

**Member Proposed Legislative Competence Order:
Mental Health
Draft Explanatory Memorandum**

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached Member proposed Legislative Competence Order (LCO), which would confer additional legislative competence upon the National Assembly for Wales. It is laid in accordance with SO 22.13 and explains the scope of the power requested.
2. The constitutional context to this request is set out by the *Government of Wales Act 2006* (the 2006 Act) and the UK Government's policy. The UK Government's White Paper "Better Governance for Wales" published in June 2005 set out the UK Government's commitment to enhance the legislative powers of the National Assembly for Wales, as a democratically elected institution with its own detailed scrutiny procedures.
3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to Fields within Schedule 5 to the 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 (LCO) in this memorandum.
4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or an LCO, approved by the Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, via an LCO.
5. The proposed LCO would confer further legislative competence on the National Assembly for Wales, in the field of Health and Health services (field 9, Part 1, Schedule 5 to the 2006 Act).
6. New legislative powers in respect of the specified "matter" will enable the Assembly Government, Assembly Members and Assembly Committees to bring forward coherent 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.

7. On 3 October 2007 Jonathan Morgan AM won the ballot to bring forward a proposed LCO. On 17 October 2007 the National Assembly for Wales, in accordance with Standing Order No. 22.50 agreed that Jonathan Morgan may lay a proposed Order, to give effect to the outline proposed Order provided on 3 October 2007 under Standing Order No. 22.48, and an explanatory memorandum.

Background

8. The objectives of the proposed LCO are to confer legislative competence on the National Assembly for Wales so that Assembly Measures may be brought forward providing mentally disordered persons with a right to assessment by the health service in Wales, duties on the health service to provide treatment, and a right to independent mental health advocacy. These rights would be applicable to mentally disordered persons who are not subject to compulsory powers under the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*).
9. The first objective of the proposed LCO is to enable Measures to be brought forward which would secure earlier assessment and treatment for mentally disordered persons. This could reduce the likelihood of further deterioration in mental health and remove the need for the use of compulsory powers later on, minimising the distress experienced by service users and their families.
10. The second objective of the proposed LCO is to give the National Assembly for Wales the power to make a Measure giving mentally disordered persons a right to independent mental health advocacy services in circumstances that will not be provided for under current legislation.¹
11. Responsibility for mental health services and for mental health policy development is devolved to the Welsh Assembly Government. It is with this body that Welsh mental health charities, campaigning groups and service users and providers engage in discussion and negotiation around the specific needs and circumstances of mental health service provision that exist in Wales.
12. Accordingly, Wales has its own Mental Health Strategy and National Service Framework for adult mental health services which are well regarded by many users and service providers but which are poorly served by current mental health legislation in England and Wales.
13. Key themes of the National Service Framework for mental health services include the development of effective, comprehensive and responsive services; the empowerment of mental health service users; and the promotion of good mental health together with action

¹ The *Mental Health Act 2007* is expected to be commenced in October 2009 in Wales.

to tackle stigma. The aims of the proposed LCO resonate closely with these themes.

14. Scotland has used its devolved legislative powers to introduce rights for persons with a mental disorder to an assessment of need and to independent advocacy, whether or not they are subject to compulsory powers, under the *Mental Health (Care and Treatment) (Scotland) Act 2003*. This Act confers rights on persons with a mental disorder in Scotland that are not enjoyed by those in England and Wales. The Scottish model is much admired for adopting a humane and inclusive approach to mental health legislation.
15. In July 2007 the *Mental Health Act 2007* received Royal Assent. The Act amended the *Mental Health Act 1983* and was the culmination of several attempts by the Westminster Government to reform mental health legislation in England and Wales. Two draft mental health bills had been published, in 2002 and 2004, but both had been highly contentious and had subsequently been dropped.
16. Following the attainment of new powers by the National Assembly for Wales under the *Government of Wales Act 2006* and the passing of the *Mental Health Act 2007* the Welsh Assembly Government sought stakeholder views on the future direction of mental health legislation in Wales.
17. In its response to the Welsh Assembly Government² the Welsh mental health charity Hafal stated that early intervention and treatment is the key to reducing the use of compulsion for those with mental disorders. Around half of those subject to compulsory treatment have previously asked for help and had it denied to them.³
18. There is strong evidence to support the view that early support and treatment helps prevent further deterioration in mental health⁴. The provision of services at an earlier stage in the cycle of mental illness would reduce the need to use compulsory powers later on. This is the preferred option of service users and their families⁵.
19. The use of compulsion in mental health services should be reserved as an action of last resort in circumstances where a failure to intervene would put the individual and others at risk. The process of compulsion can be traumatic and cause severe disruption to the individual's life, home, and family relationships, and can prolong the recovery process⁶.
20. Since devolution Wales has developed its own arrangements for the commissioning and delivery of health services. Mental health services in particular have been developing in Wales at a different

