



House of Commons
Welsh Affairs Committee

**Proposed National
Assembly for Wales
(Legislative
Competence) (Health
and Health Services
and Social Welfare)
Order 2009**

**Fourteenth Report of Session 2008–
09**

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

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The Welsh Affairs Committee

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

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Summary

The Government of Wales Act 2006 introduced a procedure whereby the National Assembly for Wales can bring forward proposals which would extend the Assembly's lawmaking powers by Legislative Competence Orders in Council. These proposals for draft Orders may be introduced by the Welsh Assembly, by committees of the National Assembly, or by individual Assembly Members (chosen by ballot). The proposed Legislative Competence (Health and Health Services and Social Welfare) Order 2009 is the first Order referred to this Committee to be introduced by a non-Government Assembly Member. We welcome the high level of co-operation between Jonathan Morgan AM, the backbench Assembly member who sponsored the proposed LCO, the Minister for Health and Social Services and the Welsh Assembly Government, and the Wales Office which enabled this proposal to proceed to its current stage.

Current legislation on mental health is largely designed for people who may become subject to compulsion and liable to detention. It does not by and large deal with the provision of assessment, the treatment and advocacy services outside the legal framework of compulsion. The proposed Order would entitle people who appear to be suffering from mental disorder but do not yet have a firm diagnosis of mental disorder to obtain early assessment of their condition and need for services. We agree that a clear need for the proposed LCO has been identified and is consistent with the Government's commitment in *One Wales* to making mental health a key priority.

The Adult Mental Health National Service Framework has set a clear mental health strategy in Wales. It does not, however, provide a statutory duty to deliver these services. The proposed LCO would allow the National Assembly for Wales to make Measures for mental health to impose duties and provide earlier assessment, treatment and access to advocacy services. The UK Government's current view is that it does not wish to introduce legislative powers in this area. We conclude that the Legislative Competence Order in Council is the most appropriate legislative route available.

Concerns were raised regarding details of the drafting of the LCO and its Explanatory Memorandum. While the LCO makes it clear that the duty to provide assessment and treatment will be in relation to individuals not previously diagnosed as having mental health needs, the Explanatory Memorandum is unclear regarding the duty towards those who were previously or are currently diagnosed as having such needs. In addition, as currently drafted, the proposed Order would allow the National Assembly to disapply in Wales the right to an Independent Mental Health Advocate for those subject to compulsory powers under the 1983 Act. Because of our concerns about possible unintended consequences of the drafting, we recommend that the LCO and Explanatory Memorandum are amended.

The legislative competence conferred upon the National Assembly by the proposed LCO would allow Measures to be brought forward which place regulatory and financial burdens on the public sector. Whilst it is recognised that there will be an initial financial cost incurred by the NHS in providing quicker access to assessment, treatment and advocacy, it is argued that early intervention could reduce long-term costs.

Introduction

Background

1. The Government of Wales Act 2006 introduced a procedure whereby the National Assembly for Wales can bring forward proposals which would extend the Assembly's lawmaking 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 to the Government of Wales Act 2006.

2. These proposals for draft Orders may be introduced by the Welsh Assembly, by committees of the National Assembly, or by individual Assembly Members (chosen by ballot). 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 prerequisite before a proposed Order is referred by the Secretary of State for Wales to each House at this pre-legislative stage.

3. Following the pre-legislative 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, 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 this proposed Order

4. If adopted, the proposed Order would expand Field 9 (Health and Social Services) and Field 15 (Social Welfare) of Part 1 of Schedule 5 of the Government of Wales Act 2006. Proposed Matter 9.2 would confer competency to legislate on the assessment of mental health and treatment of mental disorder. Proposed Matter 15.9 would extend the competence of the National Assembly for Wales to provide legislative power in relation to mental health advocacy.

5. In October 2007, Jonathan Morgan AM was successful in the ballot for the opportunity to introduce a proposal to add to the legislative competence of the National Assembly. On 17 October 2007 following a debate in plenary session under Standing Order 22.50 the National Assembly for Wales gave him leave to introduce a proposed Order about and in connection with mental health.

6. The proposed National Assembly for Wales (Legislative Competence) (No.6) Order 2008 (Relating to Provision of Mental Health Services) was laid before the Assembly on 18

February 2008. The Assembly established a Committee on 26 February 2008 to undertake pre-legislative scrutiny of the proposed Order. The Committee issued a call for written evidence and subsequently held six evidence sessions and published its report on 20 June 2008. This report recommended a number of changes to the drafting of the proposed Order.

7. The revised proposed Order, together with an Explanatory Memorandum, by Jonathan Morgan AM, endorsed by the Welsh Assembly Government, was published as a Command Paper by the Wales Office on 21 May 2009. The Secretary of State wrote to the Chairman of the Welsh Affairs Committee and to the Select Committee on the Constitution, House of Lords, inviting these committees to undertake pre-legislative scrutiny. The Welsh Affairs Committee formally accepted this invitation on 2 June 2009.

The LCO process in this instance

8. Jonathan Morgan AM is the first non-Government Assembly Member to have a Legislative Competence Order formally laid in Parliament. In oral evidence to the Committee, he highlighted the support he had received from the Health Minister and officials in the Welsh Assembly Government and the value of “joint working”:¹

The Health Minister was very keen and very supportive in that I could receive information via officials and not just information via the Minister. I was invited to briefings with the Minister and her officials. We kept in regular contact and more recently, it has been weekly contact, either meeting informally or more formally, to talk about where we are in the process [...] That very strong working relationship has continued for the past two years.²

9. Claire Fife, Mental Health Legislation Manager from the Welsh Assembly Government, commented that “it has been a really interesting process to work in this way”,³ and noted:

The Minister has been extremely supportive throughout the whole process and has made the time of her officials fully available to Mr Morgan whenever he wished to discuss a point either with her or with her officials.⁴

10. Jonathan Morgan recognised that “One of the difficulties of pursuing a competence order as a backbench Member is that clearly you do need the support of the government.”⁵ He noted that the proposed LCO had “support not just from the government but from the other two political parties in the Assembly”.⁶

11. The proposed Order as originally drafted was not laid before Parliament and was not referred to the Welsh Affairs Committee. The Assembly’s Proposed Mental Health LCO Committee undertook initial pre-legislative scrutiny and recommended substantial

¹ Q 24

² Q 22

³ Q 81

⁴ Q 81

⁵ Q 7

⁶ Q 7

changes to the proposed Order. As a result, the Order was re-drafted before the LCO in its current form was laid before Parliament on 21 May 2009. This Committee has previously commented on the benefit of sequential consideration of LCOs. If, as in this case, the changes suggested by the Assembly Committee have been incorporated into a revised draft by the time the proposed Order is considered at Westminster, this means that we are likely to be scrutinising the considered view of the Assembly as a whole rather than the initial proposal, improving both the process and the outcome, so the sequence of events in this scrutiny process appears to us to provide a sensible pattern for future consideration of Private Members' LCOs .

12. In oral evidence to the Committee, Jonathan Morgan AM spoke of the redrafting process, following recommendations made by the Mental Health Legislative Competence Order Committee of the National Assembly, and highlighted the continued working between himself and the Minister:

There was a series of correspondence exchanged between myself and the Minister where she had considered the evidence of that committee. I had made suggestions for where terminology needed to change, where wording needed to alter and where work needed to be done [...] There were then conversations and discussions between officials in the Assembly parliamentary service and officials working in the Assembly Government. The final draft was a draft provided by the Assembly Government but that was at the end of a process of going back and forth to discuss what needed to be there.⁷

Claire Fife, Mental Health Legislation Manager from the Welsh Assembly Government, commented:

The final draft [of the proposed draft] has been prepared by the Office of the Welsh Legislative Council and agreed with Mr Morgan and is based on the negotiations that officials have had, his officials and the Assembly officials, with the Department of Health, the Ministry of Justice, and so forth.⁸

Wayne David MP, the Parliamentary Under-Secretary of State, Wales Office, noted that the relationship between all parties had been a very positive one, and that the Wales Office would “wish to learn from our experience so far so that in future a similar process can be equally smooth.”⁹

13. Mr Morgan expressed some frustration about the time the process had taken and the delay in receiving Whitehall clearance for the proposed Order. He was successful in the ballot on 3 October 2007. The proposed Order and Explanatory Memorandum were published as a Command Paper by the Wales Office on 21 May 2009. In oral evidence to the Committee, he commented:

One of the difficulties is that once the Order had been agreed between myself and the Assembly's Health Minister, had received that all party support and had that very

⁷ Q 23

⁸ Q 61

⁹ Q 104

active support of the Minister and her officials, the Order was referred to Whitehall in December of last year. There have been government Legislative Competence Orders which have been published later and delivered to Whitehall later than mine which have I think almost completed their processes [...] I can understand where government officials would want to ensure that the government's legislative programme is prioritised. I accept that as one of the realities of government and political life. I suppose from my own perspective it was necessary to wait in the queue until when Whitehall clearance could be afforded and when it could be possibly referred to this Committee by the Secretary of State.¹⁰

14. Claire Fife from the Welsh Assembly Government indicated that the issue had been raised within the National Assembly for Wales:

... the Counsel General and Leader of the House has given reassurance that each LCO is considered on its merits and he has confirmed to Mr Morgan that it is absolutely not the case that backbench LCOs have been treated differently [...] it is certainly not the case that this Order has been lagging behind the Government priorities.¹¹

15. We welcome the first proposal for a Legislative Competence Order formally laid before Parliament to have been introduced by a non-Government Assembly Member. We note Mr Morgan's frustration with the time the process has taken in receiving Whitehall clearance for the proposed Order. We applaud the level of co-operation between Mr Morgan who sponsored the proposed LCO, the Welsh Assembly Government, and the Wales Office. We look forward to similar support by the Welsh Assembly Government and Wales Office to further backbench-sponsored LCOs.

The Welsh Affairs Committee inquiry

16. The Secretary of State referred the proposed National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2009 to us for pre-legislative scrutiny. We considered whether the proposed Order is in the spirit and within the 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.¹²

17. We took oral evidence on three occasions, including from Jonathan Morgan AM, sponsor of the proposed LCO, officials from the Welsh Assembly Government, and from the Parliamentary Under-Secretary of State, together with officials of the Wales Office and an official from the Department of Health. We were disappointed that the Welsh Assembly Government Health Minister Edwina Hart MBE AM was not able to appear before the Committee but look forward to her appearing before us for our inquiry into cross-border health services. We received written evidence from Dai Davies MP, Mind Cymru, Gofal

¹⁰ Q 21

¹¹ Q 80

¹² On 2 June 2009 the Committee issued a press notice setting out the scope of its inquiry and inviting written submissions from interested parties.

Cymru, the College of Occupational Therapists, Hafal, the Children's Commissioner for Wales, Royal College of Nursing, Wales, and Jonathan Morgan AM. The evidence we received is appended to this Report. We are grateful for the assistance of our specialist advisers, Professor Phil Fennell of Cardiff Law School,¹³ and Professor Keith Patchett, Emeritus Professor of Law, University of Wales.¹⁴

1 Purpose of the draft Order

Purpose

18. The full background to the proposed Order is set out in the Explanatory Memorandum accompanying the proposed Order. The provision of assessment and clinical treatment in respect of mental health is provided as part of the National Health Service under the National Health Service (Wales) Act 2006. There are two main legal duties of relevance to assessment and treatment. They are:

- (1) the duty imposed on a local authority to assess the need for detention or guardianship under s. 13 of the Mental Health Act 1983, which deals with the manner in which patients may be compelled to receive assessment in hospital for their mental disorders and to receive treatment of the same;
- (2) the duty of a local authority to assess a person's need for community care services under s. 47 of the National Health Service and Community Care Act 1990.

These legal duties are supplemented by duties under the Welsh Assembly Government's Adult Mental Health National Service Framework.

19. The Mental Health Act 2007 amended the Mental Health Act 1983 and provides for advocacy services to be provided in certain circumstances in respect of patients subject to certain provisions of the 1983 Act, known as Independent Mental Health Advocates (IMHAs). The Mental Capacity Act 2005 also provides for advocates in certain prescribed circumstances, known as Independent Mental Capacity Advocates (IMCAs), who provide extra protection to the most vulnerable people who lack capacity.

20. The Explanatory Memorandum states that the objective of the proposed Order is to enable the Assembly to bring forward Measures which:

... would allow duties to be placed on NHS bodies and social service providers to assess a person's mental health. The LCO would allow such duties to be placed in respect of individuals not previously diagnosed with a mental disorder, but who are presenting with the appearance of mental ill health. Duties may be placed on NHS

¹³ See Formal Minutes of the Committee for 9 June 2009 at <http://www.parliament.uk/documents/upload/FORMALMINUTESWAC08-09v3a.pdf>

¹⁴ See Formal Minutes of the Committee for 28 November 2006 at <http://www.parliament.uk/documents/upload/final%20FORMAL%20MINUTES%2006%2007.pdf>

bodies and social service providers in respect of the treatment of a person's assessed mental disorder.¹⁵

and:

... extend legislative competence as regards the provision of social care services to the area of mental health.¹⁶

21. In oral evidence to the Committee, Jonathan Morgan AM stated that there are:

... very clearly gaps in the provision of three key areas and those three key areas [are] the assessment of individuals, the treatment and care that could be offered to them and also the provision of independent advocacy [...] It [is] felt that a Legislative Competence Order, subject to approval by both the Assembly and Parliament, could provide greater clarity and ultimately better services in Wales.¹⁷

Wayne David MP, Parliamentary Under-Secretary, Wales Office, told the Committee that:

... the Legislative Competence Order will allow the Welsh Assembly Government to introduce Measures to address the assessment and treatment of mental disorders for individuals who are not covered by the 1983 Act and provide comprehensive and wide-ranging advocacy services.¹⁸

22. The Welsh Assembly Government at present has executive functions which relate to the Mental Health Service but no power to legislate regarding mental health. Welsh Ministers have powers to issue directions and policy and practice guidelines:

- Under s. 12(3) of the National Health Service (Wales) Act 2006, Welsh Ministers may give directions to a Local Health Board about its exercise of any function, and under s. 19(1) they may issue directions to NHS Trusts. Welsh Ministers also have the power to issue directions under s. 7A of the Local Authority Social Services Act 1970. Directions must be complied with.
- Welsh Ministers may issue “policy guidance” under s. 7(1) of the Local Authority Social Service Act 1970.
- Finally they may issue practice guidance, which although it “lacks the status accorded by s. 7(1)” is advice “to which regard must be had” by councils in carrying out their statutory functions, and if they adopt a different course to the advised in the guidance, they should have a good reason for so doing.¹⁹

¹⁵ Explanatory Memorandum, para 21

¹⁶ Explanatory Memorandum, para 25

¹⁷ Q 2

¹⁸ Q 85

¹⁹ *R v Islington LBC ex parte Rixon* (1998) 1 CCLR 119, pl131E, (1996) 32 BMLR 136 (QBD)

The proposed Order and existing Welsh Assembly Government policy

The identifiable need for the proposed Order

23. The Explanatory Memorandum by Jonathan Morgan AM, endorsed by the Welsh Assembly Government, lists six perceived gaps in the current arrangements:

- The existing framework does not provide for a comprehensive duty *vis-à-vis* the provision of the assessment of mental health and the treatment of mental disorder outside of compulsion;
- The need for an improved focus on early intervention and treatment through statutory duties as regards the provision of assessment and treatment which is the preferred option of many service users and their families;
- The extant duties on local authorities to provide certain assessments do not translate into duties to provide services arising out of the assessments;
- The duties for assessment by local authorities are applicable only in respect of those who are mentally disordered, and not those who appear to be exhibiting symptoms or manifestations of such disorder. This can result in individuals having to reach a certain level of ill health before becoming eligible for assessment;
- There is a patchwork of duties in respect of specialist mental health assessment and treatment within secondary services. In Wales such services are increasingly provided on a multidisciplinary basis, which involves a range of professionals and service. Those working within such services are keen to ensure, in line with the Welsh Assembly Government's strategies and service frameworks for mental health, that multidisciplinary working in this way should be strengthening. This would allow for a more seamless approach to service provision for the individual recipient, and for those services to be focused on the needs of the individual in line with effective care planning;
- The existing legislative framework does not provide for a wide ranging and comprehensive advocacy service—the role of the IMHA is limited to specific functions in respect of qualifying patients in limited circumstances. There is a need to ensure advocacy is available for people at a time when their mental health and usual support mechanisms may be breaking down, leaving them vulnerable when key decisions about treatments and support may need to be made.²⁰

24. In evidence to ourselves and the Assembly Committee, witnesses highlighted the lack of suitable powers under the current legislative provision that could be used to deliver a comprehensive assessment, treatment and advocacy framework for Wales. Edwina Hart AM, Minister for Health and Social Services, told the Assembly Legislation Committee that:

There are many issues that the current legislation is not addressing in some key areas. We have secondary legislation powers under the Mental Health Act 1983, but

²⁰ Explanatory Memorandum, para 19

these do not cover assessment, treatment and advocacy or those who are not subject to compulsion. There are various duties for the NHS and for local government in terms of the provision of services that, individually, go some way to secure assessments, but taken collectively, that is not cohesive across Wales.²¹

25. In oral evidence to us, Jonathan Morgan AM commented:

There is a feeling that, whilst Parliament has clearly legislated in the past for those people who become detained under the 2007 Act, there is very little in terms of duties that are placed on public bodies in Wales or anywhere else for that matter which would allow for the assessment at an earlier stage, perhaps in many circumstances preventing people from becoming detained at the point at which that crisis kicks in.²²

Similar arguments were also raised by Neil Buffin, Senior Lawyer at the Welsh Assembly Government:

One of the things about the 1983 Act [...] is that it lays down the framework under which people may become subject to compulsion and liable to detention under that Act, but the 1983 Act does not actually deal with the provision of assessment, the provision of treatment or services. Turning then to the NHS and Community Care Act, that does allow assessment of needs but within the social services context rather than within the health context. Further, it relates to adults rather than children.²³

26. Witnesses highlighted that the intention of the proposed order was to entitle people who appear to be suffering from mental disorder, but do not yet have a firm diagnosis of mental disorder, to obtain early assessment of their condition and need for services. In their written evidence, the College of Occupational Therapists noted that the LCO “offers the opportunity for Wales to create a whole-system, modern approach to mental health legislation. This should move away from the medical domination of access to services to a more client led, multi-professional approach.”²⁴ They expanded on this in oral evidence to the Committee:

We are looking at the development of early intervention, we are looking at better development of community multidisciplinary teams so that people are able to access the range of services because if those continue to sit in secondary care you cannot actually access them until you are admitted to hospital, whereas if we were able to have more practitioners in occupational health services, if we were able to keep people in work, in their own role, in their own communities, then we could be delivering those services before we get to the expensive end of the service and start destroying people’s lives.²⁵

²¹ Record of Proceedings, para 5, 6 May 2008, Proposed Provision of Mental Health Services LCO Committee

²² Q 4

²³ Q 62

²⁴ Ev 33

²⁵ Q 31

27. Current legislation on mental health is suitable for people who may become subject to compulsion and liable to detention. However the current legislative framework does not deal with the provision of assessment, the provision of treatment and advocacy services for those for whom the exercise of coercive powers are inappropriate. There is wide support for an extension of legislative competence to deal with this gap and we agree that a clear need for the proposed Legislative Competence Order has been identified.

The “fit” with existing Welsh Assembly Government policy

28. Part of our scrutiny of proposed Orders is to ascertain the extent to which the Order “fits” with existing Welsh Assembly Government policy. In this case, the proposed Order clearly develops previously announced Welsh Assembly Government policy.

29. The Welsh Assembly Government’s Strategy for mental health services for adults of working age in Wales was published in 2001,²⁶ setting out the Assembly Government’s aspirations for a modern, community-focused mental health service which is based on the principles of equity, empowerment, effectiveness and efficiency. As highlighted by the Explanatory Memorandum, the National Service Framework (NSF) for Adult Mental Health Services was published in 2002, setting the standards and outlining the key actions necessary to drive up quality and reduce variations in health and social care policy. A Revised NSF for Adult Mental Health services, *Raising the Standard*²⁷, was published in October 2005, following the 2005 Report of the Wales Audit Office which found that mental health services were not effectively organised to promote achievement of the NSF’s objectives.

30. Edwina Hart AM, Minister for Health and Social Services in the Welsh Assembly Government, told the Assembly Legislation Committee that she supported the broad principles of the proposed Order, and confirmed that it is in line with the Government’s commitment in *One Wales* to making mental health a key priority.²⁸ In evidence to us, Chris Stevens from the Legislative Policy Branch of the Wales Office commented:

I think the UK Government would agree that it is appropriate for this legislative competence to be devolved in that it meets the criteria set out in Devolution Guidebook 16. This is an area of policy where the Assembly Government have functions and they have a clear case for the power to be devolved and we believe that the scope of the proposed competency is appropriate and, therefore, for that reason, we are happy for this competence to be devolved ...²⁹

31. We conclude that the proposed Order clearly develops and is consistent with previously announced Welsh Assembly Government policy.

²⁶ *Equity, Empowerment, Effectiveness, Efficiency*, National Assembly for Wales, September 2001

²⁷ Welsh Assembly Government, *Raising the Standard; The Revised Adult Mental Health National Service Framework and an Action Plan for Wales*, October 2005

²⁸ *One Wales: A progressive agenda for the government of Wales*, 27 June 2007

²⁹ Q 87

Use of the Legislative Competence Order Procedure

National Service Framework

32. National Service Frameworks (NSFs) are intended to be a major vehicle for improving the quality of health services, and recognising the entitlements of patients to a service which is responsive to their needs and involves them in planning and service delivery decisions.

33. Standard 2 of the Adult Mental Health National Service Framework deals with service user and carer empowerment, and aims “To encourage the full and genuine participation of service users and carers in all aspects of mental health services, including planning and commissioning.” The following Key Actions in the NSF are relevant to the proposed amendment to Field 9:

Key Action 5. By March 2006 local authorities and Local Health Boards (LHBs) were to produce bilingual, locally accessible, service directories which include arrangement for access out of hours and also provision in the voluntary sector.

Key Action 13. Any individual with an identified mental illness is to be able to contact local services on a 24-hour basis in order to have their needs assessed and receive appropriate advice, treatment, care and/or support.

Key Action 14. People with mental health problems are to be made aware of the national mental health helpline CALL and other available helplines.

Key Action 23. Out of hours access to services, including CMHTs [Community Mental Health Teams], is to be made available during public holidays, at weekends and during the evening.

Key Action 25. A range of specialist services is to be available and accessible across Wales. These should include eating disorder services, mother and baby units, low security care, liaison psychiatry, neuropsychiatry and early intervention services accessible to each Trust area.

By March 2007 LHBs/NHS Trusts/Health Commission Wales (HCW) were to ensure timely access to specialist tertiary inpatient care where necessary via an agreed referral route. Referral will include ensuring that all opportunities to deliver care via specialist community services or secondary care inpatient settings have been explored and assessed as inappropriate.

34. The National Service Framework is non-statutory. It aims to “set standards for services in Wales, drive up quality and reduce unacceptable variations in health and social services provision”.³⁰ The NSF sets out a number of Key Actions each with a time frame and performance target, together with monitoring information and identification of the organisations responsible for implementation. The Standard and Key Actions form the basis for any future assessments of mental health services carried out by regulatory and

³⁰ Welsh Assembly Government, *Raising the Standard, Revised Adult Mental Health National Service Framework and Action Plan for Wales*, October 2005

inspectoral bodies. The NSF includes a commitment by the Welsh Assembly Government to “ensuring that mental health remains a top health and social care priority for Wales”.

35. While witnesses commented that the National Service Framework had set a “fantastic framework for mental services”,³¹ Hafal and the College of Occupational Therapists agreed that it lacked “teeth”.³² Jonathan Morgan AM commented:

Although they are there to guide the NHS to provide better services, there is no public duty that exists. There is no legal duty on those bodies to provide either the assessment, the level of treatment and care that that person may require or ensure that that person gets access to the level of advocacy that they may need [...] It is very clear that the national service frameworks in themselves, although providing a strategic direction, do not have the legislative oomph in the way that placing duties through Assembly Measures on the back of this LCO could. I think that is quite fundamental.³³

Claire Fife of the Wales Assembly Government, agreed that “the NSF is a strategic framework within which services can be provided, but it remains a strategic framework—it does not provide a statutory duty to deliver those services”.³⁴

36. Witnesses commented that the lack of “legislative teeth”³⁵ led to deficiencies in the monitoring of the NSF via the inspecting and regulatory bodies. Alexandra McMillan, Public Affairs Manager, Gofal Cymru, stated:

You can inspect and monitor as much as you like, but if at the end of the day all that produces is a report saying that something is not happening and there is no follow-up to that then that is not very helpful.³⁶

37. We also examined the possibility of providing advocacy services outside the framework of the Mental Health Act 1983 or the Mental Capacity Act 2005. Key Action 6 of the NSF require that:

A range of appropriate independent, trained and dedicated advocacy services should be available and promoted across Wales. Statutory advocacy is to be compliant with the requirement of the proposed new Mental Health Act 2007 and accessible by 2007. Non statutory advocacy services are to be developed and fully available at inpatient sites by 2008/9 and in the community by 2009/10.

The target date for in-patient non-statutory advocacy to be introduced was March 2009 and for the community service March 2010.

