion of equality in relation to well-being has been deleted. See now **Matter 15.1(c)** which enables provision to be made for the functions of public authorities for the reduction of inequalities in well-being.

**Interpretation in field 15** adds definitions for “development”, “health”, “persons formerly looked after”, “social care services” (rather than “social care”) and “vulnerable children”, replaces the definition of “young persons” to cover all who have attained 18 but not 25, and makes small improvements in the definition of “well-being”.

**Art 4:** (new) adds a new Matter 16.1 to Field 16 (Sport and recreation) enabling provision to be made for recreational facilities and activities for children and young persons.

**Art 5:** as did the original Art.3, contains additional exceptions to the Social welfare field, consequent on the addition of matters to that field by this Order. As well as consequential changes to cross-references, the revised Article adds vaccine damage payments and welfare foods as further exceptions.

The Article sets out these exceptions in a consolidated table of exceptions and adds a table of exceptions related to matters concerned with Highways and transport, replacing provisions originally attached to the relevant matters.

**Art 6:** (new) contains necessary amendments consequent upon the creation of the tables of exceptions by Article 5.

*April 2008*

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#### Memorandum submitted by Anne Crowley, Special Adviser to the Committee

- **Vulnerable children:** a definition of “vulnerable children” is introduced and a reference is added at matter 15.1 to “safeguarding and promoting the well-being of vulnerable children”.
  - **New or amended definitions:** a number of other new or amended definitions are introduced, including “social care services”, “development”, “health” and “persons formerly looked after”. The definition of “young persons” is also changed to include those aged under 25 (formerly it was those aged under 24) to be consistent with provisions in the Children and Young Persons Bill and the Assembly Committee’s recommendation.
  - **Introduction of new matters:** a new matter is introduced into field 5 (education and training) concerning facilities for social or physical training and educational activities for children and young people, see article 2 of the Order. A new matter is also introduced into field 6 (sport and recreation) concerning recreational facilities and activities for children and young people, see article 4 of the Order. Previously all the matters in the proposed Order were within field 15 (social welfare).
  - **Amending the existing matters:** a number of changes are made to the content of the matters originally proposed by the Welsh Assembly Government. Some are drafting amendments, while others clarify the scope and substance of the power. For instance:
    - (a) An amendment clarifies that the broad powers in matter 15.1 relate only to the functions of “public authorities whose principal functions relate to any one or more of the fields” (eg NHS and Local Health Boards) and will not apply to non-devolved public bodies (eg the police or probation) unless those bodies are specifically identified. Related changes are made to matter 15.5—see para 23 of the memorandum;
    - (b) Matter 15.7 (relating to the Children’s Commissioner) is amended to include “advocacy services”—see para 32 of the memorandum; and
    - (c) “Special guardianship support services” are introduced into matter 15.2 in addition to “adoption services”.
  - **Other minor changes** include the introduction of provisions to address amendments brought about by the Local Transport Act 2008 (see article 1(3)) and two new “exceptions to matters” under field 15 in relation to “vaccine damage payments” and “welfare foods” (see the table headed “social welfare”).
  - **Changes to explanatory memorandum:** the new memorandum contains a greater level of detail, particularly in relation to the scope and potential use of the proposed Order.
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**Supplementary memorandum submitted by the Children's Commissioner for Wales**

Thank you for the opportunity to provide an additional memorandum to the Welsh Affairs Committee. On reflection I have concluded that some of the information we offered to supply may not be relevant to the Committee's scrutiny of the Legislative Competence Order (LCO) and could prove to be a distraction and cause delay in the progress of the LCO through Parliament. While I will deal with each point below, I have little to add to the evidence I had previously provided in writing.

I have to agree with the Chair's comments, as noted in the transcript, namely:

“We are really talking about your powers at the moment, when we should be talking about the LCO.”

**QUESTION 10 & 36**

With reference to my concern that whistleblowing was not explicitly mentioned on the face of the LCO, I am content, in view of Mr. Lubienski's response in Committee. I had been concerned that there was the potential to dilute the present statutory functions of the Commissioner, but these concerns have since been addressed.

**QUESTION 29**

I believe that my evidence as presented to the Welsh Affairs Committee inquiry into cross border issues raised what I consider to be the salient points on this issue. The LCO itself will not necessarily affect these issues in any event.

**QUESTION 10**

I am satisfied with the bodies which are listed in the LCO and have no further bodies to add to my previously submitted written evidence.

**QUESTION 44**

In relation to the reference to “children falling through the net”—which relates to the Commissioner's powers—I take the view that the discussion of this issue is not relevant to the scrutiny of the LCO. This issue cannot be addressed by the LCO and although I am keen to raise these matters with Members of the Committee and would welcome future discussion and an opportunity to give further information, I do not wish to distract from the scrutiny of the LCO in any way or delay its progress.

I would be willing to provide the Committee with examples of case histories from our Advice and Support Service for Children and Young People. If the Committee wishes to pursue this, I will be in a position to do this within two working weeks. It may, however, be more appropriate to provide these examples at the time when Measures are developed.

Thank you again for the opportunity to inform the scrutiny of this important piece of legislation for children, I look forward to cooperating with you in the future.

*June 2008*

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

Thank you for the wide-ranging and informative evidence session on 15 May on the proposed Vulnerable Children Order in Council.

At that session I undertook to write to the Committee to clarify why different thresholds are applied within the definition of vulnerable children set out in the proposed Order. Gwenda Thomas made a commitment in similar terms, and wrote to you on 22 May explaining the approach that has been taken.

I have nothing to add to the clarification Gwenda provided,<sup>8</sup> and trust that it answers your Committee's query satisfactorily.

3 June 2008

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

**PROPOSED VULNERABLE CHILDREN ORDER IN COUNCIL**

Firstly, may I thank the Welsh Affairs Committee for agreeing to scrutinise this proposed Order. I can confirm that this Order in Council does not give legislative competence to the National Assembly for Wales to pass legislation to prohibit smacking.

Under the criminal law, parents (or someone in loco parentis) are entitled to discipline their children using reasonable degree of force. Without this longstanding common law defence, the person taking the disciplinary measure would be guilty of an offence such as assault. A significant restriction on this defence was imposed by s58 of the Children Act 2004 which provided that corporal punishment by a parent was no longer lawful if it constituted one of the more serious assaults.

The proposed matters in this Order relate to:

- function of local authorities (matter 15.1);
- particular kinds of activities relating to the social welfare of children, namely adoption services, fostering and social care services (matter 15.2–15.4);
- functions and powers of a strategic nature relating to the social welfare of children (matter 15.5 and 15.6); and
- an office or body dealing with the social welfare of children (matter 15.7).

None of the matters contained within this Order in Council therefore devolve legislative competence to the National Assembly for Wales which would enable them to legislate to remove the common law defence mentioned above.

This proposed order has been requested by the Welsh Assembly Government so as to enable it to achieve the commitments in its programme of government.

The Welsh Assembly Government is satisfied that the Order will enable it to legislate to achieve those objectives—namely, to consolidate and reform the law relating to vulnerable children, improve preventative measures and tackle child poverty.

I look forward to seeing the Committee's Report on this Order.

19 June 2008

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<sup>8</sup> Ev 33

ISBN 978-0-215-52132-3