² Hafal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 13, paragraph 2.5

³ Hafal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 13, paragraph 4.8

⁴ Ted Unsworth (2007) *Future Direction of Mental Health Legislation in Wales* Ev 08, paragraph 1

⁵ Gofal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 16 p2

⁶ College of Occupational Therapists (2007) *Future Direction of Mental Health Legislation in Wales* Ev 18, p1

pace to those in England and elsewhere in the UK. Services in many parts of Wales need to respond bilingually, and to a population which may be sparsely distributed. There is therefore a distinctive set of challenges facing mental health services in Wales which can more effectively be addressed by Welsh legislation. The proposed LCO would facilitate Measures to improve mental health services in Wales without undermining the common approach taken to compulsion across England and Wales under the amended *Mental Health Act 1983*. The recognition by The Joint Committee on the Draft Mental Health Bill 2004⁷, the Wales Audit office⁸ and others, of the differences in need and service provision in Wales is a sound basis for asking that this proposed LCO be conferred on the National Assembly for Wales.

21. Mental health services in Wales are undergoing a process of development to address the aims of the Mental Health Strategy and National Service Framework which seek to locate more services in the primary care and community sectors. A re-balancing of mental health services towards early intervention would help shift the focus towards community-based treatment and accelerate the modernisation of mental health services in Wales.
22. The emphasis on compulsory treatment in current mental health legislation in England and Wales focuses resources and effort on services for individuals subject to compulsion. The right to earlier assessment and services that would be facilitated by the proposed LCO would create the incentive that is needed to ensure that service providers focus their efforts on early intervention and treatment⁹.
23. The right to independent advocacy will be available to individuals subject to compulsory powers and those receiving certain types of treatment under the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*). However, those that fall outside these categories cannot expect to receive the support of an independent advocate as of right.
24. The proposed LCO would allow the National Assembly for Wales, by Measure, to confer a right to independent advocacy on mentally disordered persons 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 services need to be made.

Scope

⁷ Joint Committee on the Draft Mental Health Bill 2004, *Draft Mental Health Bill* HL Paper 79-I HC 95-I, para 450 <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtment/79/79.pdf>

⁸ *Adult mental health services in Wales: A baseline review of service provision*, Wales Audit Office, October 2005: http://www.wao.gov.uk/assets/englishdocuments/Adult_Mental_Health_Services_Baseline_Review.pdf

⁹ Hafal (2007) *Future Direction of Mental Health Legislation in Wales* Ev 13, paragraph 2.5

25. It is proposed that the following Matter be inserted under Field 9 Health and Health Services in Schedule 5 to the *Government of Wales Act 2006* to enable the Assembly to legislate on this issue by way of an Assembly Measure:

Provision for and in connection with:

- a) the assessment by the health service in Wales of persons who are or may be mentally disordered persons,
- b) duties on the health service in Wales to provide treatment for mentally disordered persons,
- c) independent mental health advocacy for persons who are or may be mentally disordered persons.

This matter does not include assessment of, treatment or advocacy for persons detained, liable to be detained or liable to recall under the Mental Health Act 1983 (or any statutory modification or re-enactment thereof).

Interpretation of this field

“mentally disordered persons” means persons having any disorder or disability of the mind.”

26. The principle purpose of this proposed LCO is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act that will enable Welsh Ministers to ensure that mentally disordered persons receive an assessment of need, treatment, and independent advocacy in circumstances that will not be provided for under current legislation.
27. It is not intended that the proposed LCO will be used to make changes to the powers of compulsory treatment and detention contained in the *Mental Health Act 1983* (as amended by the *Mental Health Act 2007*).

Geographical limits of any Assembly Measure

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

effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

29. 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

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

Conclusion

32. For the reasons outlined above, Jonathan Morgan proposes that the legislative competence should be conferred on the National Assembly for Wales in accordance with the provisions of the proposed Order to which this Explanatory Memorandum relates.

February 2008