38. Witnesses commented on the lack of quality and availability of advocacy services across Wales. Alun Thomas, Deputy Chief Executive, Hafal, highlighted the “postcode lottery,

³¹ Q 32

³² Q 28, Q 32

³³ Q 5

³⁴ Q 67

³⁵ Q 48

³⁶ Q 49

this very patchy approach” that existed in Wales.³⁷ Claire Fife of the Welsh Assembly Government agreed that advocacy services varied in quality and frequency and availability, and that “using Measures that the National Assembly could bring forward after achieving competence, I think, would strengthen that.”³⁸

39. Gareth Jones of Mind Cymru noted that advocacy services were not currently provided throughout Wales:

At our conference last year, which was based on advocacy, we had a panel session which was attended by the Deputy Health Minister, Gwenda Thomas, and [...] a commissioner for health services in the north of Wales. They were on the same panel and he was asked, “Why are you not providing these advocacy services as per the National Service Framework?” and his reply quite openly in front of the Deputy Health Minister was, “Because I’m not required to do so. I have other priorities that I am required to do and those are what I do”.³⁹

Jonathan Morgan AM felt that:

... advocacy had to be part of the package if we were to ensure that a legal duty being conferred upon public bodies should not just apply to the assessment and treatment⁴⁰

Need for the Legislative Competence Order

40. Witnesses agreed that an LCO would allow the Assembly to make Measures relating to mental health which could go wider than the NSF and that “full use has already been made of existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter.”⁴¹ Mr Morgan commented:

A competence order that ties together the variety of assistance that is currently provided in those [...] Acts of Parliament [...] together with the national service frameworks, would give clarity to what the Assembly Government wanted to achieve. It would also allow the Assembly Government by Measure to go slightly further than the national service frameworks. The national service frameworks themselves are confined to those people who are not detained. However, the Assembly’s Health Minister is keen to ensure that there is a level of advocacy which is extended to those people who are detained as well as those who are not detained. A national service framework as it is currently drafted within the current legal framework would only apply for those people who have not been detained. A Legislative Competence Order would tie all of that together to allow the Assembly to legislate by measure for people regardless of their circumstances.⁴²

³⁷ Q 40

³⁸ Q 72

³⁹ Q 46

⁴⁰ Q 13

⁴¹ Ev 40

⁴² Q 6

41. Dr Stephen Hunter, Medical Director, Welsh Assembly Government, argued that:

... the NSF, even if we amended it, would not deal with people as yet to be identified as suffering from a mental disorder; it would not significantly direct or even empower community mental health teams, assertive outreach teams, crisis resolution teams, and so on [...] Measures taken under this order would enable services to identify much earlier and place an obligation on them to intervene much earlier. I do not think that could be achieved through a National Service Framework. I think that could only be achieved by some legislative *force majeure* in that sense.⁴³

42. Dai Davies MP, however, questioned the need for a specific Welsh LCO, commenting that the changes could be made using primary legislation at Westminster:

If amendments are needed to legislation regarding those with mental health issues, and if arguments for those changes are strong enough to require such a change in the law—because of the way they improve the lives of mental health sufferers—then such improvements should be argued for and made on behalf of all sufferers across the UK! [...] If what is being proposed is best practice, and/or first-rate new thinking which will alleviate suffering, then why not roll it out to everyone in the UK by amending not just the Wales Act but UK Acts which affect such provision across the UK.⁴⁴

43. When this issue was raised with Jonathan Morgan AM, he acknowledged that framework powers under the 2007 Mental Health Act would have been desirable. However he noted:

... we are where we are and the Legislative Competence Order route is certainly the only opportunity afforded to me as a backbench Member. As I understand it there are no other Bills currently before Parliament that would afford the Assembly Government the opportunity to ask for framework powers.⁴⁵

Richard Rook of the Mental Health Division of the Department of Health commented:

... the UK Government has only relatively recently taken through what became the Mental Health Act 2007 in which many of these issues were discussed, but the view that the Government took was that it did not think that a legislative solution was the best way forward.⁴⁶

He further commented:

... the UK Government felt that [early intervention] was not a justification for providing a specific duty for a relatively small part of the population in relation to

⁴³ Q 67

⁴⁴ Ev 35

⁴⁵ Q 20

⁴⁶ Q 98

one set of health problems, to have a separate duty to assess mental health problems when there is no equivalent duty for people with physical problems.⁴⁷

44. The Parliamentary Under-Secretary at the Wales Office believed that the LCO represented “the Welsh Assembly and its Government identifying what its priorities are within the overall UK framework.”⁴⁸

45. While the Adult Mental Health National Service Framework has set a clear strategic framework in Wales, it does not provide a statutory duty to deliver those services. The Legislative Competence Order would allow the Welsh Assembly to make Measures relating to mental health to ensure earlier assessment, treatment and access to advocacy services. The UK Government’s current view is that it does not wish to legislate in this area. The Legislative Competence Order procedure is therefore the only legislative route currently available to allow Mr Morgan’s proposal, endorsed by the National Assembly for Wales, to proceed.

2 Scope of the Proposed Order

Scope of Matters

Scope of Matter 9.2 – Assessment of mental health and treatment of mental disorder

46. New Matter 9.2 which the proposed Order would add to the legislative competence of the National Assembly for Wales is intended to confer competence to pass primary legislation on the assessment of mental health and treatment of mental disorder. Treatment of mental disorder is widely defined to mean “treatment to alleviate, or prevent a worsening of, a mental disorder or one or more of its symptoms or manifestations; including (but not limited to) nursing, psychological intervention, habilitation, rehabilitation, and care”.⁴⁹ Mental disorder is equally widely defined, and means any disorder or disability of the mind apart from dependence on alcohol or drugs.⁵⁰

47. Jonathan Morgan AM explained how the scope of Matter 9.2 has changed since the original proposal:

... in its original form the Order made reference to the wording in relation to those people who may require assessment. It said that the Order would apply to persons who are or may be mentally disordered [...] The problem with that particular terminology is that it raises conceptual difficulties of defining how persons who may be mentally disordered are identified. Likewise, reference to persons who appear to be mentally disordered gives rise to the questions: appears to whom? We were very

⁴⁷ Q 101

⁴⁸ Q 98

⁴⁹ Clause 2(2)

⁵⁰ Clause 2(3)

conscious to ensure that ambiguities were removed, which is why the start of Matter 9.2 merely says, ‘Assessment of mental health and treatment of mental disorder’...⁵¹

The Assembly’s Legislative Competence Order Committee recommended that the Order should be broadly drafted. Mr Morgan stated his view:

... that the duty should fall on local authorities with regard to social services as well as the NHS with regard to mental health services. It allows for the assessment which would in many cases, particularly in secondary care, require quite a multidisciplinary team of people to provide that assessment, people who may not be employed by the health service but by the local authority.⁵²

48. Mr Morgan acknowledged that the wording of the matter was broad, “but it is not overly broad.”⁵³ He believed:

The LCO is sufficiently broad in my own mind to encompass whichever groups of people might need to be legislated for within Assembly Measures.⁵⁴

Joanest Jackson, Senior Legal Adviser in the National Assembly for Wales, believed that the broad wording of the Matter:

... allowed sufficient flexibility for the current policy to develop and to be adopted to fit suitable circumstances as they appear. It is intended to allow a building upon the current legislation which in many ways is restrictive.⁵⁵

49. There was widespread support amongst witnesses for the broad drafting of the proposed Order. Alun Thomas, Deputy Chief Executive of Hafal, commented:

The major concern would be getting this LCO through and agreed and the Measures to come from it but then having to come back to do the same thing possibly even in 18 months’ time because of the sort of advances that are going on in health and social care. The changes in investment, changes in political will could well mean that a very strictly drafted LCO would be too time-limited for it to have any real effect.⁵⁶

Ruth Crowder, Policy Officer for the College of Occupational Therapists, noted that “If it is too tightly drawn it is not going to stand the test of time to actually give us the opportunity to drive assessment and treatment services as we need them in Wales.”⁵⁷

50. We are persuaded that the rate of change in the development of treatment for mental health problems justifies the use of broad drafting in the proposed Order.

⁵¹ Q 9

⁵² Q 4

⁵³ Q 9

⁵⁴ Q 4

⁵⁵ Q 8

⁵⁶ Q 34

⁵⁷ Q 33

Exclusions

51. Clause 2(2) of the proposed LCO restricts the scope of the proposed power. The Explanatory Memorandum states:

... the LCO would not allow the Assembly to legislate in respect of compelling individuals to be assessed, treated or supervised or subjecting persons to guardianships. In effect, this means there is no overlap with the main subject matter of the 1983 Act and the legislative competence of the National Assembly for Wales.⁵⁸

52. In oral evidence to the Committee, Jonathan Morgan AM expanded on the exclusion included in the proposed power:

It does not include those people who are subject to compulsory attendance at any place for purposes of attendance or treatment. Nor does it include those people who are under compulsory supervision or guardianship because they are already covered in other legislation. It was felt that it would be intruding on the work that is currently done by other Acts of Parliament in particular which provide for those individuals.⁵⁹

The Parliamentary Under-Secretary at the Wales Office agreed with the need for this exclusion:

... the LCO is very specific in recognising that there is no need for, and nor should there be, any impingement of what is set out very, very clearly in the 1983 Mental Health Act, and that focus on compulsion.⁶⁰

53. Proposed clause 2(2)(b) provides that the power does not extend to consent to assessment or treatment. However Claire Fife of the Welsh Assembly Government explained that:

... the Measures that could be brought forward would not be able to cover compulsion, but an individual subject to compulsion may benefit from some of the Measures. For example, if something was around advocacy and we wanted to provide a measure advocate, just because a person was subject to detention does not mean they would not attract the benefits that that measure advocate could bring forward.⁶¹

54. The proposed exclusions ensure that the Assembly will not be allowed to amend existing law relating to treatment without consent in Parts IV and IVA of the Mental Health Act 1983; compulsory admission, guardianship or Community Treatment Orders powers under Part II of the 1983 Act; or the provisions in ss 135 or 136 of the 1983 Act relating to removal to a place of safety for compulsory assessment. We are satisfied that these exclusions are appropriate.

⁵⁸ Explanatory Memorandum, para 22

⁵⁹ Q 11

⁶⁰ Q 91

⁶¹ Q 69

Application

55. The Explanatory Memorandum explains that the LCO “would allow such duties to be placed in respect of individuals not previously diagnosed with a mental disorder but who are presenting with the appearance of mental ill health.”⁶²

56. The College of Occupational Therapists expressed concern over the application of the Order:

Paragraph 21 states that the duty for assessment and treatment will be for individuals not previously diagnosed. This is excellent for early intervention for the group (predominately young men with psychosis) who are becoming unwell for the first time. However, we also believe this Order should include those already known to services who are becoming unwell and recognise it. As currently constructed, this group would still not get early assessments or treatment. This would miss the full benefits for Wales of this LCO.⁶³

When we pursued this during oral evidence, Genevieve Smyth, Mental Health and Learning Disability Officer of the College of Occupational Therapists, commented that they had been reassured by “a range of people around who have read the LCO differently from us” that the order would incorporate people who had already been recognised but were not currently in services.⁶⁴

57. Claire Fife of the Welsh Assembly Government conceded that the confusion had arisen due to the drafting of the Explanatory Memorandum:

... I think perhaps it reflects the drafting in paragraph 21 of the Explanatory Memorandum and perhaps the way that the Order of the Scrutiny Committee and the Assembly was drafted. What the Explanatory Memorandum does not say is that duties can only be placed in respect of previously undiagnosed persons, but I accept it does not say that they can either.⁶⁵

She commented that:

... the Order itself certainly does not exclude a person who is previously or currently diagnosed.⁶⁶

58. This point was also made by the Parliamentary Under-Secretary at the Wales Office:

I think perhaps the Explanatory Memorandum could on this point have been clearer [...] but to be clear [...] the LCO would allow a Measure to include duties relating to individuals not previously diagnosed as having a mental disorder as well as those with a previous or current disorder.⁶⁷

⁶² Explanatory Memorandum, para 21

⁶³ Ev 33

⁶⁴ Q 36

⁶⁵ Q 71

⁶⁶ Q 71

⁶⁷ Q 93

59. Matter 9.2 makes it clear that the duty for assessment and treatment will be for individuals not previously diagnosed. As a result of the evidence, we are satisfied that it is not the intention to exclude those who are previously or currently diagnosed. We suggest that the Explanatory Memorandum be amended to make this clear.

Definition

60. Clause 2(3) provides that the definition clause of Field 9 is to be amended by inserting after the definition of “illness” in the National Health Service (Wales) Act 2006 the following:

“mental disorder” means any disorder or disability of the mind, apart from dependence on alcohol or drugs;

The National Health Service (Wales) Act 2006 states that “illness” includes mental disorder within the meaning of the Mental Health Act 1983 (c. 20) and any injury or disability requiring medical or dental treatment or nursing.⁶⁸ The definition in the Order will be added to that.

61. Jonathan Morgan AM commented that there had been “quite a lot of consideration” before including a definition in Field 9 which effectively duplicates the one in the 1983 Act (and is therefore already within the existing definition in s. 206 of the National Health Service (Wales) Act 2006). He felt it was necessary to avoid confusion as to what was meant by the term “treatment of mental disorder”.⁶⁹ Joane Jackson, Senior Legal Adviser to the National Assembly for Wales expanded on this point:

It ensures that we are not thinking of treatment as solely medical and medicating somebody to deal with an episode of ill health but it is broader and deals with rehabilitation, nursing and psychological intervention but of course it is not limited to that so it allows for a suitable package to be put in place.⁷⁰

Scope of Matter 15.9 – Social Care Services connected to Mental Health

62. New Matter 15.9 of the proposed Order extends the competence of the National Assembly of Wales as regards the provision of social care services to the areas of mental health.

63. We received advice that Matter 15.9, as currently drafted, would allow the Assembly to disapply in Wales the right to an Independent Mental Health Advocate (IMHA) for those subject to compulsory powers under the 1983 Act. Jonathan Morgan AM told us however that:

⁶⁸ National Health Service (Wales) Act 2006, s. 206

⁶⁹ Q 12

⁷⁰ Q 12

... there is no intention to, nor would the proposed Order enable the Assembly in a subsequent Measure to dis-apply the advocacy provisions contained in the Mental Health Act 1983.⁷¹

Claire Fife of the Welsh Assembly Government commented that although it was not the intention of the Welsh Assembly Government to disapply the provision of IMHA “there may be an unintentional risk that we would be keen to readdress.”⁷²

64. The Parliamentary Under-Secretary at the Wales Office conceded that there was a need to re-examine the drafting:

... I have been studying very carefully the wording in 15.9 and I think that is something that, when we move beyond the pre-legislative process, we will have to look at again very, very carefully, because [...] though it might not be a policy intention now or in the foreseeable future, nevertheless there is at least a theoretical possibility that a certain interpretation could be put on parts of 15.9 which are not intended.⁷³

65. We are satisfied that it is not the intention in the drafting of Matter 15.9 to allow the National Assembly for Wales the ability to disapply in Wales the right to an Independent Mental Health Advocate (IMHA) for those subject to compulsory powers under the 1983 Act. However we are concerned about unintended consequences and suggest that the LCO is amended to make this clear.

Cross-border issues

66. The proposed Order has the potential to raise cross-border issues which, as the Parliamentary Under-Secretary commented, “have to be taken very, very seriously.”⁷⁴ Claire Fife from the Welsh Assembly Government, said:

... in developing some of the thinking around the Measures we have given consideration to issues around GP registration, taking account of this Committee’s own findings on cross-border health services; we have considered issues about where patients receive secondary care, about patients that are receiving health and social care in Wales having previously received that elsewhere.⁷⁵

67. Dr Stephen Hunter, Medical Director for the Welsh Assembly Government, commented on the current situation, where some patients suffering from mental health problems are transferred outside of Wales in order to receive “really quite high-level care, largely in low secure environments and occasionally in specialist environments”.⁷⁶ He also noted that:

⁷¹ Ev 40

⁷² Q 75

⁷³ Q 95

⁷⁴ Q 96

⁷⁵ Q 76

⁷⁶ Q 76

Wales does have a significant problem in relation to transferring individuals out to hospitals, often many hundreds of miles away from where people's homes are.⁷⁷

68. Our witnesses viewed as a key aim of the transfer of competence the possibility of providing for patients in Wales to “receive the help, support and assistance they need as close to home as possible.”⁷⁸ In its written submission, Gofal Cymru stated:

... it might be hoped that improvements to mental health services in Wales as a result of obtaining legislative competence might lead to a reduction in the number of people needing to receive services outside of Wales.⁷⁹

Dr Stephen Hunter noted that that the aim would be to:

... prevent an individual deteriorating to the extent where they needed to be transferred out to low, medium and high secure facilities outside of Wales, because, as with everything else in medicine, the earlier one is able to intervene the less likely it is that the consequences are going to be that extreme.⁸⁰

69. Nonetheless, patients will continue to be transferred to England for specialist care. The Minister of the Wales Office stated unequivocally that:

... anything which is agreed with regard to this LCO and the measures that follow from it will not in any way question or undermine the existing cross-border protocols [...] it will be up to the Assembly Government to study any cross-border implications of their precise policies very, very carefully...⁸¹

Impact on the public sector

70. Our witnesses acknowledged that Measures arising out of the LCO had the potential to increase the burden on health services. Jonathan Morgan AM commented on the regulatory burden that could be placed on the NHS as a consequence of Measures permitted by the LCO, although he believed there was also the potential of simplifying duties for providers:

There could well be a regulatory burden and Measures resulting from the requested powers could provide that additional burden on providers. These also have the potential to replace a complex array of existing duties [...] Although there could well be a regulatory burden, I would expect that the potential Measures would clarify the legal position in Wales with regard to who was actually responsible for what.⁸²

71. Witnesses also identified the probability that initial financial costs would be incurred by the NHS in providing quicker access to assessment, treatment and advocacy.⁸³ The College

⁷⁷ Q 76

⁷⁸ Q 15

⁷⁹ Ev 38

⁸⁰ Q 76

⁸¹ Q 96

⁸² Q 16

⁸³ Q 16, Ev 33

of Occupational Therapists expressed concern that funding would be removed from in-patient care to fund the early intervention services, as had occurred in England:

The Mental Health Act Commission's Twelfth Biennial Report has identified the declining quality of in-patient units in England. We believe this is a potential outcome of removing funding from in-patients units too hastily ...⁸⁴

Claire Fife of the Welsh Assembly Government commented that it was not the Minister's intention to withdraw services and funding to inpatient services to fund any statutory duties imposed by any Measure⁸⁵ and that:

The Welsh Assembly Government has ensured that there are unprecedented levels of funding to mental health services in Wales ...⁸⁶

72. Witnesses unanimously agreed that new Measures could in the long-term achieve a positive cost benefit with less money needing to be paid out on specialist high need services. As Ruth Crowder, Policy Officer of the College of Occupational Therapists, commented, "one of the burdens on the public sector is how long and how expensive it is to support people once we have allowed them to become so unwell."⁸⁷ Jonathan Morgan also noted that:

... there could well be savings further along the line where those people thankfully, because of early intervention, do not then become subject to compulsory detention because they have become unwell. Many of those people who do not receive early intervention do find themselves becoming in-patients and of course in-patient care can be very much more expensive than treating and providing care and support to someone in the community.⁸⁸

73. The legislative competence conferred upon the National Assembly by this LCO would allow Measures to be brought forward which place regulatory and financial burdens on the public sector. While we recognise that there will be an initial financial cost incurred by the NHS in providing quicker access to assessment, treatment and advocacy, it is hoped that early intervention services will lead to long-term cost benefit. The extent of such duties would be a matter for future Measures.

⁸⁴ Ev 35

⁸⁵ Q 78

⁸⁶ Q 77

⁸⁷ Q 42

⁸⁸ Q 16

3 Conclusion

74. The proposed Legislative Competence Order would allow Measures to be made by the National Assembly for Wales that are a departure from the settled views of the UK Government. The evidence we have received shows wide support for Legislative Competence to be devolved to the National Assembly for Wales. We agree that the National Assembly for Wales should have the ability to legislate with regard to the assessment and treatment of mental disorder and access to advocacy services. The use of the Legislative Competence Order procedure is appropriate and acceptable in this instance.

75. We congratulate the high level of co-operation between Jonathan Morgan AM, the backbench Assembly Member who sponsored the proposed LCO, the Minister for Health and Social Services and the Welsh Assembly Government, and the Wales Office which enabled this proposal to proceed to its current stage. We hope that Mr Morgan and the Welsh Assembly Government will take our comments regarding drafting of the Legislative Competence Order and the Explanatory Memorandum into account.

Conclusions and recommendations

The LCO process in this instance

1. We welcome the first proposal for a Legislative Competence Order formally laid before Parliament to have been introduced by a non-Government Assembly Member. We note Mr Morgan's frustration with the time the process has taken in receiving Whitehall clearance for the proposed Order. We applaud the level of co-operation between Mr Morgan who sponsored the proposed LCO, the Welsh Assembly Government, and the Wales Office. We look forward to similar support by the Welsh Assembly Government and Wales Office to further backbench-sponsored LCOs. (Paragraph 15)

The identifiable need for the proposed Order

2. Current legislation on mental health is suitable for people who may become subject to compulsion and liable to detention. However the current legislative framework does not deal with the provision of assessment, the provision of treatment and advocacy services for those for whom the exercise of coercive powers are inappropriate. There is wide support for an extension of legislative competence to deal with this gap and we agree that a clear need for the proposed Legislative Competence Order has been identified. (Paragraph 27)

The "fit" with existing Welsh Assembly Government policy

3. We conclude that the proposed Order clearly develops and is consistent with previously announced Welsh Assembly Government policy. (Paragraph 31)

Need for the Legislative Competence Order

4. While the Adult Mental Health National Service Framework has set a clear strategic framework in Wales, it does not provide a statutory duty to deliver those services. The Legislative Competence Order would allow the Welsh Assembly to make Measures relating to mental health to ensure earlier assessment, treatment and access to advocacy services. The UK Government's current view is that it does not wish to legislate in this area. The Legislative Competence Order procedure is therefore the only legislative route currently available to allow Mr Morgan's proposal, endorsed by the National Assembly for Wales, to proceed. (Paragraph 45)

Scope of Matter 9.2 – Assessment of mental health and treatment of mental disorder

5. We are persuaded that the rate of change in the development of treatment for mental health problems justifies the use of broad drafting in the proposed Order. (Paragraph 50)

Exclusions

6. The proposed exclusions ensure that the Assembly will not be allowed to amend existing law relating to treatment without consent in Parts IV and IVA of the Mental Health Act 1983; compulsory admission, guardianship or Community Treatment Orders powers under Part II of the 1983 Act; or the provisions in ss 135 or 136 of the 1983 Act relating to removal to a place of safety for compulsory assessment. We are satisfied that these exclusions are appropriate. (Paragraph 54)

Application

7. Matter 9.2 makes it clear that the duty for assessment and treatment will be for individuals not previously diagnosed. As a result of the evidence, we are satisfied that it is not the intention to exclude those who are previously or currently diagnosed. We suggest that the Explanatory Memorandum be amended to make this clear. (Paragraph 59)

Scope of Matter 15.9 – Social Care Services connected to Mental Health

8. We are satisfied that it is not the intention in the drafting of Matter 15.9 to allow the National Assembly for Wales the ability to disapply in Wales the right to an Independent Mental Health Advocate (IMHA) for those subject to compulsory powers under the 1983 Act. However we are concerned about unintended consequences and suggest that the LCO is amended to make this clear. (Paragraph 65)

Impact on the public sector

9. The legislative competence conferred upon the National Assembly by this LCO would allow Measures to be brought forward which place regulatory and financial burdens on the public sector. While we recognise that there will be an initial financial cost incurred by the NHS in providing quicker access to assessment, treatment and advocacy, it is hoped that early intervention services will lead to long-term cost benefit. The extent of such duties would be a matter for future Measures. (Paragraph 73)

Conclusion

10. The proposed Legislative Competence Order would allow Measures to be made by the National Assembly for Wales that are a departure from the settled views of the UK Government. The evidence we have received shows wide support for Legislative Competence to be devolved to the National Assembly for Wales. We agree that the National Assembly for Wales should have the ability to legislate with regard to the assessment and treatment of mental disorder and access to advocacy services. The use of the Legislative Competence Order procedure is appropriate and acceptable in this instance. (Paragraph 74)
11. We congratulate the high level of co-operation between Jonathan Morgan AM, the backbench Assembly member who sponsored the proposed LCO, the Minister for

Health and Social Services and the Welsh Assembly Government, and the Wales Office which enabled this proposal to proceed to its current stage. We hope that Mr Morgan and the Welsh Assembly Government will take our comments regarding drafting of the Legislative Competence Order and the Explanatory Memorandum into account. (Paragraph 75)

Formal Minutes

Tuesday 20 October 2009

Members present:

Dr Hywel Francis, in the Chair

Nia Griffith

Mrs Siân James

Mr David Jones

Alun Michael

Hywel Williams

Mark Williams

Draft Report (*Proposed National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2009*) 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 75 read and agreed to.

Summary agreed to.

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

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

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 7 July 2009.

[Adjourned till Tuesday 27 October at 10 am

Witnesses

Thursday 2 July 2009

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Mr Jonathan Morgan AM, Ms Joanest Jackson, Senior Legal Adviser, and **Mr Steve Boyce**, Senior Research Officer, National Assembly for Wales Ev 1

Thursday 9 July 2009

Ms Ruth Crowder, Policy Officer Wales, and **Ms Genevieve Smyth**, Mental Health and Learning Disability Officer, College of Occupational Therapists; **Mr Alun Thomas**, Deputy Chief Executive, and **Mr Lee McCabe**, Recovery Practitioner, Hafal Ev 9

Ms Alexandra McMillan, Public Affairs Manager, Gofal Cymru, and **Mr Gareth Jones**, Social Justice and Rural Affairs Officer, Mind Cymru Ev 13

Thursday 16 July 2009

Ms Claire Fife, Mental Health Legislation Manager, **Mr Neil Buffin**, Senior Lawyer, Health and Food Safety Team, and **Dr Stephen Hunter**, Medical Director, Welsh Assembly Government Ev 16

Mr Wayne David MP, Parliamentary Under-Secretary of State, **Mr Chris Stevens**, Legislative Policy Branch, Wales Office, **Mr Richard Rook**, Member of the Mental Health Division, Department of Health Ev 21

List of written evidence

1	Welsh Affairs Committee Press Notice	Ev 25
2	Draft Order	Ev 26
3	Memorandum by Jonathan Morgan AM and endorsed by the Welsh Assembly Government	Ev 28
4	Written evidence from the Children's Commissioner for Wales	Ev 32
5	Written evidence from the College of Occupational Therapists	Ev 33
6	Supplementary evidence from the College of Occupational Therapists	Ev 35
7	Written evidence from Dai Davies MP	Ev 35
8	Written evidence from Gofal Cymru	Ev 38
9	Written evidence from Hafal	Ev 40
10	Written evidence from Jonathan Morgan AM, National Assembly for Wales	Ev 40
11	Written evidence from Mind Cymru	Ev 42
12	Written evidence from the Royal College of Nursing, Wales	Ev 43

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First Report	Cross-border provision of public services for Wales: Further and higher education	HC 57
Second Report	Globalisation and its impact on Wales	HC 184 –I, II
Third Report	Proposed National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2008	HC 5
Fourth Report	Work of the Committee 2007-08	HC 252
Fifth Report	The provision of cross-border health services for Wales	HC 56
Sixth Report	Proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009	HC 306
Seventh Report	Legal Services Commission Cardiff Office	HC 374
Eighth Report	Potential Benefits of the 2012 Olympics and Paralympics for Wales	HC 162
Ninth Report	The proposed National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009	HC 348
Tenth Report	Cross-border provision of public services for Wales: Transport	HC 58
Eleventh Report	English Language Television Broadcasting in Wales	HC 502
Twelfth Report	Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009	HC 678
Thirteenth Report	Digital Inclusion in Wales	HC 305
Fourteenth Report	Proposed National Assembly for Wales (Legislative Competence) (Health And Health Services And Social Welfare) Order 2009	HC 778
First Special Report	The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008: Government Response to the Committee's Seventh Report of Session 2007–08	HC 200
Second Special Report	Cross-border provision of public services for Wales: further and higher education: Government Response to the Committee's First Report of Session 2008-09	HC 378
Third Special Report	Proposed National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2008: Government Response to the Committee's Third Report of Session 2008-09	HC 410
Fourth Special Report	Globalisation and its impact on Wales: Government Response to the Committee's Second Report of Session 2008-09	HC 538
Fifth Special Report	The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009:	HC 605

	Government Response to the Committee's Sixth Report of Session 2008-09	
Sixth Special Report	Legal Services Commission Cardiff Office: Government Response to the Committee's Seventh Report of Session 2008-09	HC 825
Seventh Special Report	Proposed National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009: Government Response to the Committee's Ninth Report of Session 2008-09	HC 1024
Eighth Special Report	Digital Inclusion in Wales: Government Response to the Committee's Thirteenth Report of Session 2008-09	HC 1050
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First Report	Energy in Wales: follow up inquiry	HC 177
Second Report	The proposed Legislative Competence Order in Council on additional learning needs	HC 44
Third Report	Work of the Committee in 2007	HC 325
Fourth Report	The proposed National Assembly for Wales (Legislative Competence) Order in the field of social welfare 2008	HC 257
Fifth Report	The proposed draft National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008	HC 576
Sixth Report	The provision of cross-border health services for Wales: Interim Report	HC 870
Seventh Report	The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008	HC 812
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
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First Special Report	Government Response to the Committee's Second Report of Session 2006-07, Legislative Competence Orders in Council	HC 986

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First Report	Government White Paper: Better Governance for Wales	HC 551
Second Report	Proposed Restructuring of the Police Forces in Wales	HC 751
Third Report	Energy in Wales	HC 876-I
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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

Taken before the Welsh Affairs Committee (Sub-Committee on Mental Health) on Thursday 2 July 2009

Members present

Hywel Williams, in the Chair

Dr Hywel Francis
Mrs Siân C James

Alun Michael
Mark Williams

Witnesses: **Mr Jonathan Morgan AM**, National Assembly for Wales, **Ms Joanest Jackson**, Senior Legal Adviser, National Assembly for Wales, and **Mr Steve Boyce**, Senior Research Officer, National Assembly for Wales, gave evidence.

Q1 Chairman: Welcome to the Welsh Affairs Committee. Can you identify yourselves for the record, please?

Mr Morgan: I am Jonathan Morgan, the Assembly Member for Cardiff North. On my right is Joanest Jackson, who is one of the lawyers working with the Assembly Parliamentary Service. Steve Boyce on my left works for the Members' Research Service.

Q2 Chairman: Can you tell us broadly, what is the purpose of the LCO?

Mr Morgan: In 2007, together with the Minister for Health and Social Services, we met with a number of stakeholders in Wales, people who were working with patients who had a level of mental illness and we were alerted to some quite severe gaps in the legislative framework for the provision of services for those people with mental illnesses in Wales, regardless of the fact that there was a national service framework for older people, regardless of the fact that there was a child and adolescent mental health services framework. There were very clearly gaps in the provision of three key areas and those three key areas were the assessment of individuals, the treatment and care that could be offered to them and also the provision of independent advocacy. Whilst parts of that do exist in some existing legislation, it was very clear that the existing legislation was rather patchy. It was felt that a Legislative Competence Order, subject to approval by both the Assembly and Parliament, could provide greater clarity and ultimately better services in Wales.

Q3 Chairman: Those are fairly broad gaps if you are talking about gaps in assessment, treatment and advocacy. Has the provision been that deficient in the past?

Mr Morgan: There have been quite significant deficiencies. It was the Joint Parliamentary Committee on the 2004 Mental Health Bill who said that those services in Wales were less developed than elsewhere. That was probably a very polite way of putting things but I suspect in the work that they do, having visited Wales—I know, having spoken to a number of them—they were very concerned about some of the poor services. The legislative framework as it exists at the moment is rather convoluted. There are a series of Acts of Parliament that do relate to the

provision of services for people with a mental illness. In particular, there is the National Assistance Act of 1948 which does confer duties on local authorities to provide accommodation for persons over the age of 18 who need care and attention because they have a mental disorder. There is the NHS and Community Care Act of 1990, which requires local authorities to carry out assessments. There is obviously the Mental Health Act of 1983 as amended by the 2007 Act, which provides for the treatment and now provides for some level of advocacy for those people who have already been detained. Obviously there is the Mental Capacity Act of 2005 and that will prescribe circumstances where independent mental capacity advocates can be used. There is a variety of existing pieces of legislation. There are existing government strategies through the National Service Framework and the Child and Adolescent Mental Health Services Framework but there is nothing that pulls all of this together in one piece of legislation that could provide consistency of assessment, treatment and care and also advocacy for those people who need it, regardless of the level of mental illness they may suffer from.

Q4 Mark Williams: You have identified the disparate nature of the legislation and the big gaps and the patchiness of the service. Turning specifically to this LCO, how will it address some of those concerns that cannot already be addressed through existing powers?

Mr Morgan: Matter 9.2 as proposed in the LCO would allow the Assembly to legislate on the assessment of mental health and the treatment of mental disorder. In particular, what it will do is allow for duties to be placed in respect of persons not previously diagnosed but who are presenting with the appearance of mental health problems. One of the items of evidence that was given by Gofal Cymru to a recent inquiry by the Assembly's Health Committee into community mental health services said that the irony of the way in which services are presently provided means that you have to get to the point of crisis before you receive the assessment, the care package and any level of advocacy. There is a feeling that, whilst Parliament has clearly legislated in the past for those people who become detained under the 2007 Act, there is very little in terms of

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duties that are placed on public bodies in Wales or anywhere else for that matter which would allow for the assessment at an earlier stage, perhaps in many circumstances preventing people from becoming detained at the point at which that crisis kicks in. The LCO as currently drafted is different to the proposed LCO which went before the Assembly's Legislative Competence Order Committee some time ago. The reason it is different is that the evidence received by that Committee suggested that the duty should fall on local authorities with regard to social services as well as the NHS with regard to mental health services. It allows for the assessment which would in many cases, particularly in secondary care, require quite a multidisciplinary team of people to provide that assessment, people who may not be employed by the health service but by the local authority. In doing so, it includes a new matter in matter 15.9 which would extend the competence to include social care services. The LCO is sufficiently broad in my own mind to encompass whichever groups of people might need to be legislated for within Assembly Measures. It allows for the Assembly to place duties in the provision of those early assessments, whether those early assessments are conducted solely by the NHS or whether they are conducted by the NHS and local authorities. It provides for a variety of care and treatment and assistance which again could either be provided solely by the NHS or by the NHS and social services, but also for independent advocacy. I think that is absolutely essential. That level of advocacy and that concern about it was one of the big concerns that the mental health charities brought to us when they came to give evidence.

Q5 Mark Williams: You alluded to the limitations of codes of practice in your first answer. More generally, why is a legislative solution proposed rather than relying on codes of practice or a binding direction on the National Health Service? Is that a reflection of your feeling that those measures attribute to and explain that patchiness that we have experienced?

Mr Morgan: What I find very interesting is that when you read the National Service Framework for Older People and the Child and Adolescent Mental Health Services Framework there are some wonderful aspirations in there for ensuring that people do get assessed, that there is a level of intervention early enough and that advocacy is forthcoming. The problem has been alluded to by Mind Cymru and Gofal Cymru in their evidence to the Assembly's Health Committee. If I can quote the evidence from Gofal Cymru, they said that the service and financial framework targets are met but national service frameworks are not met because there is no consequence. Although they are there to guide the NHS to provide better services, there is no public duty that exists. There is no legal duty on those bodies to provide either the assessment, the level of treatment and care that that person may require or ensure that that person gets access to the level of advocacy that they may need. It is that lack of consistency between what is the very clear

intention of the Assembly Government, a very admirable intention, but it is the delivery mechanism. It is very clear that the national service frameworks in themselves, although providing a strategic direction, do not have the legislative oomph in the way that placing duties through Assembly Measures on the back of this LCO could. I think that is quite fundamental.

Q6 Dr Francis: This question relates specifically to the national service frameworks. You are on the record as saying that the Mental Health National Service Framework requires legislative backing. Could you reiterate for us why the policy aims of your proposal could not be achieved by effective monitoring of the national service framework via the inspectorial and regulatory bodies and rigorous enforcement of the target dates to achieve the key actions which you would wish to see delivered?

Mr Morgan: Ultimately what we want to see achieved is a consistency in the way that duties are put on the National Health Service and local authorities to provide that assessment, treatment and care and advocacy. At the moment, there are certain public duties which do exist because of the legislation which you have passed here with regard to the 2007 Act as amending the 1983 Act. Those duties only exist in so far as those people who have already been detained. No other duties exist to the same extent to provide for that level of intervention and support for those people who have not been detained. The problem with national service frameworks—I am sure the government officials when giving evidence will be able to clarify this point—is they do not have that legislative backing. A Competence Order that ties together the variety of assistance that is currently provided in those other Acts of Parliament that I referred to, together with the national service frameworks, would give clarity to what the Assembly Government wanted to achieve. It would also allow the Assembly Government by Measure to go slightly further than the national service frameworks. The national service frameworks themselves are confined to those people who are not detained. However, the Assembly's Health Minister is keen to ensure that there is a level of advocacy which is extended to those people who are detained as well as those who are not detained. A national service framework as it is currently drafted within the current legal framework would only apply for those people who have not been detained. A Legislative Competence Order would tie all of that together to allow the Assembly to legislate by Measures for people regardless of their circumstances.

Q7 Dr Francis: I take it from your reference to the Health Minister that you have had fruitful dialogues with her over a period of time?

Mr Morgan: One of the difficulties of pursuing a Competence Order as a backbench Member is that clearly you do need the support of the government. I have had not just the support of the government but active support from the Minister herself and, in all fairness, her officials who I know are here in the

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gallery this morning. This has had support not just from the government but from the other two political parties in the Assembly and there has been I think a broad consensus amongst those people who represent people with mental health difficulties that this sort of Legislative Competence Order is within the spirit of devolution; it is in the spirit of the 2006 Act where health and social services are largely devolved anyway. It would allow the Assembly to provide that greater clarity. Ultimately it could, I would hope, provide for better services in Wales. There has been a strong degree of all party support which, on a subject such as this, is extremely welcome. The Health Minister and her officials, together with officials at the Assembly, have worked extremely hard.

Dr Francis: I am sure that I speak for all Members of the Welsh Affairs Committee when I say that we are very pleased to hear that the Health Minister has been so supportive. It is good that it is on the record.

Q8 Alun Michael: There has been some discussion about the drafting of Legislative Competence Orders. I think one of our observations is that some of the drafting has been broad by following the traditions of Whitehall where primary legislation comes up sometimes only once in several years; whereas with Legislative Competence Orders, as we are demonstrating, it is quite a speedy process which can go through the whole process quite quickly. Therefore, it is quite important that the Legislative Competence Order says what the intentions are and does what it says on the tin. You have just referred to the support of the Welsh Assembly Government so I would really like to direct this question to Ms Jackson and Mr Boyce. The proposed Order is very broadly worded. Why is it considered necessary and why is the Welsh Assembly Government supporting such broad powers? Why is that necessary to achieve what are relatively limited policy goals that are set out in the memorandum?

Ms Jackson: The Order has been broadly drafted. If this Order is approved, it will confer competence on the Assembly from the day it is approved until we cannot say when. It is not just to bring forward the current policy but to allow sufficient flexibility for the current policy to develop and to be adapted to fit suitable circumstances as they appear. It is intended to allow a building upon the current legislation which in many ways is restrictive. Jonathan has referred to advocacy but I am sure Members here will be well aware of the provisions of the Mental Health Act and the Mental Capacity Act which do provide for advocacy, but provide for advocates to work in very limited circumstances; whereas the breadth of the advocacy provision which would be allowed for by the Order would allow persons who benefit from the advocacy provisions currently in place but also to receive more general assistance with matters such as applications for housing and other associated support services which may be provided

by way of social care services. We have to provide for the Order to allow for this to accommodate what we want to do now and for its development.¹

Q9 Alun Michael: Can I take you back to the earlier question about binding directions on the NHS? A binding direction is a legal requirement that the NHS has to follow. In relation to things like housing which you referred to, those responsibilities are with the National Assembly for Wales already. Why are such broad powers as are contained in the LCO necessary to achieve what are fairly clear, limited policy objectives?

Ms Jackson: You have referred to directions. As you will be aware, directions presume an existing function. There would be a challenge if one possibly tried to use existing direction powers to bring about some of what is sought in the LCO as there may be an argument that they are not tied to an existing, specific function.

Mr Morgan: The Competence Order as currently drafted merely seeks to insert two particular matters. It seeks to allow the Assembly to legislate in those three particular areas of assessment, treatment and advocacy. It is sufficiently broad to achieve that but it is not overly broad. I was conscious, when we were doing the original drafting of the Competence Order, of the views that had been expressed by this Committee in examining previous Competence Orders. We had to provide a draft that was sufficient to do what we wanted to but without being too broad. Having examined a number of Competence Orders, I can see the value of providing something which is somewhat more succinct. We believe what is in here allows the Assembly and the Assembly Government to do a huge amount of good work, but it is not too broad. Likewise, it is not too prescriptive. If I could perhaps give an indication as to where the Order has changed, in its original form the Order made reference to the wording in relation to those people who may require assessment. It said that the Order would apply to persons who are or may be mentally disordered. There was a great degree of discussion between us and the Assembly Government about the use of the wording. The problem with that particular terminology is that it raises conceptual difficulties of defining how persons who may be mentally disordered are identified. Likewise, reference to persons who appear to be mentally disordered gives rise to the question: appears to whom? We were very conscious to ensure that ambiguities were removed, which is why the start of matter 9.2 merely says, "Assessment of mental health and treatment of mental disorder" and then advocacy is referred to within Field 15 and Matter 15.9. We were conscious to ensure that the LCO was drafted in a way that delivered what we anticipated was the policy objective, recognising that, whilst there are national strategies to improve mental health services, there are significant gaps in the legislative framework and this Competence Order would address those gaps as they currently

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exist in Wales. I suppose it is a bit like trying to fit a jigsaw together when you have missing bits. This really is what this LCO is trying to achieve.

Q10 Alun Michael: I appreciate that but there are sometimes problems where the question is whether the condition that is identified is treatable or not. Sometimes a condition may not be treatable but may require management. Are you satisfied that such circumstances are covered by the Order?

Mr Morgan: I certainly am. The way in which the Order is drafted, in circumstances where somebody receives an assessment because there are underlying concerns about their nature, means a person could receive an assessment and there could be a conclusion that they do not require a package of treatment but certainly could require some additional support as provided by local authority social services departments. It is that level of multidisciplinary assessment which is important because there are certainly gaps in the legislation at the moment with regard to multidisciplinary assessments as they affect those people who could be looked after within secondary care. Of course local authorities do have quite a critical role within the provision of secondary care at present. I am certainly confident that that would be covered within the scope of the LCO and any potential Measures that could be drafted.

Q11 Mrs James: I wanted to ask about people who may not yet have been diagnosed with a mental health disorder. We have had some evidence to the Committee expressing concern that the proposed Order as currently drafted states that the duty for assessment and treatment will be for those individuals not previously diagnosed. Will it include those already known to the services who are becoming unwell and recognise it? If not, why has this group been excluded?

Mr Morgan: If we were to look at matter 9.2, the Order as currently drafted provides for the assessment of mental health and treatment of mental disorder. It does not include those people who are subject to compulsory attendance at any place for purposes of assessment or treatment. Nor does it include those people who are under compulsory supervision or guardianship because they are already covered in other legislation. It was felt that it would be intruding on the work that is currently done by other Acts of Parliament in particular which provide for those individuals. It does not include either consent to assessment or treatment or restraint or detention. The way in which the Matter is itself worded would allow for the Assembly Government to make by Measure an Order which examined how treatment and services were provided for those people who had been detained. Although the 2007 Act makes reference to detention, it does not include provision relating to assessment and treatment. The Order as currently drafted would allow the Assembly to extend the benefit of that assessment and treatment to those people who are not detained and those who are already detained. I think that is a very valuable thing. There are people

who would have become known to the health services, who would have been treated, and who may have concluded a course of treatment or care, but for whatever reason are requiring additional monitoring. I do not think this precludes them from coming back into the system if there was an identifiable problem that required further assistance. Ultimately what we hope will be achieved through any Measures is for an early enough assessment, earlier treatment and earlier access to advocacy at a point where people are capable of receiving that support and hopefully, in many cases, recovering or certainly not then getting to a point where they become so unwell that they will then be detained for their own health and welfare. That is really where we are coming from. The Order as currently drafted does not prevent people coming back into the system if they have already been in the system.

Mr Boyce: I agree. It may be that something in the explanatory memorandum leads people to conclude that it is primarily aimed at people who have not been diagnosed before, but that is not the case.

Q12 Mrs James: Going on to definitions, why was it considered necessary to add a definition in Field nine which effectively duplicates the one in the 1983 Act and is therefore already within the existing definition in section 206 of the National Health Service Wales Act 2006?

Mr Morgan: We did give this quite a lot of consideration. In discussing this with the Assembly Government lawyers and with my own colleagues, it was felt that that actual explanation needed to be included. You are right in that it restates what is currently within the Act, but we did not want there to be any confusion as to what we meant by the term "treatment of mental disorder".

Ms Jackson: It ensures that we are not thinking of treatment as solely medical and medicating somebody to deal with an episode of ill health but it is broader and deals with rehabilitation, nursing and psychological intervention but of course it is not limited to that so it allows for a suitable package to be put in place.

Q13 Chairman: Can I turn to key action six in the Mental Health National Service Framework? If that were achieved, that would make advocacy available outside the framework of the Mental Health Act 1983 and the Mental Capacity Act of 2005. Why do you believe that a legislative route would be more successful than working within the framework of those two pieces of legislation?

Mr Morgan: It was felt when drafting the Order that advocacy had to be part of the package if we were to ensure that a legal duty being conferred upon public bodies should not just apply to the assessment and treatment but that advocacy, although made specific reference to in key standard six of the national service framework, should be part of that legal framework, so it is enforced from the point of view of conferring a duty. The way in which it is inserted into matter 15.9, it does make reference therefore to the involvement of social care services in the potential provision and therefore having a level of

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responsibility for potentially seeking to provide that independent advocacy for an individual. Of course that is not covered within the national service framework. The national service framework as drafted is principally a health based piece of strategy, if I can term it in that way. By including it in the Competence Order, it ensures that it has the parity of esteem in the way in which duty is conferred on a public body alongside the treatment. Advocacy services, as you know, are conferred in a number of ways through the various Acts of Parliament and what we decided to do was to ensure that the definition of advocacy services excluded those advocacy arrangements under the Mental Capacity Act of 2005 because the 2005 Act is not simply about advocacy in connection with mental health issues. It is about treatment, accommodation and restriction of liberty in relation to other health conditions where patients lack mental capacity. We felt it was important to ensure that there was a consistent way in which we could ensure that those duties were conferred on public bodies, whilst accepting that there were certain exclusions, particularly those around the 2005 Act.

Q14 Dr Francis: Could I refer you to matter 15.9 as currently drafted? As we understand it this would allow the Assembly to disapply in Wales the right to an advocate for those subject to compulsory powers under the 1983 Mental Health Act. Is this an intended consequence?

Mr Morgan: My reading of matter 15.9 is that what it excludes is those individuals who are subject to the Mental Capacity Act of 2005.²

Ms Jackson: The definition of advocacy services which are included in matter 15.9 relates to providing assistance by way of representation or otherwise in connection with the wellbeing of any person. The important words there are "in connection with the wellbeing of any person". You then need to look to the definitions in schedule five of the Government of Wales Act. There is a definition there of "wellbeing" which has been inserted by a previous Legislative Competence Order and those meanings will be imported into this Order. Therefore it will not refer to the advocacy provided under the Mental Capacity Act or the Mental Health Act 1983. I could outline to you that wellbeing is physical, mental and emotional wellbeing, protection from harm and neglect, education, training and recreation, contribution to society, social and economic wellbeing and securing of rights.

Q15 Mrs James: It has been suggested that the Measures passed by the Assembly following legislative competence might lead to a reduction in those needing to travel outside Wales for mental health services. Do you see this as desirable?

Mr Morgan: When you look at the provision of mental health services in Wales, there are a number of services which are provided out of country, particularly for those people who are in low and

medium secure units. I think it is desirable where possible for people to receive the help, support and assistance they need as close to home as possible. Many individuals will have family members and friends they will need to keep in contact with. Those individuals will be instrumental in helping that person to recover and become well again. I think it is desirable for the Assembly and the Assembly Government to ensure that we have first class services in Wales. I suspect there are going to be issues around funding priorities and what that will mean as Measures are drafted for how this will lever in resources to provide for services. There are two schools of thought. The one I suspect from those representing mental health users will say that they would hope this will bring in lots of additional new money. I suspect the government and officials will say that this may lead to some significant reprioritisation of money that has already been provided. Ultimately however, when Measures are drafted, there will be clear financial, regulatory burdens which will have to be examined and provided for if there are additional burdens, whether financial or otherwise. Ultimately we would hope that more and better services could be provided in Wales. Having examined the way in which mental health services have developed elsewhere in the UK, I think it would be something of a great degree of national pride if Wales could lead the way on mental health reform.

Q16 Dr Francis: Your hero and mine, Aneurin Bevan, said something like this: that socialism or politics is the language of priorities. It sounds as if you have been having interesting discussions with the Health Minister on these matters. Could you precisely tell us whether you think there will be a burden placed on the NHS as a consequence of this LCO?

Mr Morgan: It is very clear that the LCO potentially would allow the Assembly by Measure to place a duty on public bodies. Potentially, a duty could carry additional burdens. There could well be a regulatory burden and Measures resulting from the requested powers could provide that additional burden on providers. These also have the potential to replace a complex array of existing duties. Part of the difficulty, I suspect, when looking at the provision of mental health services and care assessment and advocacy, is that they are covered by so many Acts of Parliament that it is very complicated for public bodies to understand where their duties come from and what they are expected to do by government on behalf of the citizens of Wales. Although there could well be a regulatory burden, I would expect that the potential Measures would clarify the legal position in Wales with regard to who was actually responsible for what. There could well be new duties on health and social services providers but of course what we would expect in the short term is, where we provide for quicker access to assessment, treatment and advocacy, whilst there could well be an up front cost, hopefully there could well be savings further along the line where those people thankfully, because of early intervention, do not then become subject to

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compulsory detention because they have become unwell. Many of those people who do not receive early intervention do find themselves becoming in-patients and of course in-patient care can be very much more expensive than treating and providing care and support to someone in the community. There could be an initial financial cost. That is certainly a possibility but I could not predict what the Measures would look like at this stage. Ultimately we could see ourselves saving resources as a result of those people not being dealt with as in-patients and I think that would be desirable, particularly where we think that people can be better looked after, better supported and helped to recovery.

Q17 Dr Francis: You are not part of the Welsh Assembly Government. You are not even in one of the parties that inform that Government. In your discussions with the Health Minister have you actually engaged with her about these clearly potential, additional resources that may well flow from this LCO?

Mr Morgan: I have discussed the matter with the Health Minister. If the Competence Order is approved by both the Assembly and Parliament and receives Privy Council approval, I suspect I will have very little time on my hands in order to draft sufficient Measures to do what I would hope to have done. However, I understand the Assembly Health Minister has access to a greater degree of resources than I do and therefore will be in a position to clarify those points which I have raised with her, because clearly if you are placing potential new duties on public bodies they could be seen as new burdens. However, I would see them as an opportunity to clarify the existing legal framework. Providing clarity very often for public servants and those running public bodies is of enormous help. I often find that one of the difficulties they face is that they have a myriad of legislative frameworks, regulations, statutory instruments and Acts of Parliament which can be rather confusing in helping those people running public bodies to understand what it is they are expected to do and for whom they are expected to do it. I am assured by the Assembly Government that any regulatory burden or financial burden would be explored fully in the regulatory impact assessment that would accompany an Assembly Measure.

Q18 Alun Michael: In view of that comment and the fact that that will fall to the initiative of the Welsh Assembly Government, this question therefore would be for Ms Jackson or Mr Boyce. We had a comment in evidence from the College of Occupational Therapists who commented that funds could be removed from in-patient care to fund the early intervention services. Indeed, they refer to that happening in relation to services in England. Would that be part of the intention?

Mr Morgan: I think it might be more useful if I answer that as Joanest and Steve work directly for the Assembly parliamentary service and not for the Assembly Government. It might be difficult to

predict what an Assembly Measure could look like. If we take into account the fact that in October of this year we will have seven new, integrated local health boards who will be responsible for primary care, secondary care, acute care and mental health services, I think it is going to be incumbent on the Assembly Government to ensure that those bodies deliver on the expectations of the Assembly Government and the annual operating framework that they will be required to report on. I am not convinced at this stage that an Assembly Measure will mean money being diverted away from in-patient care towards community services. I suppose it is possible that if fewer people are being treated in in-patient care there could be a reprioritisation of resources, but that does not mean that we suddenly start scrapping existing capacity. Ultimately what we want to achieve is more people being looked after in the most appropriate setting.

Q19 Alun Michael: The savings very often are longer down the way if you have earlier intervention and prevention. You do not get immediate savings and the College of Occupational Therapists points to the experience in England of specifically making that shift in order almost to force the improvement in preventative intervention.

Mr Morgan: The difficulty with that is that it could prove a false economy. Speaking in a personal capacity, it could prove a false economy if we think that the best way of increasing investment at the community end should only be achieved by moving resources from the in-patient sector. The reason I say that is we cannot always predict how a person will progress as a mental health patient. We may assume that a patient is fully capable of being looked after and have a better chance of recovery out of the in-patient sector but may at some point become so unwell that they do require that in-patient intervention.

Alun Michael: I understand that in general terms and I suppose I understand your correction in terms of the responsibilities of the witnesses that that is a question we have to direct to the Welsh Assembly Government and possibly to the Minister rather than to yourself.

Q20 Chairman: Why are we having a Wales specific LCO and the kind of benefits that might accrue from it? Why are we not using parliamentary process here for England and Wales or England and Wales and Scotland for that matter?

Mr Morgan: As a mere opposition backbencher of the National Assembly for Wales who has limited powers and certainly no powers to effect any redrafting of whatever Bills come before this House, I think it is very difficult for me to answer that question. I suspect the Assembly Government at some point might have discussed whether or not framework powers would have been appropriate in what was to become the 2007 Mental Health Act. I certainly think that would have been desirable and I remember raising it with the previous Health Minister before the last Assembly elections. However, we are where we are and the Legislative

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Competence Order route is certainly the only opportunity afforded to me as a backbench Member. As I understand it there are no other Bills currently before Parliament that would afford the Assembly Government the opportunity to ask for framework powers. Looking at where we are, I suspect that this is probably the only route available to us.

Chairman: I appreciate that answer as a member of the joint committee before the 2007 Act, a process which began, as we said at the time, in the last century.

Q21 Dr Francis: You are the first non-governmental Assembly Member to have an LCO formally laid in Parliament and we warmly congratulate you on that. What reflections do you have on the process, because it has been a fairly long one. Before you answer the question, I should reflect on my own experience as a backbench Member taking through a Private Member's Bill. I was told at the time, "You have to have achieved three requirements, government support, cross party support and prove to the Chancellor that it will not cost anything." You seem to have all three of them. You have either succeeded in proving it does not cost anything or you have secured some financial support from the Minister. What are your observations on your experiences over the past year or so?

Mr Morgan: Taking forward a non-government sponsored Competence Order is rather more tricky than being a government minister taking forward government priorities and being in a position where you can liaise very actively with government ministers here and of course officials at Whitehall. I suppose part of the frustration in the process is the time it can take. By October of this year I will have spent two years on this particular project. I won the ballot in October of 2007. Not wishing to pre-empt what you may conclude and any recommendations you may make, if I am lucky enough to see this process to the end, I understand that it might not be concluded, if it is concluded in my favour, until the early part potentially of next year. It is quite a lengthy process from the point of view of a backbench Member's perspective. One of the difficulties is that once the Order had been agreed between myself and the Assembly's Health Minister, had received that all party support and had that very active support of the Minister and her officials, the Order was referred to Whitehall in December of last year. There have been government Legislative Competence Orders which have been published later and delivered to Whitehall later than mine which have I think almost completed their processes. I think that is probably fair. I can understand where government officials would want to ensure that the government's legislative programme is prioritised. I accept that as one of the realities of government and political life. I suppose from my own perspective it was necessary to wait in the queue until when Whitehall clearance could be afforded and when it could be possibly referred to this Committee by the Secretary of State. I accept as a backbencher that the process is likely to be slower than government Legislative Competence Orders. I think there is a

great value in the process, I have to say. As somebody who has examined this process in some detail, I think the idea of joint working as set out in the 2006 Act between scrutiny by the Assembly and scrutiny by Parliament, including the Welsh Affairs Committee, is something that I personally value. I think we have to demonstrate to the people of Wales why we think these powers should be conferred. I think we have to explain what it is that is problematic with the current legislative framework and what it is we think could be achieved by ensuring the powers are devolved to the Assembly to allow that framework to be clarified and for services to be improved. I think the people of Wales expect that level of maturity to exist between the Assembly and Parliament. That level of joint working is something which we should value and something which I personally have found extremely helpful, certainly in the conversations I have had with Members of Parliament from Wales and in England. It has been a lengthy process. I understand why potentially it can be a lengthy process. However, I am delighted as the first non-government sponsor of a Competence Order to have achieved this stage at least.

Q22 Dr Francis: We certainly welcome the positive and constructive way you personally have approached all of us, including myself as Chair of the Welsh Affairs Committee. We have benefited from much closer working relationships with your Assembly colleagues. I was intrigued, fascinated and very pleased to hear in your earlier answers about the very close, indeed almost warm, relationships that you had with the Health Minister. It would be very good if you could elaborate a little more on that relationship because, when future LCOs are brought forward by backbenchers, I think the narrative that you can give us would be of great benefit to your successors.

Mr Morgan: The working relationship on this particular Competence Order in effect started about two years ago when we met with the representatives of a number of mental health organisations. Having had lengthy discussions with them on an all party basis, it became very clear that there were a number of deficiencies that we should try and address. It was then by sheer luck that I put in for the Legislative Competence Order ballot in October 2007 in relation to the provision of mental health services. It was sheer luck I won the raffle. As a result of that the Health Minister was very supportive from day one. It involved meetings with the Health Minister and her officials. The Health Minister was very keen and very supportive in that I could receive information via officials and not just information via the Minister. I was invited to briefings with the Minister and her officials. We kept in regular contact and more recently it has been weekly contact, either meeting informally or more formally, to talk about where we are in the process and where the Competence Order has changed in comparison to the original draft. That very strong working relationship has continued for the past two years. I hope that at the end of this, where the people of Wales expect there to be very sharp political

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differences between elected politicians—that is the nature of political life—at least the people of Wales might look at this particular Competence Order and hopefully others and say that there has been a level of maturity and cross party working that they might not have expected in the past from politicians. I think that will be a good thing for the people of Wales if they can see that. I have always stated on record my thanks to the Minister and her officials because there have been meetings, regular correspondence and regular briefings as well. In the meetings that she has had with colleagues in the Wales Office, she has always been very up front about where this Competence Order has been in the process. The ministers in the Wales Office, particularly Paul Murphy when he was the Secretary of State for Wales and also Huw Irranca-Davies, were extremely supportive. I met Huw Irranca-Davies on one occasion to discuss the Competence Order with him and it was clear from the conversations I had that ministers there were supportive as well. I think there has been a huge degree of joined up thinking and working on this which I suspect is probably why we are where we are now.

Dr Francis: I am sure that when we come to prepare our report all of that will be noted in a very positive light. When we receive evidence from the Health Minister and her officials, that will also be confirmed.

Chairman: As far as this Committee is concerned, we strive to achieve the proper degree of scrutiny but in a brisk manner, irrespective of the length of time it has taken from your lucky win in the raffle.

Q23 Alun Michael: Pursuing the same area but being very specific, there were changes in the drafting of the original and you referred to those in your evidence. Were you involved in the redrafting process or was it a question of the redrafting being put to you as a set of propositions? Can you say a bit about that because it is quite an interesting area of the preparation.

Mr Morgan: The redrafting took place at a number of different stages. There was a series of exercises of redrafting when the Mental Health Legislative Competence Order Committee of the Assembly reported because they made specific recommendations. The first draft of the Order did not make reference to field 15 and it was very clear through the evidence provided to the committee that social care services should be included. There were changes in the redrafting as a result of their recommendations to take into account what they had suggested. I think going through a process of taking evidence is somewhat pointless if, after taking

that evidence and having recommendations put to you on the basis of that evidence, as a Member responsible for an LCO, you then ignore that evidence. We were very keen in the first instance to take account of that and to start redrafting. There was a series of correspondence exchanged between myself and the Minister where she had considered the evidence of that committee. I had made suggestions for where terminology needed to change, where wording needed to alter and where work needed to be done on field 15. There were then conversations and discussions between officials in the Assembly parliamentary service and officials working in the Assembly Government. The final draft was a draft provided by the Assembly Government but that was at the end of a process of going back and fore to discuss what needed to be in there. The Assembly Government did provide a final draft of the Competence Order and the explanatory memorandum which I was perfectly happy with.

Q24 Mrs James: You have already talked about the relationship with the Minister. I would like to tease out a little bit more about the advice and support you have had on the legal and drafting issues from people like civil servants.

Mr Morgan: I received a lot of advice and support from the Assembly's parliamentary service, those lawyers such as Joane Jackson and Steve Boyce working in the Members' research department that looks at policy. There was a lot of advice and support from a number of lawyers working for the Assembly itself. We had meetings with the Health Minister and officials working in the Minister's health department and also officials working in the legal department. They were meetings that we had together. The Minister was present at those as well as myself. There was a lot of joint working which I think is beneficial. There is no point having one group of people going down one road if you have another group of people going at high speed in a different direction. You do need to ensure that when government says it will support a backbench LCO you are working together to achieve the same aims and objectives. I think that joint working has been extremely valuable. The Assembly Government's lawyers were working on the drafting as well on behalf of the Minister and we did meet with them on more than one occasion.

Q25 Mrs James: A good model then?

Mr Morgan: A good model.

Chairman: Can I thank you for your evidence? That concludes our questions to you. If you feel that we have not covered some matters or if you want to make further comments to us, you are of course very welcome to send any written comments in.³

³ Ev 42

Thursday 9 July 2009

Members present

Hywel Williams, in the Chair

Dr Hywel Francis
Mrs Siân C James

Mark Williams

Witnesses: **Ms Ruth Crowder**, Policy Officer Wales, and **Ms Genevieve Smyth**, Mental Health and Learning Disability Officer, College of Occupational Therapists; **Mr Alun Thomas**, Deputy Chief Executive, and **Mr Lee McCabe**, Recovery Practitioner, Hafal, gave evidence.

Q26 Chairman: Welcome to the second session of our inquiry into the LCO on Health Services. This room is quite small but, please, speak up because the acoustics are not the best. For the record can you introduce yourselves, please?

Mr McCabe: Lee McCabe from Hafal.

Mr Thomas: Alun Thomas from Hafal.

Ms Crowder: Ruth Crowder, Policy Officer Wales, College of Occupational Therapists.

Ms Smyth: Genevieve Smyth, College of Occupational Therapists.

Q27 Chairman: Thank you. Can we begin with the question what will this LCO allow the Welsh Assembly Government to do that they cannot already achieve with its existing powers?

Mr Thomas: I think this will be a useful one to get Lee's opinion on. What we actually see with this is that the LCO will provide a duty to provide, in effect, a right to assessment, treatment and advocacy rather than simply hoping that those sorts of things are going to happen. Lee has personal experience of this.

Mr McCabe: From my time of being admitted into hospital, me and my family did not have any support when I was released a few weeks later and discharged. Neither me nor my family got any information on what I was diagnosed with, the medications I was taking, nothing at all. This resulted in a few weeks after being discharged I had a relapse and ended up going into the psychiatric ward where I ended up six months on the ward. I ended up being sectioned where I was getting frustrated with my condition. Most importantly, it resulted in the long-term where I tried to commit suicide four times, four attempts. I was very fortunate then to have a CPN (Community Psychiatric Nurse) who finally helped me and my family with information and support on the services that were available and helped me to learn to cope.

Q28 Chairman: Thank you very much indeed for being frank with us. It must have been a very distressing time for you. Do you feel that more information before you became so gravely ill would have been a help to you and your family?

Mr McCabe: When I first went into the psychiatric ward I was having a breakdown, hallucinations, paranoia, and within ten minutes of being in with a psychiatrist I was diagnosed with paranoid schizophrenia. I had heard the term before but I did not really understand what that really meant and I

was just on the ward with the other people who were suffering with illnesses, which was quite frightening and very daunting. Whenever my mother or family visited she was told, "You'll never know Lee again, the Lee you knew". As for information or any advice on anything, there was absolutely nothing there at all.

Mr Thomas: What is worth mentioning as well is what changed was when Lee had a CPN who actually carried out an assessment, who wrote a quality treatment and care plan and made sure that was delivered. It should not be based on somebody being lucky to get the right professional, it should be based on having that right through the duty to provide that assessment, treatment and advocacy so that people do not end up in higher levels of care; do not end up losing employment, simply because there is no duty on the mental health services to do what policy has already set. The Assembly Government has excellent policy as far as the National Service Framework and strategy, but there are no teeth to it. You cannot use the NSF to say, "You are not doing this". The NSF is that whole process of setting objectives, of having aspirations and saying, "This is what we would like to see. This is what we intend to have", but this LCO is about having teeth to say, "You are not delivering it, you are now going to be in trouble for that".

Q29 Chairman: Can I ask the other witnesses perhaps why is the 2003 Act insufficient to meet these sorts of needs? Have you any comments on that?

Ms Crowder: The 2007 Act is very specifically there for dealing with people who need to be treated and assessed under compulsion and that is way too far down the line for many people, as Lee and Alun have already said. It is a major impact on people when they are that unwell, it takes such a long time to achieve recovery it really does make it so difficult, whereas if we had got in earlier and were able to work more quickly, people could take more control of their lives. I am sure Genevieve would like to add.

Ms Smyth: The point is by the time people are admitted to an acute inpatient unit, as you have been describing, if you think about the whole group of people with mental health problems, that whole spectrum, the people on an inpatient unit are at a tiny end of the spectrum so it is the people who are out and about in the community becoming unwell. The other thing to stress is very often as I have worked with service users and carers, they know when they need help and they are asking for help. We feel this would put a mechanism in place to help them at that point. For many people who are sectioned, it is a highly

traumatic experience for all of those people involved. This is a way of getting in earlier and providing what people really need at a much earlier point.

Q30 Chairman: Can I ask Mr Thomas why is the legislative route the way to go rather than perhaps beefing up the Code of Practice or perhaps giving directions to the NHS?

Mr Thomas: The Code of Practice is excellent in Wales. We feel the Assembly Government have listened to service users, carers and professionals in Wales. The Code of Practice does talk about the requirement for a holistic care plan for anybody subject to the Act, but that is an Act which is for the compulsory treatment of individuals. If we start thinking of looking at directions we cannot quite see what powers exist there at the moment for the Minister to use directions under. Similarly, in effect that would then be a Statutory Instrument from the Minister rather than something that is debated fully within the Assembly Government. We have had huge input into responses that have been made to yourselves through the Assembly Government, we are listened to and involved in all parts of the process, and we know that they will listen to service users and carers in putting together Measures which reflect what is needed in Wales, which I do not think could be done simply by a minister and, however committed the current Minister is to mental health, and we know she is, that is not something that is necessarily going to reflect the broader context.

Q31 Chairman: Can I ask the College of Occupational Therapists, in your memorandum you talk about creating a “whole-system, modern approach to mental health legislation”. In what way will this LCO allow the Assembly Government to do this as you suggest?

Ms Crowder: I think what it will do is enable us to see Measures that start the duty earlier so that we can stop only responding when people have to take control for people with mental ill-health and start seeing, hopefully, a process of assessment and service that allows people to still be well enough to have respect when they say, “I am becoming unwell”, to have that assessment and be able to be participants in their own recovery rather than having to go right the way to the end of the line before we can access services. It is about a modern approach to seeing people as true human beings and not just as people who must be done to once they are so unwell because we failed them in the beginning.

Ms Smyth: The other point about modern services is service users are increasingly recognised as the experts in their own recovery journey, as they should be, and the whole issue of advocacy earlier than at the point where you are detained and sectioned is part of that empowering people, and people who are not so able to speak up for themselves at the point where the majority of their mental health experiences are, which is not actually the acute end of the scale. Advocacy is key in the modern approach.

Ms Crowder: We would hope that Measures from this power will drive the development of services that give GPs access to services before having to admit. We are

looking at the development of early intervention, we are looking at better development of community multidisciplinary teams so that people are able to access the range of services because if those continue to sit in secondary care you cannot actually access them until you are admitted to hospital, whereas if we were able to have more practitioners in occupational health services, if we were able to keep people in work, in their own roles, in their own communities, then we could be delivering those services before we get to the expensive end of the service and start destroying people’s lives.

Q32 Dr Francis: Good morning. Could we now turn to the National Service Frameworks and I would like to ask you a question about that. Do you think that the policy aims of this proposal could be achieved by effective monitoring of the National Service Framework via the inspectoral and regulatory bodies and also rigorous enforcement of the targets to achieve the key actions?

Ms Smyth: In addition to what has already been said, I think one of the problems we have experienced is the NSF’s have set a fantastic framework for mental health services but we feel they lack the teeth.

Mr Thomas: As I said, the NSF in Wales is built on a very good strategy that service users and carers were fully involved with. On the development of such things as the CPA process in Wales, where informal carers should be fully involved in the writing of somebody’s CPA plan, we work with about 300 carers a week across Wales and we find carers are coming to us and saying, “But I’m excluded from those meetings”. It is a requirement that CPA plans are being done, and they are though very much in patches, but what we are finding is that even where certain things are happening within policy they are not being done as they should be. There has been a major investment in the CPA and where it works it really has an impact on people’s lives. If you cannot get it right on things like that, where actually involving an informal carer is a fairly obvious thing to do, you have to give it teeth and you have to hold people to account for failing to do that.

Ms Crowder: The NSF is fundamentally a health policy. One of the strengths for us about this LCO is that it is including social services and making that a very integrated package in any future Measures and that is really important. You need to have something that holds organisations to account, and that is not necessarily there in the NSF at the moment.

Q33 Mark Williams: I turn now to the scope of the Order itself and some of the definitions used. You have outlined how critically important this is, but the actual Order is quite specific in what it seeks to achieve and yet it is very broadly worded. Do you consider the broadness of the Order is necessary to achieve the fairly limited goals that the Order specifies in the Explanatory Memorandum?

Ms Crowder: Yes, we do. You need to be able to build in the ability to create Measures in the future that will deal with a whole range of people with a whole range of problems and a whole range of future services. If it is too tightly drawn it is not going to stand the test of

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time to actually give us the opportunity to drive assessment and treatment services as we need them in Wales.

Q34 Mark Williams: I guess that is particularly pertinent to the issue of duties, which is not a matter for us to discuss now but it allows for that breadth to come in Measures in the future.

Ms Crowder: It does.

Mr Thomas: That is exactly our view. The major concern would be getting this LCO through and agreed and the Measures to come from it but then having to come back to do the same thing again possibly even in 18 months' time because of the sort of advances that are going on in health and social care. The changes in investment, changes in political will could well mean that a very strictly drafted LCO would be too time-limited for it to have any real effect.

Q35 Dr Francis: Pursuing the scope and duty, the proposed Order as it is currently drafted states that the duty for assessment and treatment will be for individuals not previously diagnosed. In the memorandum from the College of Occupational Therapists you express concern regarding those already known to services who are becoming unwell and recognise that. How could you suggest that the Order be amended to cover this group?

Ms Crowder: That was our reading of the wording of the LCO and we have been assured that this would incorporate people who have already been recognised but are not currently in services. We think that is really important because, as Lee said, people recognise when they are becoming unwell and you would not want to see it solely for those people.

Q36 Dr Francis: Could I just pursue that before Mr McCabe responds. From whom did you get that reassurance because this is a private Member's proposal? Where did that assurance come from?

Ms Crowder: We have been talking to a range of people around who have read the LCO differently from us, to other organisations and various people in Wales who read it differently from us.

Ms Smyth: I do not think we are suggesting that the LCO is amended. We understand that the LCO is going to cover people not previously diagnosed and is also going to cover people who have a diagnosis, who have been discharged from the service but who then need to get back into a service. I think we are satisfied with it as it stands.

Q37 Dr Francis: Would it not be the case that you would need that reassurance not from others elsewhere in other bodies but from the Minister, surely?

Ms Smyth: I am not sure where we would need that assurance from, but my assumption is, having worked in services, there is a group of people who have diagnoses, they are discharged from services and the issue is about them getting speedier access back into a service and I think that is covered by the LCO.

Mr Thomas: I think that is covered in the report that was done by the cross-party group in the Assembly where the Minister did not wish to see the Order

limited to those who had previously had an episode of ill-health, she believed it was not appropriate to address the matter at the Order stage but it would come within the Measures.

Q38 Dr Francis: Who said that?

Mr Thomas: That is the Minister.

Q39 Dr Francis: Mr McCabe, did you want to say anything?

Mr McCabe: My personal opinion is we need early intervention. With the process I went through, and many others in the same situation, I felt institutionalised, totally distant from the community and it was quite a scary situation. Had there been earlier intervention and support I think my recovery would have been a lot quicker. I do not think I would have got as bad as I did in my diagnosis and my recovery would have been so much quicker. It took about 12 years to finally start coming to my old self again and dealing with my illness and living with it. I am sure that with better support I would have achieved that way before.

Dr Francis: Thank you.

Q40 Mark Williams: I want to return to the Mental Health National Service Framework and in particular Key Action 6 which, if achieved, would make advocacy available outside the framework of the Mental Health Act 1983 and the Mental Capacity Act 2005. You touched on this earlier on, but do you believe that a legislative route would be more successful than working to achieve the framework under Key Action 6?

Mr Thomas: There is a National Service Framework Implementation Advisory Group in Wales which has broad representation from all relevant parties. That was tasked with going through with the baseline review, looking at what exists, giving guidance, giving advice on how these Key Actions could be achieved. What we find is we have got this postcode lottery, this very patchy approach. Wales has a unique character as well. We have a limited number of urban areas, and I am sure my colleague from Mind Cymru will talk about the particular problems of rurality, but where you have a county that in effect you can drive across in ten minutes, providing an advocacy service there may be easier to achieve, than in a broader authority where it is easier to not do it and what you have to do is say, "Okay, it's not just a recommendation, it's not an ambition, you will do this" and however the Measure is worded there will be a right to that through some form of Measure. The NSF's are just not doing that.

Q41 Mark Williams: The word "patchiness" came up in our evidence last week and I can testify to the problems representing a rural constituency and, as you say, I am sure we will hear from your colleague on that later, I am sure. Matter 15.9 as currently drafted would allow the Assembly to disapply in Wales the right to an advocate for those subject to compulsory powers under the Mental Health Act 1983. That may seem a divergent direction of policy but, nevertheless,

the assertion is made that, as written, the Order would allow that to happen. Are you concerned about that possibility?

Mr Thomas: We are not. We see that the Assembly will get that sorted out. In all of the discussions we have had, none of this is intended to undermine the Mental Health Act in any way, shape or form. It is a case of if you guarantee everyone will get advocacy then it is really not a problem where it comes from.

Q42 Mrs James: I am sorry I was late. There has been much talk about the burden on the public sector. What do you believe will be the burden that the LCO will place on the public sector and the NHS in Wales?

Ms Crowder: I think one of the key things for us at the moment is one of the burdens on the public sector is how long and how expensive it is to support people once we have allowed them to become so unwell. In the short-term we then have to find the funding to upfront provide the services that may come out of any new duties, but in the long-term that should actually result in people being supported much earlier and not becoming so unwell for so long. Obviously the detail of that is down to whatever is in the Measures, so it is quite difficult to identify any particular burden, but we would anticipate that this should really be supporting people to avoid becoming unwell or as unwell as they might have were there no powers in place.

Mr Thomas: That is the Assembly Government's responsibility to sort out. As campaigning organisations we are going to be saying, "We would like to see this, this and that" and that is the nature of the relationship that we have, we speak for our members, for the service users and carers and say what we would like. The Assembly Government has to balance that and make sure that whatever it puts into place is achievable and viable. What is significant is what the LCO is looking for is nothing more really than is already supposed to be done but making sure it does get done. Funding has been provided to local authorities and health boards to deliver on the National Service Framework, they accept their financial and strategic targets every year and are supposed to achieve them, but what this is doing is saying, "Well, actually we are going to hold you to account to do what you have said you are going to do and if you can't what have you been doing with the money anyway?"

Q43 Mrs James: Have you any suggestions where the additional resources could come from or who would provide them?

Mr Thomas: I think this is very much a case of at some point in the future, but we already know through the Secure Services Reviews that took place in Wales that there are huge amounts of money being paid out in specialist high need services. When Jo Roberts, one of

our clients, gave evidence to the Joint Parliamentary Scrutiny Committee on the Mental Health Bill, Jo was somebody who had personal experience of the Act herself but also was working as an advocate in a secure unit, and a straw poll there showed that 90% of the women she was working with had asked for help before committing an index offence and becoming subject to compulsion. Our recent research has shown about 50% of the people we have contact with who have experienced compulsion asked for help before that. It appears to be the new mantra in health and social care that prevention in early intervention is the way forward. Not only does it improve lives, it prevents those sorts of very expensive hospitalisation costs. In Wales we have still got some way to go before we modernise our mental health services but this is the right direction of travel and whether or not this has initial financial implications which may make the situation easier longer term, we are sometimes in that fortunate position in the campaigning organisations that it is not really for us to have to worry about it, we just shout loudly for it.

Q44 Chairman: Can I finally ask you a question leading on from that point about the use of cross-border services. It has been argued that Measures leading from this Order might lead to a reduced need for people to travel outside Wales to access particularly specialist services. What is your opinion on that issue?

Mr Thomas: We should be having our service users receiving services in the best places available and if those happen to be outside Wales then they happen to be outside Wales. If we are able to provide services that prevent them becoming so unwell that they need specialist services, clearly that would have an impact. We do not really see that there should be a cross-border issue because I think this Committee has found very little evidence of any sort of health tourism and we have a very long, transparent border which people will go across for certain treatments and people will come in for certain treatments. What is important is that this is also a way of saying that within Wales mental health is a priority, there is a commitment to make sure that people are given a thorough assessment, the best treatment that is available as early as possible, and have a right to challenge that. Perhaps we can show our colleagues across the border that there are other ways of looking at these things.

Ms Crowder: We would concur with that.

Chairman: Can I thank you for your evidence. Can I thank you particularly, Mr McCabe, for giving us an authentic account of your own experiences, that has been a great help to us as a Committee. If you feel that you would like to add anything to the evidence that you have given this morning you are very welcome, of course, to write to us and submit further information. Thank you very much indeed.

Witnesses: Ms Alexandra McMillan, Public Affairs Manager, Gofal Cymru, and *Mr Gareth Jones*, Social Justice and Rural Affairs Officer, Mind Cymru, gave evidence.

Q45 Chairman: Can I welcome you to the Committee. Thank you for coming. Can I ask you formally to identify yourselves, please?

Ms McMillan: My name is Alexandra McMillan, I am Public Affairs Manager for Gofal Cymru.

Mr Jones: I am Gareth Jones and I work for Mind Cymru.

Q46 Chairman: Can I just remind you if you can speak up a little if possible. Can I begin with the same questions as I asked the previous witnesses. What will this LCO allow the Government to do in Cardiff that it cannot do with its existing powers? Why, indeed, is the 2003 Mental Health Act insufficient to address the needs of those who are experiencing mental ill-health?

Ms McMillan: Mental health is often described as a Cinderella service, but actually my experience in Wales is that there is a high degree of interest and understanding among Assembly Members from all parties and from the Government. There are quite regular discussions, regular interest and yet, despite that, there is also recognition across the board that services are not good enough and support for people experiencing mental ill-health is not good enough. One wonders why that is if the political will is there. For me, at least in part, it must come down to the fact that although the Welsh Assembly Government is responsible for financing, deciding where money goes within mental health, is responsible for strategy and policy direction and the structures that ultimately will procure and deliver those services, it is not able to produce any legislation of its own and, therefore, this LCO would be a very welcome step in hopefully improving the experience of those people.

Mr Jones: First of all, on the issue of why can it not be done with what is there already, our organisation has been saying for years that there needs to be some change and movement. We feel that despite the best efforts of the Assembly to get that process moving and changing, for whatever reason, and I am sure there are good reasons for it, the changes do not seem to be happening at the present time. Something came into my mind earlier with the first group of witnesses in relation to things having teeth or not having teeth. At our conference last year, which was based on advocacy, we had a panel session which was attended by the Deputy Health Minister, Gwenda Thomas, and a gentleman whose name I cannot remember but he was a commissioner for health services in the north of Wales. They were on the same panel and he was asked, "Why are you not providing these advocacy services as per the National Service Framework?" and his reply quite openly in front of the Deputy Health Minister was, "Because I'm not required to do so. I have other priorities that I am required to do and those are what I do". That was said in the presence of the Minister, which I thought was quite enlightening, and it was quite enlightening from our point of view as well. I think the Assembly have done what they can with what they have got. The will is there from the services' point of view as well but it is just not happening in reality.

Q47 Chairman: That addresses the point about the Code of Practice but what about a binding direction from the minister to someone like that manager, would that not be sufficient?

Ms McMillan: I am not a lawyer and I do not have a legal background, but my understanding is that there would not be an appropriate mechanism at present—I am sorry, I do not know what the correct legal term is—to tag those directions onto. There is not anything suitable at the moment to do that is my understanding, but I am not a legal expert.

Mr Jones: The scenario I was talking about was not about the Code of Practice, that was about providing advocacy services for the community and things like that, which the National Service Framework refers to. It happens in some places but it is very patchy. I will not address all those issues at this time. The Code of Practice is for those who are subject to compulsion, it was the services outside those subject to compulsion required by the Code of Practice and, therefore, we presume that by and large it happens, but it is about the next layer down where there is no requirement where it does not happen.

Ms McMillan: That is why I think this LCO is potentially so important. You mentioned the Mental Health Act and it is about a different set of people, or potentially a different set of people. It is a different issue, it is about early intervention and not about those subject to compulsion.

Q48 Mark Williams: I want to return to the opportunities and perhaps the limitations provided by the National Service Framework. I think I know the answer to this, but could the policy aims of the proposal be achieved by more effective monitoring of the provisions of the Framework via inspectorial and regulatory bodies and rigorous enforcement of the target dates to achieve Key Actions? What have been the limitations of that? Are some of them financial? We have heard about the patchiness and you have also told us about the will collectively to take action on this, but what have been the limitations of the National Service Framework?

Ms McMillan: You have heard from earlier witnesses that there is general support for the National Service Framework. Most people think it is a good thing and there is a lot in it that we would commend and would like to see happening, but the reality is on the ground there are sections of it certainly that are not being delivered, or not being delivered in full. One example I could give you is our organisation provides a service in a couple of areas where we make sure that people leaving hospital have a suitable home to go to. It is astonishing how many people on mental health wards are homeless. Included in the NSF is this idea that there should be a better link-up between homelessness services and hospital. As far as we are aware, the service that we provide, and we only provide it in a very few areas in Wales, is not being provided anywhere else, despite the fact that it is in the NSF. It is about having that rigour, needing the legislative teeth or necessary rigour to ensure enforcement of the NSF.

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Q49 Mark Williams: So implicit in that is a criticism that the inspectoral regime to administer the targets of the Framework is not working?

Ms McMillan: I would not want to comment on that too directly. I do not know if you have any experience of that?

Mr Jones: Again, I presume it to be the Implementation Advisory Group who over the years have constantly said, "We have so and so targets coming along that have not been passed, what are you going to do about it?" and despite their intent they do not seem to have the powers to do something about it. I do remember a letter going out directly addressing one particular thing that was sent to the health trusts but nothing actually happened at the end of the day. You mentioned Key Action 6 earlier and, as an example, that was why we had advocacy as our conference subject last year, because the National Service Framework came along in 2002 and said in 12 months there would be advocacy services available but nothing happened and in 2005 when the revised National Service Framework came out there was a new target set for 2008–09 and still nothing has happened. That is despite people asking questions and officials sending letters to health trusts, *et cetera*. Whatever the faults are with the monitoring system, the fact is that it is not happening and we think that is down to the fact that there are no teeth in it.

Ms McMillan: You can inspect and monitor as much as you like, but if at the end of the day all that produces is a report saying that something is not happening and there is no follow-up to that then that is not very helpful.

Q50 Dr Francis: If we could turn to the question of scope. The proposed Order is broadly worded. Do you consider such broad powers to be necessary to achieve what appear to be relatively limited policy goals as set out in the Explanatory Memorandum?

Ms McMillan: Obviously the issue of Measures is for another time. For us, it is important that it is as broad as possible to ensure there is that scope for developing a range of Measures for a range of people. Certainly, assessment, treatment and advocacy is a very broad area and we feel it is important that it has the potential to encompass in future Measures as many people as possible in as many different situations as possible.

Mr Jones: Although it is broadly worded, it is broadly worded around quite limited areas, being the three areas of assessment, treatment and advocacy, and it is assessment, treatment and advocacy outside of what is there already under other Acts. That is what the LCO will be about, but the broad wording gives some leeway, I hope, to carrying on the procedure as it has gone on so far to get views and opinions from people from all sectors to see the best way of going ahead with that. That breadth gives the opportunity to do that. The thing about it being limited to assessment, treatment and advocacy in a strange sort of way is quite limited in focus but allows flexibility to deal with those limited things in a more suitable way.

Q51 Mrs James: I am particularly interested in the social care aspect of this. Key Action 6 of the Mental Health National Service Framework, if achieved,

would make advocacy available outside the framework of the Mental Health Act 1983 or the Mental Capacity Act 2005. Why do you believe that this legislative route would be more successful than working to achieve this framework?

Mr Jones: I think the aim of the LCO is to start filling some of the gaps that are there in relation to people who are not at the level where they are subject to compulsion under some of the other Acts. There is no other way of putting these things into place with teeth, with a requirement of some sort, other than under compulsion and, as we understand it, this is about getting help and support, assessment, treatment and advocacy available to people who are not at the level where they require those under the Mental Health Act or Mental Capacity Act. This goes back to what the gentleman said at the conference, that because he is not required to do it at the moment, he would love to do it but he does not do it because there is no requirement on him. What we hope is going to come from this eventually is through having this LCO there will be requirements to provide treatment, assessment and advocacy to people when they feel they need it, people who may have been ill already and are thinking, "I know what is happening, I need help again". This came up earlier. We clarified that point with Assembly officials and it does apply to everybody who is already in the system. It is that group of people that the current legislation does not cater for.

Q52 Mrs James: There is this element that Matter 15.9 as currently drafted appears to allow the Assembly to disapply in Wales the right to an advocate for those subject to compulsory powers under the Mental Health Act 1983. Are you concerned about this possibility?

Ms McMillan: As you have heard from previous witnesses, the importance is that people can access advocacy and not particularly which piece of legislation entitles someone to that. Obviously when drafting this LCO I understand it was important to be clear that it did not cover people who were subject to compulsion, who were detained under the Act and, therefore, it was important to be clear that it was dealing with a separate set of people. As long as people can access the advocacy I am not concerned which piece of legislation it comes under.

Mr Jones: It is not something I am particularly well clued up on, but from our reading of it I do not think it means that people who should be eligible to advocacy under the Mental Health Act, for instance, will be in any way not entitled to that because of the new stuff that might come from this LCO. That is our reading of it, so we are not concerned about it.

Q53 Mrs James: The problem is things are subject to tests, are they not, and we are rather keen that we cover all the bases.

Ms McMillan: Absolutely.

Mr Jones: We are quite clear that this LCO is about new stuff, which is a different group of people who at the moment, because there is no requirement in place, do not get help very often. Perhaps at this point I could say this is particularly an issue in some of the

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rural parts of Wales, as I am sure it is in the rural parts of England. By bringing together the whole lot in one package, hopefully, in relation to early interventions so that it saves the longer term treatment and cross-border, and joining the services together, social care and health, the LCO has got the opportunity to make it more possible to provide wider coverage in a sensible, joined-up way across the rural parts of Wales.

Q54 Dr Francis: This is a question specifically to Gofal Cymru and it relates to cross-border implications. You have suggested that the Measures passed by the Assembly following the legislative competence might actually lead to a reduction in the numbers of people travelling across the border. Do you think that this is always desirable?

Ms McMillan: I think people want to receive a service as close to home as possible. Everyone is aware that currently some people have to travel a very long distance to receive the services that they require because they are not available close to home. Receiving that service far away is better than not receiving that service at all, but it would certainly be preferable if people could access those services closer. We do not know yet what Measures will come out of this LCO, but one would suspect and hope that it would lead to increased provision of services within Wales and, therefore, fewer people having to travel those distances.

Q55 Mark Williams: What is your understanding of the additional burden that this LCO will place on the National Health Service?

Ms McMillan: I think “burden” is an incredibly negative word. If you look at the evidence that was given to the Assembly Committee that looked at the draft LCO, local social services directors, for example, were keen for the LCO to apply to them. They were not saying, “No, we don’t want this, this will be a great burden”, they were saying, “Make it apply to us as well” and now, in fact, it does. It is worth looking at it that way, that perhaps it is something to be welcomed rather than a negative burden that they are going to have to deal with.

Q56 Mark Williams: I should have been more specific. What about the financial burden that this would be deemed to place on the National Health Service?

Ms McMillan: Again, it would depend on Measures that resulted from it. However, I have no reason to believe that the Assembly Government would pass a Measure that was not financially viable. In the long-term it might be that by providing more early

intervention less money is needed to be spent on the very costly inpatient side of things, but it would absolutely depend on future Measures.

Q57 Mark Williams: You have pre-empted my next question!

Ms McMillan: I am sorry, I apologise.

Q58 Mark Williams: Which is that the College of Occupational Therapists have commented that funds could be removed from inpatient care to fund early intervention services. That is quite a topical one actually in Ceredigion at the moment. Are you in favour of this suggestion?

Ms McMillan: I certainly would not want it to happen in advance of an improvement in community services. As I say, in the long run one might expect if people were getting help earlier that there would be less need for inpatient services. There is some great work going on in terms of community crisis interventions that can really help support people to stay in the community and not need those very, very costly inpatient services.

Mr Jones: To go back to the additional burden, what we are talking about here is potential change. Yes, change involves additional work perhaps but it is not an additional burden. Going back to the experiences of 2007 and the consultations across Wales in various settings, we found that very often multidisciplinary teams on the ground across social services and health were all trying to do the same thing, help people get better as quickly as possible, but because of the different systems they were working to very often they could not do it in the most sensible, efficient and time saving way because they came from different organisations. It would be nice to think that the LCO in bringing health and social care together could actually address some of those issues by saying, “This is what is best for the patient”. Perhaps it is wishful thinking, but we see the potential there for reducing the burden in some ways by working more efficiently. What was the other one?

Q59 Mark Williams: The general principle of inpatient care to early intervention services.

Mr Jones: We do not think it would be right to take resources away from inpatient care upfront. You have to get the other stuff in place first and as that works through, hopefully, and starts reducing the burden on inpatient care then at some point in the future we may be able to reduce it, but in the interim there has to be a range of services to suit the needs of people at different levels.

Chairman: I think that concludes our questions. Can I thank you for your evidence. If you feel you would like to send anything else in, please feel free to do so. Thank you very much indeed.

Thursday 16 July 2009

Members present

Hywel Williams, in the Chair

Dr Hywel Francis
Mrs Siân C James

Mark Williams

Witnesses: **Ms Claire Fife**, Mental Health Legislation Manager, **Mr Neil Buffin**, Senior Lawyer, Health and Food Safety Team, and **Dr Stephen Hunter**, Medical Director, Welsh Assembly Government, gave evidence.

Q60 Chairman: May I welcome you to the Welsh Affairs Committee. We are very glad to see you here. Would you, for the record, introduce yourselves?

Ms Fife: Good morning. Claire Fife, Mental Health Legislation Manager, Welsh Assembly Government.

Mr Buffin: Good morning. Neil Buffin, Senior Lawyer in the Health and Food Team, Legal Services in the Welsh Assembly Government.

Dr Hunter: Good morning, Chairman. I am Dr Stephen Hunter, Medical Director of the Welsh Assembly Government.

Q61 Chairman: Thank you. May I begin by asking to what extent was the Welsh Assembly Government involved in drafting this piece of legislation, this LCO, which was, after all, initially proposed by a backbench Member?

Ms Fife: We have had a very open and constructive dialogue with the proposing Member, and the Minister for Health and Social Services has been fully supportive of the work that he has been doing there. She has supported officials working collaboratively with Mr Morgan and his own officials and advisers to develop and refine the Order which is before you today, and I think that involvement in the drafting has varied over time. Most significantly, our involvement came in after the Assembly scrutiny committee, and we have entered into a range of discussions, with the support of the Wales Office, with our counterparts in the Department of Health and the Ministry of Justice. The final draft that is before you has been prepared by the Office of the Welsh Legislative Council and agreed with Mr Morgan and is based on the negotiations that officials have had, his officials and the Assembly officials, with the Department of Health, the Ministry of Justice, and so forth. Overall it has been quite an interesting process of joint working really. I think that joint working has allowed the Order to come to the point that it is now before you today.

Q62 Chairman: Could you tell the Committee what the LCO will allow the Welsh Assembly to do that it could not do under the existing powers of the Mental Health Act 1983 or the National Health Service and Community Care Act 1990?

Ms Fife: Certainly. I think I will start and then pass over to Mr Buffin. It will allow the National Assembly for Wales to consider legislating at a future date in those areas of assessment of mental

health and treatment of mental disorder and also, importantly, through support and advocacy, because currently the National Assembly for Wales does not have legislative powers in those areas. I think by providing legislative competence to the Assembly through that Order, it would give the Welsh Assembly Government the ability to propose legislation in those areas. It is about using the legislative competence rather than maybe the more piecemeal approach to the patchwork of legislation at the moment. Neil, do you want to come in on the 1983 Act and the 1990 Act?

Mr Buffin: Yes. One of the things about the 1983 Act, of course, is that it lays down the framework under which people may become subject to compulsion and liable to detention under that Act, but the 1983 Act does not actually deal with the provision of assessment, the provision of treatment or services. Turning then to the NHS and Community Care Act, that does allow assessment of needs but within the social services context rather than within the health context. Further, it relates to adults rather than children. So it does not really paint a full picture of what policy might wish to be achieved if the legislative competence were granted.

Q63 Chairman: With these policy aims, could they not be achieved by directions to Local Health Boards and Trusts or possibly via health improvement plans locally?

Mr Buffin: If I can pick up on the directions, yes, indeed, the Welsh ministers have powers to direct Local Health Boards in two specific areas—to direct them to undertake functions which are formally exercisable by health authorities or to direct functions of the Welsh ministers—but, in that context, you would have to identify a specific function which already exists; whereas what the Order would allow is for specific functions or duties to be created, as it were, and then those functions conferred by Measure on particular bodies. There are some further concerns about directions, because, of course, they are made by the Welsh ministers, not by the National Assembly for Wales. They could be made but, equally, they can be withdrawn and, of course, they are not subject to the scrutiny that any subsequent Measures would be.

Q64 Chairman: We did have evidence from the College of Occupational Therapists and they used the phrase “a whole system modern approach to

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mental health legislation". In what ways will this LCO allow the Welsh Assembly Government to create such a system?

Ms Fife: Our NSF (National Service Framework) and the range of NSFs that cover mental health look at the entirety across health and social care, and this Legislative Competence Order would allow that to be covered more fully. Dr Hunter, do you want to speak about the whole system approach?

Dr Hunter: The whole system approach and the provision of mental health services have been, as it were, the preferred *modus operandi* for the best part of a quarter of a century. They are substantially harder to achieve in actuality than they are in principle. I think one of the advantages of the LCO, or rather the Measures that might follow as a consequence of the LCO, are that for the first time what would be conferred upon individuals is a right, as it were, to secondary prevention. In other words, the existing legislative powers really require you to meet quite significant tests in relation to the severity of the mental illness or the mental distress that you are experiencing and expressing before there is a duty on health or social or, indeed, criminal justice services to respond; whereas within this framework it would be incumbent on the services to respond rather earlier, I guess, in the illness process. As a consequence of that, it would be my opinion that there would be far less likelihood of the need for, as it were, high-end medical intervention, high-end hospital intervention and that sort of thing, and much more opportunity conferred on local services to develop responses that would be around multi-disciplinary, multi-agency, domiciliary services, which certainly include occupational therapy as part of the assessment and, indeed, possibly as part of the treatment. In addition, you have got social care and sheltered occupation. There is a whole range of services that might be enable us to intervene rather earlier in the disease process than is currently the case with the existing legislative powers that we have.

Chairman: I am an approved social worker under the 1983 Act and I would be really interested to see how this all turns out.

Q65 Dr Francis: Chairman, could I ask a supplementary. To come back to your earlier answer, I was interested to hear your description of "joint working". In terms of a private Member's bill here in Westminster, there comes a point where the Government takes ownership of it. At what point do you consider that the Welsh Assembly Government will actually take ownership of this LCO?

Ms Fife: At this point we are working jointly. We remain in partnership, and it is certainly Mr Morgan's intention that this will go all the way through in his name. Once competence and if competence is achieved, at that point, the Welsh Assembly Government would put forward the proposals for the Measure. So, really, I think the LCO would remain Mr Morgan's, and that is certainly the spirit in which the Minister has approached this work.

Q66 Mark Williams: I would like to explore a little further the case for taking the LCO route in this. You touched on the limitations of directions in terms of the NHS. Could you say a little bit more about why a legislative solution is needed vis-à-vis the introduction of a code of practice? We have heard a lot from other witnesses in previous sessions about the limitations, about the patchiness and the issues of enforcement. What are your feelings on that?

Ms Fife: I think the most pertinent code of practice would be the code that sits under the 1983 Act, and, of course, that code arises out of section 118 of that Act, and section 118 is quite limiting in what that code can cover. Essentially, the functions that arise out of the 1983 Act: the code can give statutory guidance to support; the code can also give guidance to medical professionals and others on the treatment of mental disorder; and whilst we could hang a little bit of this on that element of it, really the code is aimed at underpinning the 1983 Act and, therefore, because, as Dr Hunter has said, much of the policy behind this Order is aimed at reaching people before detention or compulsion comes into play, really that code is not going to be of significant support to us in these policy objectives. Other codes, such as the Mental Capacity Act code of practice, not a code that is devolved to the Assembly, again, are possibly not a suitable vehicle to take this forward. Of the current codes available to us, we do not think those would take our policy objectives forward.

Q67 Mark Williams: Do you think another possible route would have been more effective monitoring of the National Service Framework, in other words tightening up the inspection and monitoring regime which should be working?

Ms Fife: I think that is an important point, and I am very conscious of the evidence that has been given to this Committee before about that. Certainly the NSF is a strategic framework within which services can be provided, but it remains a strategic framework—it does not provide a statutory duty to deliver those services—and so we believe, within the current range of tools and powers available to Welsh ministers, the NSF is being implemented; in parts that may be at varying levels. Do you want to come in about the monitoring of the NSF and ensuring services are delivered?

Dr Hunter: It is a very difficult question to answer because it is framed in two levels, one of which would be better dealt with by my colleagues on the right. Certainly, if all the objectives within the NSF were to be achieved, one would lessen the impact of individuals whose mental health was deteriorating but who had not reached a point at which assessment under the various powers of the 1983 Act, as subsequently amended, would be the case, but it would not deal with it completely for a number of reasons. Partly because the NSF, even if we amended it, would not deal with people as yet to be identified as suffering from a mental disorder; it would not significantly direct or even empower community mental health teams, assertive outreach teams, crisis resolution teams, and so on, at locality level to prioritise those individuals who either themselves or

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as a consequence of the input of carers or other workers that were working with them were identifying a deteriorating pattern—it would not achieve that—and there are some specific groups too who are known to be at risk in particular sets of circumstances that Measures taken under this Order would enable services to identify much earlier and place an obligation on them to intervene much earlier. I do not think that could be achieved through a National Service Framework. I think that could really only be achieved by some legislative *force majeure* in that sense. I am a psychiatrist by trade. I could go into detail around that, but one of them is women in the ante-natal and immediate post-partum period who are at a huge risk of developing a mental illness but who do not at the current time. It is very difficult within an NSF framework to say, no, you will target those individuals specifically.

Mark Williams: One of the strongest messages that has come from the evidence so far has been the patchiness of those services across Wales and the inability, which you have alluded to, of the National Service Framework to be administered and target dates to be met, and the same principle, I think, applies to the codes of practice as well.

Chairman: Can I just say, the acoustics in room are not fantastic, so I would be very grateful if all witnesses could speak up.

Q68 Mrs James: The proposed Order is broadly worded. Do you consider such broad powers are necessary to achieve the relatively limited policy goals set out in the Explanatory Memorandum?

Ms Fife: The proposing Member, in working on the drafting, has ensured that he has followed the Assembly Committee's recommendation following scrutiny that the Order should be broadly drafted to allow the Assembly greater flexibility to identify scope and definition within the Measure. It is our view that the drafting certainly allows the policy objectives that the Welsh Assembly Government has for future Measures to be brought forward and those that will be required from here-on-in. We do not consider that the drafting is overly broad, nor that it should be drafted more narrowly. I think we see that as part of the Measure area, and so we are confident that the Order has sufficient flexibility to bring forward the legislative proposals that we have, and I would echo what Mr Morgan said to you himself, that really this is a building-on process and the Order allows that.

Q69 Mrs James: Is it the intention to confer legislative competence in relation to all non-compulsory mental healthcare? We have heard a great deal about the wording and the generalisation of the terms and what is already covered in past Acts.

Ms Fife: The Order excludes matters relating to compulsion, and you can see there, there is detention, restraint, consent to treatment. So the Measures that could be brought forward would not be able to cover compulsion, but an individual subject to compulsion may benefit from some of the

Measures. For example, if something was around advocacy and we wanted to provide a measure advocate, just because a person was subject to detention does not mean they would not attract the benefits that that measure advocate could bring forward.

Q70 Mrs James: Do you think that the wording in clause 2(2)(b) in particular reflects this intention, or should the power to give assessment of treatment without consent be explicitly excluded?

Ms Fife: The exclusion that is currently drafted does not allow the National Assembly for Wales to bring forward a Measure which would alter the meaning of consent within the 1983 Act the context in which the Mental Capacity Act 2005 applies or, indeed, common law through the doctrine of necessity, and we believe that it is right that it was excluded in this way.

Q71 Mrs James: Again, the proposed Order as currently drafted suggests that the duty for assessment and treatment will be for individuals not previously diagnosed. In the memorandum that the College of Occupational Therapists provided for us, they express concern regarding those already known to services who are becoming unwell, and they recognise that although in oral evidence they commented that they have been reassured, they are still a little bit concerned that it will cover this group. Can you confirm that this group will be covered?

Ms Fife: I am happy to do that. We certainly acknowledge the concern that the College have raised with yourselves. They have raised a similar concern with us as well, and I think perhaps it reflects the drafting in paragraph 21 of the Explanatory Memorandum and perhaps the way that the Order before the Scrutiny Committee of the Assembly was drafted. What the Explanatory Memorandum does not say is that duties can only be placed in respect of previously undiagnosed persons, but I accept it does not say that they can either. I really wanted to emphasise that the Order itself certainly does not exclude a person who is previously or currently diagnosed, and I think that is important. The Order itself does not exclude that.

Mr Buffin: The Order refers, in broad terms, to assessment of mental health, treatment of mental disorder; it moves away from reference to people, which was in the initial draft as presented by Jonathan Morgan.

Mrs James: Thank you.

Q72 Chairman: You will know from the previous evidence that one of the key matters we have discussed is the use of existing dispensations as compared to whatever might come forward subsequent to this LCO. Looking at Key Action 6 of the Mental Health National Service Framework, which, if that was achieved, would make advocacy available outside the framework of the Mental Health Act 1983 or the Mental Capacity Act, for that matter, do you think that the legislative route

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that is being proposed now would be more successful than using either of those policy levers or any other methods to achieve the targets?

Ms Fife: We have heard the evidence of others around Key Action 6, and we concur with much of that. Those target dates, which have fallen due to be met by this time, have been met, but we also acknowledge the evidence of the Wales Audit Office, for example, in their 2005 baseline review, that whilst inpatient advocacy may be available across the piece, it varies in quality and frequency and availability, and using Measures that the National Assembly could bring forward after achieving competence, I think, would strengthen that. I do not know if it would be helpful to talk about issues around the way that advocacy is currently provided through the Mental Health Act and the Mental Capacity Act, because we have heard concerns that it may be that the Order as drafted disapplies independent mental health advocacy under the 1983 Act.

Q73 Chairman: I think actually we want to come on to that.

Ms Fife: I am so sorry.

Q74 Dr Francis: I think you were giving the answer before I had posed the question.

Dr Hunter: I apologise.

Q75 Dr Francis: I am a bit slow off the mark. In referring specifically to this, Matter 15.9 as currently drafted would allow the Assembly to disapply in Wales the right to an advocate for those subject to compulsory powers under the 1983 Act. Was this intentional?

Ms Fife: We discussed this briefly with the proposing Member. It is certainly not the intention of the Welsh Assembly Government, and we have been reassured by the proposing Member it is not his intention, to disapply the provisions of IMHA (Independent Mental Health Advocates). Members may be aware that IMHA commenced six months earlier in Wales than it did in England because the Minister was so keen to ensure that this important safeguard was available. So it is absolutely not the intention to disapply it, but we are very aware, having taken account of the scrutiny that you are undertaking at this moment, that that certainly may be an effect and, therefore, we would seek to speak to the proposing Member about this after this Committee reports. We think there may be an unintentional risk that we would be keen to readdress.

Q76 Mark Williams: Turning now to the issue of cross-border implications, we have a written submission from Gofal Cymru in which it is stated, "It might be hoped that improvements to mental health services in Wales, as a result of obtaining legislative competence, might lead to a reduction in the number of people needing to receive services outside of Wales." Do you see these proposals as having that outcome?

Ms Fife: The Legislative Competence Order itself, no, obviously that does not give rise to those cross-border issues which you have outlined, but it certainly may be an effect of the Measures that would be brought forward afterwards, and we would need to assess those implications within the Regulatory Impact Assessment that would accompany the Measure. I do not know if it would be reassuring to the Committee to maybe speak about some of the work that we are already doing in that area. Without straying into the world of Measures, in developing some of the thinking around the Measures we have given consideration to issues around GP registration, taking account of this Committee's own findings on cross-border health services; we have considered issues about where patients receive secondary care, about patients that are receiving health and social care in Wales having previously received that elsewhere. Those are the kind of considerations that are informing our thinking at the moment, but the Legislative Competence Order itself we do not see arising in cross-border issues.

Dr Hunter: I dealt with Gofal, and the dominant concern there is in relation to patients who are having to be transferred outside of Wales in order to receive really quite high-level care, largely in low secure environments and occasionally in specialist environments in relation to people who are borderline learning disability or dual diagnosis, and so on. One would like to think that one of the consequences of this as a Measure would be that, by force of secondary prevention, one would prevent an individual deteriorating to the extent where they needed to be transferred out to low, medium and high secure facilities outside of Wales, because, as with everything else in medicine, the earlier one is able to intervene the less likely it is that the consequences are going to be that extreme. Wales does have a significant problem in relation to transferring individuals out to hospitals, often many hundreds of miles away from where people's homes are.

Q77 Mark Williams: Thank you. The College of Occupational Therapists in their evidence relating to that talked about early diagnosis having a beneficial cost benefit on the Exchequer. Are you confident that the Welsh Assembly Government would be able to provide the resources? I know we have not got the Measure, but, nonetheless, the broad principles we are getting clearer on would provide the necessary resources for the implementation of the new legislation that you aspire to?

Ms Fife: We are confident of that. The Welsh Assembly Government has ensured that there are unprecedented levels of funding to mental health services in Wales, and whilst I appreciate it would be inappropriate for me to go into the precise details of funding, the Minister has set out her spending priorities and, given the First Minister's statement earlier this week about the intention to bring forward a Measure as soon as competence is achieved, those spending priorities have considered the cost implications associated to future Measures.

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Q78 Mark Williams: I appreciate the Assembly has only had a spirited debate in terms of budgetary priorities at the moment, but do you see the removal of funds from inpatient care being directed to early intervention services as a possibility in that process?

Ms Fife: That is a risk area that, amongst others, the College of Occupational Therapists have raised with us, given the experiences they have reported to us that have happened elsewhere, but it is not the intention of the first Measure and certainly not the funding commitments that the Minister has made to withdraw services and funding to inpatient services to fund this Measure or any Measures.

Q79 Dr Francis: Could we turn to the distinction between people with mental disorders and people with physical disorders? Is the Welsh Assembly Government concerned at potential allegations of discrimination if they provide a statutory entitlement to the one and not the other?

Ms Fife: We have not got specific concerns in that area. We think there are particular aspects to mental health, such that Dr Hunter has alluded to, that make the provision of statutory legislation in this area of particular regard. Essentially, I am alluding to the fact that certain people may be compelled to receive treatment and may have their liberty removed from them and, therefore, we do believe that mental health is a particular case in this area. It would not be the only matter for which special provision is made. Under the NHS Wales Act other matters are.

Mr Buffin: There are certain limited provisions within the NHS Wales Act where services must be provided, all be it a limited medical inspection of school pupils, for example, certain services related to sexual health.

Q80 Mrs James: Jonathan Morgan when he gave evidence spoke about the delay in receiving Whitehall clearance for the Legislative Order. At the same time several other issues have come forward. Why were other LCOs prioritised, in view of the backing it received from the Minister and her officials?

Ms Fife: This issue has also been raised within the National Assembly and the Counsel General and Leader of the House has given reassurance that each LCO is considered on its merits and he has confirmed to Mr Morgan that it is absolutely not the case that backbench LCOs have been treated differently. This LCO has gone through a range of different drafting processes, including negotiation, and all those processes have gone at different speeds at different times; so it is certainly not the case that this Order has been lagging behind the Government priorities.

Q81 Chairman: Can I ask you lastly, as Jonathan Morgan was the first non-Government Assembly Member to have a Legislative Competence Order

formally laid before Parliament, what support did he receive from the Minister? What legal and drafting support did he receive and was that all timely, as it were?

Ms Fife: As I said earlier, it has been a really interesting process to work in this way. The Minister has been extremely supportive throughout the whole process and has made the time of her officials fully available to Mr Morgan whenever he wished to discuss a point either with her or with her officials. The time of the Office of Welsh Legislative Council has been timetabled to accommodate support in the drafting and the iterative process and it may be helpful to place on record our thanks to the Wales Office for their support in helping in the negotiations with the Department of Health and the Ministry of Justice, who have really helped influence and shape the way that this drafting has been brought forward and has really influenced the work we have done with Mr Morgan, who, again, has been extremely helpful and supportive in taking this work forward.

Q82 Mrs James: I was going to ask another question. You have not covered it in your answer and I hoped that you might. One of my concerns is that the Scrutiny Committee, because there was revision and a new draft, have not had any time to work on that properly. I am a little bit concerned about that, because the Scrutiny Committee is a really important part of this.

Ms Fife: Absolutely. I agree; the scrutiny of these Orders has been extremely important. I think the point I made earlier about the disapplication of IMHA is a point in hand that the Scrutiny Committee certainly did review a different Order and it is on the basis of their recommendations that much of the redrafting has taken place, and I believe, but I could not comment fully, the proposing Member may have spoken to the chairman of that committee about that, but it would be outside my area to comment on that.

Q83 Dr Francis: The Welsh Affairs Committee is currently undertaking an internal review of the process and would certainly benefit from the views of ministers on their experiences over the past year. Could you enlighten us as to the extent to which your minister was engaged in discussions and negotiations in Whitehall on this outcome?

Ms Fife: The Minister has had meetings with Huw Irranca-Davies when he was within the Wales Office; she has spoken with the current Secretary of State for Wales and previous Secretaries of State for Wales about this. The negotiations with Whitehall have been through the Wales Office in that way and she has been fully engaged in this process.

Dr Francis: We will be writing to each of the Ministers seeking their views and opinions on their experiences of that process.

Chairman: Can I thank you for your evidence this morning. We can now move on to the next witnesses. Thank you.

Witnesses: **Mr Wayne David MP**, Parliamentary Under-Secretary of State, **Mr Chris Stevens**, Legislative Policy Branch, Wales Office, **Mr Richard Rook**, Member of the Mental Health Division, Department of Health, gave evidence.

Q84 Chairman: Good morning and welcome to the Welsh Affairs Committee. Could you formally for the record introduce yourselves, please?

Mr David: I am Wayne David, Parliamentary Under-Secretary of State in the Wales Office. To my left is Chris Stevens, also of the Wales Office, and to my right is Richard Rook, a Member of the Mental Health Division at the Department of Health.

Q85 Chairman: May I begin with a question that you will have heard already. What will this LCO allow the Welsh Assembly Government to do that it cannot already achieve with the existing powers?

Mr David: I suppose we know that health is devolved. Welsh ministers have executive functions which relate to the Mental Health Service but no power to legislate regarding mental health. The other point I would make is, of course, we have the 1983 Mental Health Act, which provides a framework for assessment and treatment of people with mental disorders, for people who are subject to compulsion, but there are gaps in the provision in Wales, as we have heard, particularly with regard to assessment of people with mental disorders at an early stage, gaps with regard to the treatment of those individuals and the advocacy they could receive. Jonathan Morgan's Legislative Competence Order, supported by the Welsh Assembly Government, seeks to address these gaps which have been identified and it does so, essentially, by introducing two Matters into Schedule 5 of the Government of Wales Act 2006, the Matter at 9.2 and the Matter at 15.9. Those are the two technical means to facilitate their objectives. Broadly speaking, the Legislative Competence Order will allow the Welsh Assembly Government to introduce Measures to address the assessment and treatment of mental disorders for individuals who are not covered by the 1983 Act and provide comprehensive and wide-ranging advocacy services. That, in essence, is the proposal that we have before us today.

Q86 Chairman: Could the proposals and the aims of the Assembly Government be achieved by other means, by directions or by health improvement plans under other legislation?

Mr David: I think it is important to stress that we are also talking about democracy here, in that we are talking about powers of the Welsh Assembly as a whole to legislate in these areas rather than have ministers simply issuing their own diktats, if you like. I think Jonathan Morgan in his evidence referred to the question of "oomph". I think if there is a legislative base to the proposals which are coming forward, they obviously will have greater strength and greater validity and greater enforceability than any direction by government ministers.

Q87 Chairman: Would the Wales office consider it appropriate use of this Legislative Competence Order to place a statutory duty on health services to co-operate in NHS and Community Care Act assessments?

Mr David: I think that would probably be treading into the area of the Measures which the Welsh Assembly Government may decide to bring forward. We understand, of course, from the announcement from the First Minister this week, that it is the intention of the Welsh Assembly Government to bring forward a number of Measures, and one of the Measures which will derive from this LCO will be focusing on mental health, but I think that we have to focus our attention specifically on what we have before us with the LCO rather than what the Assembly may wish to do.

Mr Stevens: I think the UK Government would agree that it is appropriate for this legislative competence to be devolved in that it meets the criteria set out in Devolution Guidebook 16. This is an area of policy where the Assembly Government have functions and they have a clear case for the power to be devolved and we believe that the scope of the proposed competency is appropriate and, therefore, for that reason, we are happy for this competence to be devolved, but the details of the Measure are a matter for the National Assembly.

Chairman: Thank you.

Q88 Mark Williams: The question I posed to the earlier witnesses I know you heard, and they concur with what the Under-Secretary of State said on diktats. You are pursuing the issue of why a legislative route is needed rather than the introduction of codes of practice and what are the limitations of National Service Frameworks in delivering some of the goals. We have heard that the LCO and the Measure that will follow will move into new and important territory, but what about the failures of the National Service Framework in terms of monitoring and inspection? Why are we taking this route rather than those?

Mr David: Of course, there is a National Service Framework in force, and the purpose of the framework, as I understand it, is that it sets standards for services in Wales, it provides us with an essential framework, but I think that it has, by its very definition, certain limitations. I think that what this LCO will allow the Assembly to do is to take forward both the principles which are set out in the framework but also the policy commitments of the Welsh Assembly Government, particularly as set out in the One Wales Agreement. It will be able to take forward those announcements or stipulations into a much more firm statutory basis.

Q89 Mark Williams: At face value, certainly in the National Service Framework the stipulations that apply to this matter read very well, and it has been, in part, the failure to monitor and enforce those that has led us to where we are today.

Mr David: I think there is a high degree of coherence, in fact, and consistency in what the Welsh Assembly Government has been wishing to achieve, and it has been moving towards achieving those goals. I think

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that the LCO, however, will be a crucial step along that road to facilitate the objectives which it has set out.

Mark Williams: Thank you.

Q90 Mrs James: It is the same question I asked the previous witnesses. The proposed Order is broadly worded. Do you consider such broad powers to be necessary to achieve the relatively limited policy goals set out in the Explanatory Memorandum?

Mr David: I think the two areas—areas 9.2 and 15.9 and 9.2 especially—do get the balance right. I think that it is quite prescriptive but not overly prescriptive. It will allow the Welsh Assembly Government to fulfil its policy objectives, to which we referred earlier, but it will do so in a way which is entirely, I think, within the devolution framework, so I think the balance is about right.

Q91 Mrs James: Is it the intention to confer legislative competence in relation to all non-compulsory mental healthcare?

Mr David: The important thing I would like to stress, first of all, is that there is a very clear distinction between compulsory and non-compulsory, and I think the LCO is very specific in recognising that there is no need for, and nor should there be, any impingement of what is set out very, very clearly in the 1983 Mental Health Act, and that focuses on compulsion. So we are talking about non-compulsion. I think the second part is that within that there is a recognition, as was explained earlier, that both people who have had no record or experience of mental disorders will come within the scope of this LCO, but people who perhaps have had mental disorders in the past but not presently could also be brought in as well.

Q92 Mrs James: Do you think that the approach taken with regard to exclusions in this LCO is consistent with that of the environment LCO, which contains much more detail about excluded areas?

Mr David: That is a difficult one to answer. It is always very difficult to make comparisons between the environment and individual mental health disorders. I think that in terms of the environment LCO there were a number of exceptions, some floating exceptions, and it was a very complex and very extensive LCO which impinged upon a whole range of different subject areas, a whole range of different pieces of legislation. I think there was, therefore, a need to have a number of exceptions clearly spelt out. I think this is very, very different. It is very focused, it is relatively narrow and I think, therefore, the approach which is adopted quite rightly in the environment LCO is not germane to what we have before us today.

Q93 Mark Williams: Pursuing the question of scope, you have in part answered this question but could you add a little more? The proposed Order as currently drafted suggests that the duty of assessment and treatment will be for individuals not

previously diagnosed. There are a number of witnesses who have appeared before us who are not clear whether the Order will cover those already known to services who are becoming unwell and recognise it. Should the Order be redrafted in order to remove any ambiguity or confusion over this issue?

Mr David: I do not think actually in the Order itself there is lack of clarity or ambiguity. I think perhaps the Explanatory Memorandum could on this point have been clearer, and that is perhaps something which could be looked at again, but to be clear, the interpretation of Matter 9.2, the LCO would allow a Measure to include duties relating to individuals not previously diagnosed as having a mental disorder as well as those with a previous or current disorder.

Q94 Mark Williams: Can we move on to Matter 15.9 in relation to social care services connected to mental health? Key Action 6 of the Mental Health National Service Framework, if achieved, would make advocacy available outside the framework of the Mental Health Act 1983 or the Mental Capacity Act 2005. Why would a legislative route be more successful than using other policy levers in the framework and providing increased resources to achieve the goal within the time limit set?

Mr David: I think the whole issue of advocacy is extremely important. I think that that point has been made out, for example, in the evidence to this Committee by Hafal, for instance. I fully accept there is a need to ensure that a voice is given to all people who are accessing services at whatever time they might wish to do so, and 15.9 includes competence to enable legislation to provide that kind of wide-ranging, comprehensive, all-inclusive advocacy service which the Welsh Assembly Government wishes to do. As I say, I think it is very important that we have that totality of approach rather than the more specific approach which exists at the moment.

Q95 Chairman: This is a point that we have asked other witnesses. Matter 15.9, as drafted, would allow the Assembly to disapply in Wales their right to an advocate for those subject to compulsory powers under the Mental Health Act 1983. Are you concerned at all about this possibility?

Mr David: Let me make it absolutely clear that the Welsh Assembly Government have made it crystal clear that they have absolutely no intention whatsoever to disapply the right of advocacy to those who are currently subject to compulsion. However, like my colleagues in the Welsh Assembly, I have been studying very carefully the wording in 15.9 and I think that is something that, when we move beyond the pre-legislative process, we will have to look at again very, very carefully, because (and I do take the implication of your question very seriously) though it might not be a policy intention now or in the foreseeable future, nevertheless there is at least a theoretical possibility that a certain interpretation could be put on parts of 15.9 which

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are not intended. So it does need to be looked at again, and I would warmly appreciate the comments of this Committee on that.

Q96 Chairman: Thank you. It has been suggested that the Measures following on from this LCO would mean a few people would have to travel outside Wales to access mental health treatment, particularly, as we heard earlier on, very specialised and perhaps very expensive treatment. Do you see these proposals as being likely to achieve that outcome?

Mr David: If I understood the first part of your question, it is about individuals who may have to move outside of Wales for treatment. I think that the issue of the cross-border implications is, of course, something which has to be taken very, very seriously. I know full well that this Committee has devoted a lot of time to considering cross-border issues regarding health, and I am very pleased that we have in place the cross-border health protocol, and anything which is agreed with regard to this LCO and the Measures that follow from it will not in any way question or undermine the existing cross-border protocols, but I think that when it comes to the issue of precisely which Measures, it will be up to the Assembly Government to study any cross-border implications of their precise policies very, very carefully, and that is something that we in the Wales Office consider to be very important, and we have had very firm assurances from the Welsh Assembly Government that this will, in fact, happen.

Q97 Mark Williams: Is the Wales Office concerned at potential allegations of discrimination if the Welsh Assembly Government do provide a statutory entitlement to early assessment and treatment for people with mental disorders but not for people with physical disorders? Is there a risk of that?

Mr David: I do not believe there is. This has been looked at and we have received reassurances from colleagues in the Welsh Assembly that this will not be the case. I would reinforce the comments which were made earlier in the evidence session. That is entirely our view as well.

Q98 Mrs James: A specific Welsh LCO is being sought rather than using a Westminster Bill. Would not an Act of Parliament ensure that all citizens of England and Wales receive the benefit of the proposals in the proposed Order of a comprehensive assessment, treatment and advocacy framework?

Mr David: I would like to bring in my colleague from the Department of Health in one moment, but I would just make the point that devolution is all about, of course, the Welsh Assembly and its Government identifying what its priorities are within the overall UK framework. It is deviation, as it were, rather than separation. The Welsh Assembly Government has decided that, of course, the 1983 Act, which is a vitally important piece of legislation, will continue to apply to Wales and will not be questioned nevertheless, but there are some gaps

within the Welsh Assembly Government and this LCO seeks to address those gaps. In England a somewhat different course has been followed.

Mr Rook: Indeed. In England we are equally keen that people should have early access to the assessment of treatment they need and also keen there should be access to advocacy, but the UK Government has only relatively recently taken through what became the Mental Health Act 2007 in which many of these issues were discussed, but the view that the Government took was that it did not think that a legislative solution was the best way forward. Clearly, though, the Welsh Assembly Government takes a different view, and this LCO would give them the right to act on that.

Q99 Chairman: I was involved in the joint committee looking at the initial proposals, I think the second proposals for the Mental Health Act, rather than the third which eventually went through and I know that Hafal put some evidence in at that time about early advocacy, so I am familiar with the fact that it has been a longstanding issue. What were the reasons why the Government here decided not to pursue the opportunity at that point to include advocacy early on?

Mr Rook: What the Mental Health Act does is impose a specific statutory duty to provide independent advocacy services to certain people. It not only imposes the duty to provide it, it also gives the advocate certain powers: so they have, for example, a power to visit patients, a power to view their records subject to various conditions. What the UK Government thought was that it was those people subject to compulsion who were in a different situation to most patients and where, therefore, there was the strongest case for establishing, in effect, a statutory right to advocacy services. That is not to say that it does not think that there should be advocacy services available for other people, but it believes that that should be left to local decisions about prioritisation of resources rather than being effectively imposed through a specific statutory duty.

Q100 Chairman: This is the same in respect of some early intervention for people who might be seeing themselves as becoming ill and wanting to be assessed.

Mr Rook: Yes. Again, the question was: do we need a special statutory duty in relation to that over and above the general duties and framework that applies through NHS legislation and social care legislation anyway, and the view the Government took was, no.

Q101 Chairman: You have said twice the view the Government took was, no. Can you expand briefly on what the reason for that was?

Mr Rook: Without wishing in any way to criticise the different view the Welsh Assembly Government takes, I think that the UK Government felt that that actually was not a justification for providing a specific duty for a relatively small part of the population in relation to one set of health problems,

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to have a separate duty to assess mental health problems when there is no equivalent duty for people with physical problems.

Q102 Mrs James: As a result of this LCO, do you think there will be differences between England and Wales in the treatment of mental health sufferers?

Mr Rook: Clearly there will be legislative differences. I think the answer to that is I cannot know, and no-one can know at this point, because it depends on what the Measure is and how the Measure is implemented. I am sorry; I cannot be more helpful than that.

Q103 Mark Williams: Can I go back to what Mr Rook was saying to the question I posed about potential cases of discrimination. You talked in terms of small sections of the population *vis-à-vis* the larger population. Was that an issue? In the questioning that Mr Williams just launched on was the fear of allegations of discrimination between people with mental health disorders and physical disorders. Was that a feature of those discussions and concerns?

Mr Rook: No, I do not think so. It was more, I think, a question of is it right to change what at the moment in the NHS are general duties into more of a patchwork of duties of this and that. I do not think it was because it was thought that it would be unlawful discrimination or anything like that.

Mark Williams: That is a very reassuring answer. Thank you.

Q104 Chairman: Can I ask lastly what advice and support the Wales Office provided to Jonathan Morgan in preparing his LCO?

Mr David: If I could just say that the process that we have embarked upon, of course, began in October 2007 when Jonathan Morgan won the private member's ballot in the Welsh Assembly. He brought forward his proposal for an LCO which was scrutinised by the Welsh Assembly Committee. That took place in February 2008, and, I think, as has already been referred to, there were quite a number of radical suggestions made by that Committee in the Assembly and, as a consequence, Jonathan Morgan radically redrafted his proposed LCO and there was the involvement at that point of the Welsh Assembly Government, and I think it has been a good partnership that has been established between the Welsh Assembly Government and Jonathan Morgan certainly from that point forward. Of course, that was when the Wales Office has become involved as well, and we have been involved in facilitating discussions with the Department of Health to make sure that there is a coherent interface, as it were, but also the Wales Office has been helping generally in terms of broader discussions about timetabling and taking this proposal forward. So I think the relationship we have established has been a very positive one, and I think that we would certainly wish to learn some good lessons from our experience so far so that in future a similar process can be equally smooth.

Chairman: Can I thank you again for your evidence. It has been very interesting indeed.

Written evidence

Welsh Affairs Committee Press Notice

PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED LEGISLATIVE COMPETENCE ORDER IN COUNCIL RELATING TO MENTAL HEALTH

CALL FOR WRITTEN SUBMISSIONS

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 2 June, 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 National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2009. The proposed Order, together with an explanatory memorandum by the Welsh Assembly Government, was published as a Command Paper by the Wales Office on 21 May (Cm 7627) and can be found on the internet at: <http://www.official-documents.gov.uk/document/cm76/7627/7627.pdf>

The Committee asks for written submissions in accordance with the guidelines stated below by 26 June 2009.

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. To what extent is there is a demand for legislation on the matter(s) in question?
4. Are there any cross-border issues relating to the LCO? (eg financial or policy issues)
5. Are the purpose and scope of the LCO clearly defined, including the terms and definitions used?
6. Does the LCO have the potential to increase the regulatory burden on the private or public sector?
7. 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?
8. Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill to confer competence on the Assembly?
9. Has full use been made of any existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter?

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.

2 June 2009

“Matter 9.2

Assessment of mental health and treatment of mental disorder.

This matter does not include any of the following—

- (a) subjecting patients to—
 - (i) compulsory attendance at any place for the purposes of assessment or treatment,
 - (ii) compulsory supervision, or
 - (iii) guardianship;
- (b) consent to assessment or treatment;
- (c) restraint;
- (d) detention.

For the purposes of this matter, “treatment of mental disorder” means treatment to alleviate, or prevent a worsening of, a mental disorder or one or more of its symptoms or manifestations; includes (but is not limited to) nursing, psychological intervention, habilitation, rehabilitation and care.”.

- (3) Under the heading “*Interpretation of this field*”, after the definition of “illness” insert—
 - ““mental disorder” means any disorder or disability of the mind, apart from dependence on alcohol or drugs;”.

Amendments relating to the field of social welfare

3.—(1) Field 15 (social welfare)(c) of Part 1 of Schedule 5 to the 2006 Act is amended in accordance with this article.

- (2) After matter 15.8 insert—

“Matter 15.9

Social care services connected to mental health.

This matter does not include the independent mental capacity advocacy services established by Part 1 of the Mental Capacity Act 2005.”.

- (3) Under the heading “*Interpretation of this field*”, before the definition of “children” insert—
 - “advocacy services” means services providing assistance (by way of representation or otherwise) in connection with the well-being of any person;”.

Clerk of the Privy Council

(c) In the field of social welfare, matter 15.8 and interpretation provisions were inserted (among other provisions) by the National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132).

EXPLANATORY NOTE

(This note is not part of the Order)

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

Article 2 inserts matter 9.2 and interpretation provisions into field 9 (health and health services) of Part 1 of Schedule 5 to the 2006 Act.

Matter 9.2 is about the assessment of mental health and treatment of mental disorder, excluding compulsory attendance for assessment or treatment, compulsory supervision, guardianship, consent to treatment or assessment, restraint and detention.

Article 3 inserts matter 15.9 and interpretation provisions into field 15 (social welfare) of Part 1 of Schedule 5 to the 2006 Act.

Matter 15.9 is about social care services connected to mental health, apart from the independent mental capacity advocacy services established by Part 1 of the Mental Capacity Act 2005.

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

Memorandum by Jonathan Morgan AM and endorsed by the Welsh Assembly Government

PROPOSAL FOR A LEGISLATIVE COMPETENCE ORDER RELATING TO MENTAL HEALTH

INTRODUCTION

1. This Explanatory Memorandum sets out the background to the provisions in the attached Member proposed Legislative Competence Order, which would confer additional legislative competence upon the National Assembly for Wales and explains the scope of the powers requested.

2. Section 95 of the Government of Wales Act 2006 (“the 2006 Act”) empowers Her Majesty, by Order in Council, to amend Schedule 5 to that Act so as to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added if they relate to one or more of the Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under section 95 of the 2006 Act is referred to as a Legislative Competence Order or LCO in this memorandum.

3. The LCO would confer further legislative competence on the National Assembly of Wales in the field of health and health services and in the field of social welfare (Field 9 and Field 15 respectively within Schedule 5 to the 2006 Act). New legislative powers in respect of the specified matters will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures, which are based on Welsh priorities and timescales. These Measures will be subject to thorough scrutiny and approval by the Assembly.

BACKGROUND

4. Mental health problems are very common—about one in six adults suffer from mental health problems at any point in time. There are a wide range of mental health problems ranging from common disorders of depression and anxiety, with a prevalence of about 14% in the UK, to the less common psychotic illnesses such as schizophrenia with a prevalence of less than 0.5%. Over one million people each year seek specialist treatment for mental health problems.

5. Depression and dementia are the commonest mental health problems in older people, but older people can also have the other mental health problems of adults of working age. Under-detection of mental illness in older people is widespread, due to the nature of the symptoms and the fact that many older people live alone. Dementia can also occur before the age of 65; there are about 1,000 people with dementia in younger age groups in Wales.

6. Users of mental health services often experience difficulty negotiating with mental health professionals and ensuring that their own point of view is acknowledged. These difficulties apply both to the practical activities of daily life as well as help with their mental health problems. Users often have little information about their mental ill health and the various alternatives for treatment and care. Advocacy seeks to address this imbalance by ensuring that their voice is heard, their choice is real and their rights are safeguarded.

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

8. In October 2005 the Wales Audit Office published a baseline review of adult mental health service provision in Wales. This found that at that time services were not configured in an optimum way to support the delivery of the NSF standards and key actions. As a result *Raising the Standard*, the revised NSF for adult mental health services, was published.

9. The Strategy for Older People (2003), and the second phase of that Strategy (for 2008 to 2013), *Living Longer, Living Better*, recognise the social and economic determinants of health and well being and promotes active, healthy aging. The accompanying NSF for Older People (2006) aims to complement and dovetail with adult mental health policy.

10. *Everybody's Business*, the Child and Adolescent Mental Health Service strategy document (2001), sets out the Welsh Assembly Government aims, objectives and underpinning principles for services for children and young people. This is supported by the NSF for Children, Young People and Maternity Services (2005).

11. During 2007 the Minister for Health and Social Services sought evidence on the possible future direction of mental health legislation in Wales. In response, a number of stakeholders spoke of the importance of improving service delivery, balancing the use of compulsory powers in mental health with improved rights for individuals, and developing legislation that is sensitive to the needs of people in Wales.

12. Organisations have reported the informed views of service users who have pointed to the importance of receiving early assessment and treatment for mental ill health: "...clients and carers know from experience that if a person receives early treatment for their mental illness they are much less likely to become so ill that they need compulsory treatment" (Hafal, 2007). Early intervention in psychosis means the detection and treatment of psychosis during the early phases of illness. Early treatment has been shown to improve the long-term course of psychosis. Early intervention can lead to a faster, more complete recovery, a decrease in the frequency and severity of relapses, and an increase in time to first relapse.

13. The Adult Mental Health Strategy (2001) states that: "*Every person who comes into contact with mental health services should have the right to an appropriate advocate.*" The baseline review of adult mental health services in 2005 identified that advocacy services in some parts of Wales were limited. A number of advocacy providers, service users and service providers have all expressed concerns that advocacy services will become focussed on the provision of statutory advocacy at the expense of meeting the wider strategic intention.

14. Legislative competence is needed in respect of:

- the assessment of an individual's mental health;
- the treatment of a person who is mentally disordered; and
- advocacy services in respect of persons who are or may be mentally disordered.

Current legislative framework

15. In general terms the provision of assessment and clinical treatment in respect of mental health is provided as part of the National Health Service under the National Health Service (Wales) Act 2006, both through general duties placed on Welsh Ministers and through the actual provision of services by NHS Trusts and Local Health Boards. Local Authorities also have responsibility for the provision of assessment and services established in various provisions within "community care" or "welfare" legislation. Some of the legislative provision relates only to adults, while other elements relate to persons of all ages. For example:

- National Assistance Act 1948—section 21 confers a duty to provide accommodation for persons aged 18 or over who are in need of care and attention; section 29 confers a duty to promote the welfare of, amongst others, mentally disordered persons aged 18 or over.
- National Health Service and Community Care Act 1990—section 47 requires a local authority to carry out an assessment where it appears to them that any disabled person for whom they may provide or arrange for the provision of community care services may be in need of such services. Having regard to that assessment, the local authority must decide whether the need calls for the provision of such services by them. Where it would appear the services should be provided by an LHB, they must notify the appropriate trust or authority. Section 47 does not guarantee the actual provision of services.

16. The Mental Health Act 1983 (the 1983 Act) provides the statutory framework under which assessment and treatment are provided under compulsion. The 1983 Act deals with the manner by which patients may be compelled, amongst other matters, to receive assessments in hospital into their mental disorder and receive treatment for the same. The 1983 Act does not deal with the actual provision of assessment or treatment.

17. The 1983 Act has recently been amended by the Mental Health Act 2007 and most significantly, in the context of this LCO, now provides for advocacy services to be provided in certain circumstances in respect of patients subject to certain provisions of the 1983 Act (mainly compulsion). Such advocates are known as Independent Mental Health Advocates (IMHAs).

18. The Mental Capacity Act 2005 also provides for advocates in certain prescribed circumstances, known as Independent Mental Capacity Advocates (IMCAs). The role of IMCAs will be expanded under the Deprivation of Liberty Safeguards of this Act, when these commence in April 2009.

19. Despite the existing framework of legislation, guidance and NSFs, consultations with service users, service providers, mental health professionals and others, have identified gaps within the legislation and service provision that cannot be currently addressed in respect of assessment, treatment and advocacy. Namely:

- the existing legislative framework does not provide for a comprehensive duty *vis-à-vis* the provision of the assessment of mental health and the treatment of mental disorder outside of compulsion;
- the need for an improved focus on early intervention and treatment through statutory duties as regards the provision of assessment and treatment which is the preferred option of many service users and their families;
- the extant duties on local authorities to provide certain assessments do not translate into duties to provide services arising out of the assessments;
- also, the duties for assessment by local authorities are applicable only in respect of those who are mentally disordered, and not those who appear to be exhibiting symptoms or manifestations of such disorder. This can result in individuals having to reach a certain level of ill health before becoming eligible for assessment;
- a patchwork of duties in respect of specialist mental health assessment and treatment within secondary services. In Wales such services are increasingly provided on a multidisciplinary basis, which involves a range of professionals and services. Those working within such services are keen to ensure, in line with the Welsh Assembly Government's strategies and service frameworks for mental health, that multidisciplinary working in this way should be strengthening. This would allow for a more seamless approach to service provision for the individual recipient, and for those services to be focussed on the needs of the individual in line with effective care planning; and
- the existing legislative framework does not provide for a wide ranging and comprehensive advocacy service—the role of the IMHA is limited to specific functions in respect of qualifying patients in limited circumstances. There is a need to ensure advocacy is available for people at a time when their mental health and usual support mechanisms may be breaking down, leaving them vulnerable when key decisions about treatment and support may need to be made.

20. There are no suitable powers within the current legislative provision that may be used to deliver a more comprehensive assessment, treatment and advocacy framework that is suitable for Wales.

SCOPE

Matter 9.2

21. It is proposed that Matter 9.2 be inserted under Field 9: Health and Health Services in Schedule 5 to the 2006 Act. This will enable the Assembly to legislate on the assessment of mental health and treatment of mental disorder by way of Assembly Measure. Any such Measure would allow duties to be placed on NHS bodies and social services providers to assess a person's mental health. The LCO would allow such duties to be placed in respect of individuals not previously diagnosed with a mental disorder, but who are presenting with the appearance of mental ill health. Duties may be placed on NHS bodies and social services providers in respect of the treatment of a person's assessed mental disorder.

22. The LCO would not allow the Assembly to legislate in respect of compelling individuals to be assessed, treated or supervised or subjecting persons to guardianship. In effect this means that there is no overlap with the main subject matter of the 1983 Act and the legislative competence of the National Assembly for Wales. The latter's competence being restricted solely to the provision of care and treatment which are existing devolved areas.

23. Similarly the LCO would specifically exclude from legislative competence matters concerning consent to treatment, restraint or detention. Again this ensures that the legislative competence does not overlap with the 1983 Act, the Mental Capacity Act 2005 nor the common law in these areas.

24. For the purposes of the matter, treatment of mental disorder is defined in accordance with the definition of treatment within the Mental Health Act 1983; the term mental disorder within the matter draws upon the definition of this term in section 1 of the 1983 Act. This includes provision excluding alcohol or drug dependence from the definition of mental disorder.

Matter 15.9

25. It is further proposed that Matter 15.9 be inserted under Field 15: Social Welfare in Schedule 5 to the Government of Wales Act 2006. Matter 15.9 extends legislative competence as regards the provision of social care services to the area of mental health. Other matters relating to social care services have been added under field 15 by the National Assembly for Wales (Legislative Competence)(Social Welfare and Other Fields) Order 2008, by which social care services are defined as: “*any of the following provided in connection with the well being of any person: residential or non-residential care services; advice; counselling or advocacy services; financial or any other assistance.*”

26. In addition Article 3(3) provides a definition of advocacy as “*services providing assistance (by way of representation or otherwise) in connection with the well-being of any person*”. Notwithstanding that this is in Field 9 (Social Welfare), this definition will encompass advocacy connected with health related matters as well as social services. Competence will extend to individuals who are subject to compulsion (under the 1983 Act) as well as those who are not. However the LCO would not allow the Assembly to legislate in respect of the independent mental capacity advocacy services established under the Mental Capacity Act 2005, this being specifically excluded in Article 3(3).

27. Article 4 of the proposed LCO also makes technical amendments to Schedule 5 to the 2006 Act, extending exceptions applying to existing certain social care matters to the proposed new matter 15.9. As such it excludes from the legislative competence to be conferred by matter 15.9 the following areas: child support; child trust funds; tax credits; child benefit and guardian’s allowance; social security; motability; vaccine damage payments; Children’s Commissioner established under Children Act 2004; family law and proceedings and welfare foods.

28. The National Assembly for Wales (Legislative Competence)(Social Welfare) Order 2009, commonly referred to as the Carers LCO, changes the way in which exceptions apply to matters in Schedule 5 to the 2006 Act. The proposed Order would change the effect of exceptions to matters in Part 1 of Schedule 5 by removing the current table and making exceptions apply to all matters (unless the exception was drafted as matter-specific); Part 2 of Schedule 5 would be renamed as “Exceptions to Matters and General Restrictions” and amended to list all the current exceptions, organised by reference to fields. Section 94 of the 2006 Act would also be amended to reflect this change. The Carers LCO is currently subject to pre-legislative scrutiny in Parliament and the National Assembly and, if it is made before this LCO, Article 4 would not be required. The LCO and Explanatory Memorandum would be amended to reflect this.

29. The proposed LCO does not add any new exceptions, since no additional exceptions are required by the matter being added.

GEOGRAPHICAL LIMITS OF ANY ASSEMBLY MEASURE

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

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

MINISTER OF THE CROWN FUNCTIONS

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

CONCLUSION

33. For the reasons outlined above, it is proposed that legislative competence of the National Assembly for Wales should be extended in accordance with the provisions of the Member proposed LCO to which this Explanatory Memorandum relates.

Written evidence from the Children's Commissioner for Wales

The potential to enshrine in law, rights relating to assessment, treatment and advocacy is something I very much welcome, especially in relation to the possibility of addressing some of the current deficiencies of child and adolescent mental health services (CAMHS) in Wales.

The Welsh Assembly Government's "*Everybody's Business*" was widely applauded as a comprehensive CAMHS strategy when it was launched in 2001. However my team has repeatedly listened to the negative experiences of children and young people with mental health problems which prompted us to repeat, in successive Annual Reports, that CAMHS in Wales are "in crisis".

We also stated in the UK Commissioners joint report to the Committee on the Rights of the Child, presented during the last UK reporting round in 2008:

110. Despite there being a mental health strategy for Wales, CAMHS provision is in crisis largely due to inadequate funding. Welsh children receive poor mental health services compared to children in England. Welsh Government commissioning guidelines result in there being no CAMHS available for 16 to 18-year-olds unless they are in full-time education and there is no guarantee that they would be able to access adult services. Moreover, children and young people who have a primary diagnosis of learning disability are unable to access some specialist CAMHS.¹

Other issues include:

- Non-recurrent and insufficient funding of services;
- Disputes relating to commissioning of services leading to unacceptable delays in provision; and
- Referral criteria and practice.

The United Nations Committee on the Rights of the Child, in response to the latest reporting round, noted in its Concluding Observations in October 2008 that:

"while one in 10 children in the State party have a diagnosable mental health problem, only around 25% of them have access to the required treatment and care"²

The Committee then recommended: "...strengthening mental health and counselling services ensuring that they are accessible and sensitive to adolescents"³.

Although these remarks were directed at the UK as a whole, it is my opinion that they apply to Wales in particular, especially since the funding for CAMHS in Wales is considerably poorer than it is in England.

Concerns around CAMHS in Wales were central to my thinking in submitting our evidence to the National Assembly for Wales (NAFW) Mental Health LCO Committee as we sought assurances that the definition of "persons" within the LCO would include children and young people.

I am confident, following the Welsh Assembly Government Minister for Health and Social Service's assertion that the LCO is "age blind"⁴ and the amended Explanatory Memorandum,⁵ that the concerns raised in my written submission as well as from other organisations in the children's voluntary sector in Wales during the Assembly scrutiny, have been addressed.

This is reflected in the fifth recommendation in the (National Assembly for Wales) Proposed Provision of Mental Health Services LCO Committee report, published in June 2008:

"We are satisfied that where the proposed Order refers to 'persons' with mental disorders, it would encompass duties and services in relation to children and young people. We welcome the commitment from the Member in Charge to clarify this in the Explanatory Memorandum."⁶

¹ <http://www.childcomwales.org.uk/uploads/publications/61.pdf>

² <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

³ *ibid*

⁴ <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-legislationlco-2008-8/bus-committees-third-ac-agendas-4/mh20080506qv.pdf?langoption=3&ttl=MH%283%29-06-08%20%3A%20Transcript%20%28PDF%2C%2048kb%29>

⁵ The explanatory memorandum has since been amended to include a reference to the Welsh Assembly Government's Child and Adolescent Mental Health Service strategy document (2001), "*Everybody's Business*", as well as the National Service Framework for Children, Young People and Maternity Services.

⁶ <http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/busbusiness-documents-doc-laid/crld7093-e.pdf?langoption=3&ttl=CR-LD7093%20-%20Proposed%20Provision%20of%20Mental%20Health%20Services%20LCO%20Committee%20Report%20on%20the%20National%20Assembly%20for%20Wales%20%28Legislative%20Competence%29%20%28No-6%29%20Order%202008>

There is a consensus amongst those of us who have the rights and welfare of children and young people in Wales at the heart of everything we do, that this LCO may well provide the tools to address the gaps between policy and service provision. Various reports and reviews of CAMHS in Wales such as my own "Somebody Else's Business"⁷ underlines the need for change sooner rather than later.

I urge you therefore to progress this Legislative Competency Order.

26 June 2009

Written evidence from the College of Occupational Therapists

1. SUMMARY

- The College believes this power is essential to enable the Assembly Government to develop legislation which gives people access to assessment, treatment and advocacy before they become so unwell that there is need for compulsion.
- People with mental ill-health often recognise they are becoming unwell and report having sought early treatment, but have been unable to secure it.
- This would balance the current power of society to compel assessment and treatment when someone is deemed unwell with a similar power for individuals to identify this themselves and to require services to respond.

2. RESPONSE TO SPECIFIC QUESTIONS

Occupational therapists play a vital role in providing services for people with mental health problems and are instrumental in enabling people to recover and take up a quality of life including work, personal independence and leisure activities that all contribute to a person's mental wellbeing and sense of self, facilitating continued mental health and wellbeing in the long term.

Many service users tell us that it is occupational therapy, which has made the difference to their recovery. The service user's own goals and interests as well as their active participation directs therapy, ensuring that the pace and outcomes are what the service user wants.

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

Yes, the College believes it is.

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

Yes the College believes it is.

2.3 *To what extent is there is a demand for legislation on the matter(s) in question?*

The profession believes there are great opportunities for service improvement if legislative competence were given in this area.

In Wales, services have not modernised as rapidly as they should have. We remain tied to hospital-based services, which are frequently only accessible after a person has reached severe illness or crisis. Often by that time they have lost their employment, their homes may be at risk, personal and familial relationships may have been irrevocably damaged and recovery can be a long process.

Occupational therapists believe that services need to be refocused to enable early access with community based services aimed at preventing deterioration and supporting people to remain in their own physical and social environment. GPs need access to alternatives to admission in times of crisis. The majority of the population with mental health problems are not admitted to specialist units but are managed by general practitioners. Those GPs need direct access to specialist staff such as occupational therapists and others. Crisis intervention teams are vitally important, but need to enable important rehabilitation and longer-term support, for example allowing occupational therapists to use their skills to support return to work, independent living and other activities, which enhance mental health. Therefore it is also important to ensure that there are rehabilitation teams or multi-disciplinary community mental health teams providing ongoing access alongside crisis work.

Occupational health services also need access to mental health practitioners such as occupational therapists with the skill to keep people in employment as long as possible. Mental health problems may be characterised by a relapse and remission pattern where people may recognise they are becoming unwell and need to be able to directly access services straight away to prevent further deterioration. Such direct access services are very rare in Wales. These areas are part of the scope that occupational therapists would like to see included in new measures following legislative competence.

⁷ <http://www.childcomwales.org.uk/uploads/publications/5.pdf>

This offers the opportunity for Wales to create a whole-system, modern approach to mental health legislation. This should move away from the medical domination of access to services to a more client led, multi professional approach.

2.4 Are there any cross-border issues relating to the LCO? (eg financial or policy issues)

The College does not believe so. The LCO offers the opportunity bring forward measures which ensure that the people of Wales are able to access assessment, treatment and advocacy as soon as possible,

2.5 Are the purpose and scope of the LCO clearly defined, including the terms and definitions used?

Yes and we would agree with all the points raised in page 11–12 in the attached memorandum.⁸ Paragraph 21 states that the duty for assessment and treatment will be for individuals not previously diagnosed. This is excellent for early intervention for the group (predominately young men with psychosis) who are becoming unwell for the first time. However, we also believe this Order should include those already known to services who are becoming unwell and recognise it. As currently constructed, this group would still not get early assessment or treatment. This would miss the full benefits for Wales of this LCO.

2.6 Does the LCO have the potential to increase the regulatory burden on the private or public sector?

There is a potential that this will increase the burden on services in the short term. The current difficulty in accessing early services is perceived to be attempts at rationing/gate keeping access. However, in the long term the cost savings of supporting people early and of treating people before they require hospital admission or treatment under compulsion will be noticeable.

It will be less of a burden if it is only for those not previously diagnosed. Services in Wales will need to consider how they finance any changes resulting from Measures arising as a result of this LCO. In England money was removed from in-patient care to fund the early intervention services and this is a potential option to shift the focus away from inpatient care.

2.7 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?

We do not believe so. This LCO would impact on the providers of mental health services in Wales as they currently exist.

2.8 Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill to confer competence on the Assembly?

Yes we believe so.

2.9 Has full use been made of any existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter?

Yes, In relation to some of the issues of the new Mental Health Act 2007 the College has been pleased to play a part in the process. That Act does not resolve the issues of this LCO, namely ensuring that people can access assessment and treatment and advocacy before they become so unwell that the Mental Health Act is relevant.

Many service users and carers do not feel helped by the services they receive, and want more emphasis on social inclusion and recovery rather than crisis and compulsion, which the College would support. A reaffirmation of the recovery model would enable services to rediscover their therapeutic and rehabilitative ethos enabling them to target those who are functionally and occupationally deprived as a consequence of mental illness.

The needs of black and minority ethnic communities should be fully addressed as they form a disproportionately high number of people who are sectioned under the Mental Health Act, and services (including occupational therapy) are criticised as not being culturally sensitive enough.

There is a welcome recognition (para 6) that activity is key to mental wellbeing. Any new measure arising from these powers should enshrine the importance of access to activity, social inclusion and participation alongside a reduction in stigma and prejudice against persons with mental health problems.

26 June 2009

⁸ Cm 7627; Ev 28–31

Supplementary written evidence from the College of Occupational Therapists

The College would like to clarify the statement made in our written evidence in respect of Services in England removing money from in-patient care to fund the early intervention services.

We do not advocate this as an option in Wales. We simply identified it as an option that has been used by service managers in England. The Mental Health Act Commission's Twelfth Biennial Report has identified the declining quality of in-patient units in England.⁹ We believe this is a potential outcome of removing funding from in patient units too hastily and support the LCO as a means of ensuring a whole system approach to mental health services.

10 July 2009

Written evidence from Dai Davies MP

In its communication with potential participants it was stated that “the Committee would particularly welcome comments” on specific aspects of the proposed Order. I will address some of my comments to these “specific aspects” defined by the Committee, and will then widen out my contribution.

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?*

This proposal, endorsed by the Welsh Assembly Government seeks to amend and widen the scope of the powers of the Government of Wales Act 2006. The devolution settlement (with its subsequent changes) provides for just such amendments and, in my view, is clearly in accordance with the Act, and fairly reflects the scope and spirit of that settlement. It is my clear view that primary decisions on such matters as the mental health of the people of Wales should rest with the Assembly. I qualify that view in other responses I make below.

3. *To what extent is there is a demand for legislation on the matter(s) in question?*

There is no evidence—in the information made available to me, as part of this process—given by the author of the proposed Order, nor by the Assembly Government which is supporting him. This substantially weakens the case being made. To simply request further powers without justifying the need for the amendment is a matter for concern. It would serve the process of legislative drafting, of devolution, and above all service to the people of Wales if all requests for such amendments and extension of powers are supported by robust reasons.

4. *Are there any cross-border issues relating to the LCO? (eg financial or policy issues).*

There are cross-border issues. There is a presumption which underpins this proposal that there is a need to develop specifically Welsh initiatives in Mental Health care. Why? What are the mental health issues which are unique to Wales?

The memorandum to the proposed LCO outlines the “state” of mental health problems and challenges in Wales, but doesn't define how they differ from the rest of the UK. Indeed, it specifically states that some of the figures used are UK figures. The question arises—why is a specific Welsh LCO being sought when changes can be made using the Parliamentary process?

The proposal specifically states the “Geographical limits” of this measure, which would not “have effect other than in relation to Wales”. But this undermines the need for such an LCO. If amendments are needed to legislation regarding those with mental health issues, and if arguments for those changes are strong enough to require such a change in the law—because of the way they improve the lives of mental health sufferers—then such improvements should be argued for and made on behalf of all sufferers across the UK! To do otherwise would be to create partial, exclusive, and negative legal changes. Suffering is suffering—whether it takes place in Wales or anywhere else in the UK.

If what is being proposed is best-practice, and/or first-rate new thinking which will alleviate suffering, then why not roll it out to everyone in the UK by amending not just the Wales Act but UK Acts which affect such provision across the UK. That way everyone with a mental health issue benefits across the UK.

I would welcome—with the extra detail the Committee needs to properly fulfil its work—a clear statement on resources for improved mental health provision in Wales.

⁹ *Risks, Rights, Recovery—The Mental Health Act Commission's Twelfth Biennial Report 2005-2007*, Mental Health Act Commission (2008) London, The Stationary Office
http://www.cqc.org.uk/_db/_documents/pdf%2012th%20biennial%20report.pdf

Another cross-border issue which arises is in the provision of Cognitive Behavioural Therapy. While not a replacement for long-term depth psychotherapeutic intervention (which is expensive and “beyond budget” in most parts of the UK), nevertheless, it is considered by the Institute of Psychiatrists to be a very effective (shorter-term) intervention for tackling the very substantial issues of mental ill health across Wales.

There is a Mental Health Strategy Framework being prepared to HC Deb, 19 Jan 2009 col 1196W) the New Horizons Strategy for Mental Health Commissioning will include provision of (amongst other things) cognitive behavioural therapy, counselling and behavioural activation.

Given that the south Wales valleys are among the hardest-hit in the UK this is especially relevant. Two months ago it became clear that *“More anti-depressant drugs are being prescribed to patients in the south Wales valleys than anywhere else in England and Wales”*. Those figures, discovered (under the Freedom of Information Act) and made public by the BBC, revealed that seven of the “top 10” areas for the drugs were in Wales, and the highest was across those valleys.

The rate of prescribing anti-depressants was just under one in 10 of patients in my areas: Blaenau Gwent; in Rhondda Cynon Taf; and Merthyr Tydfil.

The national guidelines for England and Wales on the prescribing of anti-depressants recommends they should not be used as first line therapy for mild to moderate depression. The guidelines state that in the first instance patients should be offered self help and psychological therapies, but the shocking truth is that there is a severe shortage of therapists “on the ground” anywhere in Wales.

Faced with this fact, doctors turn to the only other “support” available which is to prescribe drugs. I have revealed the very real dangers of this approach on my website: www.daidaviesmp.co.uk I would urge each Committee member to read for themselves the facts and figures which are an indictment of us all: in this House, in the Welsh Assembly, and beyond.

I am not making a political point. This issue is far too wide-spread, deep-seated, and shocking for that.

I am making the point that we are facing a mental health problem of plague proportions, and sitting on a mental health time-bomb which is ticking just below the surface of many of our communities.

I am also making the point that cognitive behavioural therapy is cost-effective, effective in dealing with some of that tide of human misery, and should be prioritised.

To say that “we are in a recession and can not afford this” is to ignore the fact that that very recession is bound to make the issue of mental ill-health even more pressing.

The case is compelling for high priority to be given to much more intervention and funding, especially in those south Wales valleys.

The Government says it is planning to “help primary care trusts improve access to psychological therapies in England for people with depression or anxiety disorders. It is supported by a significant national investment rising to £173 million by 2010–11. Our plan is to have trained 3,600 more therapists who will help to provide 900,000 more people with access to psychological therapies by 2010–11”.

The reference to NICE and to “national” clearly means that this funding and extra emphasis is “for England only”.

England will enjoy an extra £33 million for 2008–09; a further £70 million to a total of £103 million in 2009–10; and a further £70 million to a total of £173 million in 2010–11.

A “needs assessment” is to be carried out in every area of England among the local population. A detailed assessment will be made, too, of how well prepared strategic health authorities are to meet the mental health needs of their areas.

This LCO would be greatly strengthened if it, too, addressed such specifics and sought amendments which would ensure similar assessments and the funding to meet the very pressing needs that such a test of local populations would produce across Wales but in particular in the valleys of south Wales.

In human terms this work, and a similar commitment to funding in and for Wales, is compelling, I would say—unarguable.

But there are also very powerful economic arguments for relieving the growing problem of mental ill-health.

An estimated £23.1 billion is lost to the economy on account of people with mental health problems being unable to work.

We overlook mental health at our peril, and at great personal and collective cost, then. Yet mental health services are the poor and overlooked relation in the NHS.

There are too few counsellors, because there are too few counselling jobs for them to go in to. The alternative of drugs is at epidemic proportions in the south Wales valleys. As I say, the facts and figures are on my website. They make very shocking reading.

This recession is about to engulf us in even higher unemployment, soaring debt, home repossessions, and very considerable extra problems with mental ill-health. The bald fact is that most of those valleys have never come out of the last recession. The problems are getting deeper and intervention is vital—and long overdue.

With the recession bringing rising unemployment, rising debt and home repossessions, the number of people needing help with depression and mental distress can only be set to rise.

This LCO would be greatly strengthened if it made detailed cases for extending such interventions, for Wales, and the funding to underpin them.

5. *Are the purpose and scope of the LCO clearly defined, including the terms and definitions used?*

The answer to this must be—no, and this is of concern. The Order defines some specifics of the powers being sought:

“The assessment of mental health and treatment of mental disorder, (but excluding compulsory attendance for assessment or treatment, compulsory supervision, guardianship, consent to treatment or assessment, restraint and detention.”

[“Treatment of mental disorder” meaning treatment to alleviate, or prevent a worsening of, a mental disorder or one or more of its symptoms or manifestations; and includes (but is not limited to) “nursing, psychological intervention, habilitation, rehabilitation and care.” Mental disorder “meaning any disorder or disability of the mind, apart from dependence on alcohol or drugs;]

Amendments relating to the field of social welfare:

Advocacy services through Social Care Services connected to mental health. Which means, in the case of children, “services providing assistance (by way of representation or otherwise) in connection with the well-being of any person;”

[It excludes: “the independent mental capacity advocacy services established by Part 1 of the Mental Capacity Act 2005”].

But, beyond, this there is little other detail

This, then, raises questions regarding the Order being discussed. What specific changes are being sought to Mental Health services in Wales—which require these powers to be handed from Parliament to the Assembly? The Order does not define these things in detail. No doubt Assembly politicians would say that they can not be defined until the power is there to enact. Critics would say “what you are asking for is greater powers without defining clearly the ways—on the ground—you would use such powers”.

7. *Does the LCO have the potential to increase the regulatory burden on the private or public sector?*

It is not possible to answer this question without far more detail from the author of the proposal. That detail ought to be provided.

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?*

Again, this is not defined, yet should be, in order to estimate the likely costs and effects of this proposal. The second question can not be answered without such further detail.

The LCO as drafted implies that it will necessitate changes. What those changes are likely to be to “the formation or abolition of Welsh institutions and structures” will have to await that further detail.

9. *Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill to confer competence on the Assembly?*

10. *Has full use been made of any existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter?*

Specifically the Order calls for “Legislative competence in respect of the assessment of an individual’s mental health; the treatment of a person who is mentally disordered; and advocacy services in respect of persons who are or may be mentally disordered”.

In which ways do mental health professionals in Wales not already have such powers and competence? Is the author of this LCO saying that such professionals in Wales are unable to carry out these tasks?

If they are unable then there is an argument that this could be amended through changing UK law, so that everyone in the UK suffering mental health issues can benefit? If they are not then why seek powers which are not needed?

This proposal states that the current legislative framework [ie: the NHS (Wales) Act 2006] is too limited. “There are no suitable powers within the current legislative provision that may be used to deliver a more comprehensive assessment, treatment and advocacy framework that is suitable for Wales”, it states.

This limitation (if true), again, might just as easily be amended by Parliament as by this route.

Much emphasis is placed on the need for greater advocacy and more advocates to ensure those with mental health issues have “their voice heard, their choice is real and their rights are safeguarded”. And on setting and ensuring standards are met the under the National Service Framework (NSF) for Adult Mental Health Services.

The fact is that the budget and priorities for mental health services for Wales are set and implemented by the Assembly. Is it not the case that the Assembly already has the power to do what this Order is seeking which is being able to “configure” priorities “in an optimum way to support the delivery of the NSF standards and key actions”.

The memorandum also emphasises “the importance of improving service delivery, balancing the use of compulsory powers in mental health with improved rights for individuals, and developing legislation that is sensitive to the needs of people in Wales”. The ability to do those things is already in the hands of the Assembly—which must set its priorities to achieve those things.

Dai Davies MP
Blaenau Gwent

23 June 2009

Written evidence from Gofal Cymru

SUMMARY

1.1 Gofal Cymru fully support the proposed mental health LCO and believe it offers the opportunity to improve mental health services so that they more adequately meet the needs of the Welsh population.

1.2 We believe the proposed LCO has been worded in such a way that it would allow additional legislation to be introduced in Wales without infringing upon the common approach contained within the Mental Health Act and other relevant England and Wales legislation.

INTRODUCTION

2.1 Gofal Cymru has been working for over 18 years in Wales to provide support and assistance for people experiencing mental ill-health. We work with over 1,700 people a year, experiencing varying degrees of mental ill-health, and offer a wide range of services including: Wales’ first (and only) Crisis House; “hospital-to-home” homelessness prevention services based on in-patient wards; job retention and back-to-work support, and mental health training and support for employers; supported housing; housing advice; and support to help people live independently in their own homes.

2.2 We also campaign for improvements to mental health policy and practice and have supported Jonathan Morgan’s LCO from its inception. We previously gave both written and oral evidence to the National Assembly for Wales’ Proposed Provision of Mental Health Services Committee.

2.3 We recently produced a collection of people’s experiences of mental health services in Wales over the past 18 years (since the introduction of “Care in the Community”) which showed that, whilst improvements have been made, there is still a long way to go before they meet the needs of those experiencing mental ill-health.¹⁰

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

3.1 We believe that the LCO request is in the spirit and scope of the devolution settlement. Health and social care are devolved policy areas, and by conferring legislative competence the Assembly will be able to produce legislation to meet the specific needs of, and improve the lives of, the people of Wales.

3.2 The LCO also specifically does not request competence over matters such as compulsion and detention, which might be deemed outside of the spirit and scope of the devolution settlement.

¹⁰ *Then and Now: 18 years of mental health services in Wales*, available to download from <http://www.gofalcymru.org.uk/index.php?page=27>

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

4.1 This LCO seeks to amend Schedule 5 of the Act to add a matter that relates to Fields listed in that Schedule, and is therefore in accordance with the Act.

To what extent is there is a demand for legislation on the matter(s) in question?

5.1 All parties in the Assembly have supported the need for legislative competence, as have medical professionals,¹¹ social services¹² and the mental health voluntary sector in Wales.¹³

5.2 *One Wales*, the strategic agreement underpinning the Welsh Assembly Government's programme of government, pledges to seek legislative competence in relation to mental health.

5.3 There is widespread recognition that mental health services in Wales do not currently meet the needs of those who experience mental ill-health. Although the Welsh Assembly Government's mental health strategies have attempted to improve the situation, there have been on-going difficulties in implementation.¹⁴ It is hoped that these short-comings could, in part, be addressed by using legislation to impose statutory duties regarding the assessment and treatment of those experiencing mental ill-health and the provision of advocacy services.

5.4 Current UK legislation (such as the Mental Health Act, for example) is largely concerned with the small percentage of people who are acutely unwell; we believe there is a need to re-dress the balance and place a greater emphasis on services to support people before they reach the stage of compulsory treatment and detention.

Are there any cross-border issues relating to the LCO? (eg financial or policy issues)

6.1 It is certainly the case that some Welsh residents do receive mental health services from England. Protocols addressing cross-border issues are already in place, however, and we do not see why the LCO would result in any changes that would require additional policies or monies.

6.2 Indeed, it might be hoped that improvements to mental health services in Wales as a result of obtaining legislative competence might lead to a reduction in the number of people needing to receive services outside of Wales.

Are the purpose and scope of the LCO clearly defined, including the terms and definitions used?

7.1 The Explanatory Memorandum produced by Jonathan Morgan AM makes clear the purpose and scope of the LCO.

7.2 In our evidence to the National Assembly for Wales' Proposed Provision of Mental Health Services Committee we did express concern about the use of the term "treatment" (believing it to imply medical treatment, rather than the wider, more holistic range of interventions a person might benefit from) and use of the term "mental disorder" (because of its negative connotations and because we did not want scope of the LCO limited to those with a medical diagnosis of mental illness). We do understand, however, that these terms were chosen because they are those which are commonly used in legislation, and we have been partly reassured by the widening of the LCO to include social services as well as health. We were also concerned that the LCO should cover children, as well as adults, but evidence given to the Proposed Provision of Mental Health Services Committee has re-assured us that the LCO includes people of all ages.

Does the LCO have the potential to increase the regulatory burden on the private or public sector?

8.1 We do not see how the LCO would place any additional burdens on the private sector.

8.2 In his Explanatory Memorandum, Jonathan Morgan AM outlines the potential to create public sector duties in relation to mental health assessment, treatment and advocacy, but given that this has been largely welcomed by both health and social services it would seem unfairly negative to describe it as a "burden".¹⁵

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?

9.1 We do not believe the LCO would necessitate the formation or abolition of any Welsh institutions or structures.

¹¹ The Royal College of Psychiatrists, The Royal College of Physicians and The Royal College of Nursing all gave supportive evidence to the National Assembly for Wales' Proposed Provision of Mental Health Services LCO Committee.

¹² The Association of Directors of Social Services also gave evidence in support of the LCO to the Committee.

¹³ As individual organisations, and under the umbrella of the Wales Alliance for Mental Health.

¹⁴ The Wales Audit Office's 2005 report into adult mental health services, for example, found standards and targets set out in the National Service Framework were not being met.

¹⁵ As mentioned in response to question 3, evidence to the National Assembly for Wales' Proposed Provision of Mental Health Services LCO Committee by the Association of Directors of Social Services was very positive about the LCO, as was that received from Powys LHB, the Royal College of Nursing etc.

Is the use of an LCO more appropriate than, for example, the use of framework powers in a Westminster Bill to confer competence on the Assembly?

10.1 We are not aware of any planned Bill that would allow for the inclusion of suitable framework powers.

Has full use been made of any existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter?

11.1 Given their support for this LCO, the Welsh Assembly Government clearly feels that statutory guidance and secondary legislation is not adequate to ensure improvements to mental health services in Wales.

11.2 As referred to in response to question three, there have been on-going problems with Government policy and strategy not being delivered “on the ground”.

25 June 2009

Written evidence from Hafal

The following is Hafal’s submission to the Welsh Affairs Committee in their pre-legislative scrutiny of the proposed National Assembly for Wales (Legislative Competence) (Health and Health Services and Social Welfare) Order 2009.

Hafal is a mental health charity run by those it supports: people with serious mental illness and their carers. Our 1,000 Members are overwhelmingly the people who would be directly affected by the proposed Order and any subsequent Measure. Hafal also provides services and gives a voice to many more clients and families using our services in all 22 counties of Wales.

Response to the Committee’s questions

1. Hafal Members believe that the LCO request is fully in the spirit and scope of the devolution settlement because it enables regulation of responsibilities devolved to the Assembly in the fields of health and social care.
2. We understand that the use of the LCO mechanism in this case is fully in accordance with the Government of Wales Act 2006.
3. Hafal is a Member-led charity representing over 1,000 people with serious mental illness and carers from across Wales. There is an emphatic support among our Members for legislation in the areas proposed by the LCO.
4. We believe that there are no significant financial/policy/other cross-border problems which the LCO could create.
5. We believe that the purpose and scope of the LCO is clearly defined, including the terms and definitions used.
6. We do not believe that it will increase the regulatory burden on the private or public sector.
7. We do not believe that the LCO would necessitate the formation or abolition of Welsh institutions and structures.
8. We believe that the use of an LCO is more appropriate than the use of framework powers in a Westminster Bill to confer competence on the Assembly: as mental health falls within the Fields specified in the Government of Wales Act 2006, the use of this Act is realistic and appropriate.
9. Hafal Members also agree that full use has already been made of existing powers to issue statutory guidance and/or secondary legislation in relation to this Matter. For example, the Mental Health Act Code of Practice for Wales addressed key issues such as care planning. However, the Code of Practice only relates to patients subject to compulsory treatment and does not have the scope that a Measure could have in addressing mental health services for patients at all levels.

June 2009

Written evidence from Jonathan Morgan AM, National Assembly for Wales

Thank you for inviting me to give oral evidence on 2 July 2009, and for your subsequent invitation to provide a supplementary note in relation to question 14. I hope the information set out below is helpful to you.

By way of background, Matter 15.9 of the proposed Order extends the competence of the National Assembly for Wales as regards the provision of social care services to the areas of mental health.

As this Matter is inserted into Field 15 (social welfare) the definitions which have been inserted into Field 15 by the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (often referred to as the Domiciliary Care LCO) apply to new Matter 15.9.

Therefore, “Social care services” are defined for the purposes of Field 15 (social welfare) as follows:

“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 other assistance”.

This definition is prospectively amended by the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (often referred to as “the Carers LCO”) by the insertion of “information” after “non-residential care services”.

A definition of “advocacy services” will be inserted into Field 15 as follows:

“‘advocacy services’ means services providing assistance (by way of representation or otherwise) in connection with the well-being of any person”.

Into this definition is imported the definition of “well-being” inserted into Field 15 by the Domiciliary Care LCO:

“Well being” is defined in relation to individuals as:

“Well being as relating to any of the following:

- (a) physical and mental 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.”

The advocacy services which derive from my proposed Order will be constrained by the above definitions. There is no intention to, nor would the proposed Order enable the Assembly in a subsequent Measure to dis-apply the advocacy provisions contained in the Mental Health Act 1983, but it should be borne in mind that the advocacy services provided under the 1983 Act are specific in their nature. The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008 require Local Health Boards (LHB) to make arrangements for IMHAs to be available to patients who qualifying for help under section 130C of the 1983 Act. Qualifying patients are those patients who are:

- (i) liable to be detained in hospital (other than under sections 4,5(2)(4),135 or 136 of the Act);
- (ii) subject to guardianship or community treatment orders;
- (iii) informal patients who are being considered for a form of treatment that falls under section 57 of the Act;
- (iv) informal patients who have not attained the age of 18 years and are being considered for a form of treatment under section 58A of the Act (regulation 3(1)).

However, my proposed Order would enhance the services available to qualifying patients, as they would be able to benefit from the advocacy services provided by way of Matter 15.9 (despite their assessment and treatment being effectively excluded by Matter 9.2).

I would like to take this opportunity to clarify one point relating to the Explanatory Memorandum.

Paragraph 27 of the Explanatory Memorandum makes reference to article 4 of the proposed Order. As members of the Committee will see from the draft before them, there is no article 4. The reasons for this are as follows:

As originally drafted, article 4 made technical amendments to Schedule 5 to the Government of Wales Act 2006 by extending exceptions applying to existing social care matters to the proposed new matter 15.9, i. e. it would exclude from Matter 15.9 competence in areas such as child support, child trust funds tax credits, child benefit and guardian’s allowance; social security, motability, vaccine damage payments, Children’s Commissioner for England, family law and proceedings and welfare foods.

The *National Assembly for Wales (Legislative Competence) (Social Care) Order 2009* (often referred to as the Carers LCO), as originally drafted, included an article which would have effectively replaced article 4 (but would have the same effect). Subsequently, the Welsh Assembly Government has placed before the Assembly the *National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009* which strips out from the Carers LCO the exceptions to matters and places them in this separate Order. This draft Order has recently been approved by the Assembly.

If the “Exceptions to Matters Order” is made before my proposed Order, it will not be necessary for my proposed Order to contain any general exceptions. I am mindful that, should the Exceptions to Matters Order not be made before my proposed Order, some redrafting of my proposed Order may be required.

Finally, in response to the Chairman's closing remarks, I would like to refer and draw upon the response given by Ms Jackson to Mr Alun Michael MP concerning the breadth of my proposed Order—Question 8 refers.

Whilst not demurring from the response given, I would urge the Committee to be mindful of the checks and balances which are inherent in the proposed Order. I have referred to the intrinsic constraints relating to advocacy services above; Matter 9.2 is similarly self-limiting. Although it does not refer to them expressly, certain subject matter of the 1983 Act is excluded, as is certain subject matter of other relevant enactments and the common law. Essentially the proposed Order excludes any element of compulsion or detention or consent to treatment such as may be provided for under the 1983 Act, or eg the Criminal Procedure (Insanity) Act 1964 or Criminal Justice Act 1991. The proposed Order would also exclude legislating on deprivation of liberty such as is provided for under the Mental Capacity Act 2005 and would not allow interference with the common law on consent to treatment, restraint and detention.

10 July 2009

Written evidence from Mind Cymru

EXECUTIVE SUMMARY

- Mind Cymru believes this LCO to be an appropriate mechanism for developing legislation in the devolved matters of health and social care as they relate to people with experience of mental distress living in Wales.
- We believe the evidence of the demand for this legislation is strong across Wales, from the individual, family, local and national perspectives.
- Mind Cymru believes this LCO and subsequent Measures to be the best placed mechanism for providing for the wider needs of people with experience of mental distress living in Wales, as full use of existing powers has already been made.

INTRODUCTION

Mind is the leading mental health charity in England and Wales. Mind Cymru is Mind's presence in Wales.

Mind Cymru welcomes the opportunity to contribute to this consultation process. The views expressed within this response are the views of Mind Cymru and are informed by people with direct experience of mental distress.

Mind Cymru is well experienced in matters of legislation affecting people with experience of mental distress, living in Wales. One example of this being the facilitation of 13 events across Wales, in the community, hospitals, secure units and prisons, to inform the Mental Health Act Code of Practice for Wales 2007.

Mind Cymru's key messages are that:

- People with experience of mental distress inform all that we do.
- Because people with experience of mental distress inform all that we do, we know what the real issues are.
- We are determined to improve society's recognition, understanding and acceptance of people with experience of mental distress.
- We value diversity and ensure inclusion is at the heart of our work

EVIDENCE

1. Mind Cymru believes that this LCO request is in the spirit and scope of the devolution settlement, as the matters refer to regulation in the devolved fields of health and social care.

2. Our understanding is that use of this LCO mechanism is in full accord with the Government of Wales Act 2006.

3. It is our belief that there is a significant demand for legislation in this matter. Our opinion is based on comments by the over 400 people attending relevant consultation events in 2007; our network of 20 local Mind associations (LMAs) in Wales who provide a range of over 100 local mental health services to over 5,000 regular service users across Wales; individual members of our networks; and from discussions with other national and local mental health and advocacy organisations in Wales.

4. Mind Cymru does not believe that the LCO will create any significant additional cross border issues with regard to finance and/or policy.

5. We believe that the purpose and scope of the LCO, including the definitions and terms used are well defined.

6. Mind Cymru does not think that the LCO will potentially increase the regulatory burden on the public or private sectors.

7. Mind Cymru does not believe that the LCO will necessitate the formation or abolition of institutions and/or structures in Wales.

8. As the LCO refers to matters devolved to the National Assembly for Wales, in our view it is wholly appropriate.

9. We believe that full use of existing powers has already been made. A good example of this is the Mental Health Act Code of Practice for Wales 2007, which was informed by people with experience of mental distress and based on the principles of Equity, Empowerment, Equality and Efficiency and also makes specific reference to the needs of carers. However the Code of Practice cannot address the wider needs of people with experience of mental distress in Wales, as it only relates to those subject to compulsory treatment. We believe that this LCO and subsequent Measures would be the best placed mechanism for providing for the wider needs of people with experience of mental distress living in Wales. It would also afford opportunities to complement other LCOs, such as the one for Carers, to assist the Assembly in joined up provision for the people of Wales.

RECOMMENDATION

Mind Cymru recommends that the Committee supports this LCO as it will provide the mechanism to enable the Assembly to improve the lives of people with experience of mental distress living in Wales, and to be accountable for these devolved matters.

23 June 2009

Written evidence from the Royal College of Nursing, Wales

I write to you to express the support of the Royal College of Nursing for the proposed Legislative Competence Order in Council relating to Mental Health. We believe this order will lead to improvements in service and although we do not have detailed comment to make at this stage we thought it might be helpful for the Committee to be aware of our view.

18 June 2009
