EXPLANATORY MEMORANDUM TO

THE NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (SOCIAL WELFARE) ORDER 2008

2008 No.

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

2. Description

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

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

None

4. Legislative Background

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

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

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

5. Territorial Extent and Application

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

6. European Convention on Human Rights

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

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

7. Policy Background

7.1 The provision of social services, including charging for services, is a devolved matter. Assessing the need for social services, as defined in section 1 of the Local Authority Social Services Act 1970, and the provision of these services is a local authority function. The powers of the Secretary of State under the 1970 Act were devolved by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999 and it is the Welsh Ministers who are responsible for issuing directions and guidance to local authorities as to the exercise of their social services functions. The Welsh Ministers are also responsible for regulating and supervising the provision of social care under various pieces of social care legislation including the Care Standards Act 2000 and the Health and Social Care (Community Health and Standards) Act 2003.

7.2 In February 2007, the Welsh Assembly Government published its ten year strategy for Social Services in Wales "Fulfilled Lives, Supportive Communities". It sets out how modernised social services will contribute to a better Wales and to improving the lives of its citizens and emphasises the need for modern, accessible and responsive services, delivered flexibly, consistently and sustainably across organisational boundaries to a high standard.

7.3 It envisages a shift from residential care towards support at home and a switch towards more preventative services. This request for legislative competence therefore derives from a need to ensure that local authority social services charging arrangements support this strategy.

7.4 Under the terms of section 17 of the "Health and Social Services and Social Security Adjudications Act 1983" (HASSASSA) whether to charge, and how much to charge, for non-residential social services is at individual local authorities' discretion. This has resulted in significant variations in charging for comparable services.

7.5 Service users, carers and their representatives are concerned that charges are often set too high and that differing amounts can be charged by different local authorities for similar services resulting in inequities and uncertainties for these groups of people. There is also disparity in the way that benefits and/or disability related expenditure are treated in an individual's assessment.

7.6 This request for legislative competence is also made in the context of the limitations to the current settlement which, in some respects, restricts the

Welsh Assembly Government from tackling Welsh priorities and issues. Whilst the Assembly Government can provide statutory guidance to local authorities under section 7 of the Local Authority Social Services Act 1970 on the exercise of their charging arrangements, this has been limited in its impact.

7.7 Using the powers in section 7 the Welsh Assembly Government issued "Fairer Charging" guidance to local authorities in 2002 in an attempt to address some of the problems with the wide variation in charging policies operated in Wales. It remains largely good practice except for four key elements which are statutory and which ensure service users are left with a guaranteed level of income after charging has been applied.

7.8 Section 7 therefore provides a vehicle for issuing general guidance in this area. However, if the Welsh Assembly Government were to issue further comprehensive guidance under section 7 in relation to charging for non-residential social care it would need to be sure that it did not fetter local authorities' discretion to charge for certain services and to recover such charges as they consider reasonable as set out in section 17 of HASSASSA. The Welsh Assembly Government has given guidance as to how an authority should set about exercising its discretion to charge ("Fairer Charging"), but that guidance cannot make it obligatory for local authorities to exercise their discretion in a particular way. Neither can it alter that discretionary power by limiting the power to charge. Any policy that sought to establish greater uniformity, for example by applying maximum charges or standard charges, could not therefore be achieved using section 7 powers. The current executive powers of the Welsh Ministers are not sufficient to enable them to achieve a fairer and more consistent approach.

7.9 The Welsh Assembly Government has taken steps to ameliorate the impact of charging, but other developments suggest that further action on charging will be necessary:

a. Rising pressure on services, with budgets increasing more slowly than in recent years, is likely to mean that individual local authorities will increasingly feel compelled to put up charges in ways which are likely to extend the current disparities;

b. As a result of "Delivering Beyond Boundaries", the Welsh Assembly Government's framework for public services in Wales, there is likely to be a move towards more regionally commissioned and delivered services provided jointly by groupings of bodies. It will be important that the charging regimes are supportive of this.

7.10 New powers in this field would therefore enable the Welsh Assembly Government to bring forward coherent proposals for Measures, based on Welsh priorities and timescales that will allow it to achieve a fair and consistent approach to charging.

7.11 The draft Order will insert a new matter into field 15: social welfare in Schedule 5 to the Government of Wales Act 2006 to enable the Assembly to

legislate on this issue by way of Assembly Measure. The Order only covers charges levied by local authorities in respect of non-residential social care. It would not enable the Assembly to legislate in respect of charges levied for non-residential social care by private care providers. It also encompasses the charging arrangements for those service users in receipt of any type of payment to enable them, or persons looking after them, to secure non-residential social care to meet their needs.(this would currently only capture a "direct payment" as this is the only type of payment currently made directly to an individual for this purpose

7.12 The matter would enable the Assembly to ensure that where a local authority decides to charge it does so in accordance with such requirements as may be specified by an Assembly Measure. The Assembly Government also wishes to have the flexibility to set the level of charging at nil for specific services or for specific client groups, should it conclude that this is appropriate, and the matter is drafted so as to enable such provision to be made by an Assembly Measure.

7.13 The principle purpose of this draft Order is therefore to empower the Assembly to pass Assembly Measures under Part 3 of the Government of Wales Act that will enable the Assembly Government to regulate the setting of charges and remove the wide disparities that currently exist.

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

- Re-numbering of the matter – the proposed Order in Social Welfare and other fields inserted matters 15.1 to 15.8 into Field 15 of schedule 5 to the Government of Wales Act 2006. The previous version of this Order on charging for non-residential social care therefore inserted matter 15.9 into Field 15. As this Order will now be laid before the Parliament in advance of the Social Welfare and other fields Order, the matter that it inserts is now numbered 15.1.

- Inclusion of the definitions of social care services, local authorities and well-being – the definitions to be used in Field 15 which are relevant to this Order (social care services, local authorities and well -being) have been moved into it with minor amendments to reflect the fact that for the time being, the definitions will apply to this Order only..

- Definition of social care – the term 'social care' which, as explained above, was previously included in the Social Welfare and other fields Order has been replaced in that Order by the term 'social care services'. The wording of the matter in this Order has therefore been amended to reflect that change. The Welsh Affairs Committee recommended that the definition of 'social care' in the proposed Order

be amended to read ‘means’ rather than ‘includes’. This has been addressed in the revised definition of ‘social care services’ as suggested.

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

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

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

7.16 As explained above, the definition of the matter covered in this Order includes certain exceptions. These exceptions clarify that the matter does not include child support (i.e. arrangements for the provision of maintenance by both parents of a child); tax credits; child benefit and guardian’s allowance; social security; Independent Living Funds; or Motability.

8. Impact

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

9. Contact

Queries about the content of the instrument or this memorandum should be addressed to Geth Williams (Tel: 020 7270 0554 or email: (geth.williams@walesoffice.gsi.gov.uk) or at the Wales Office.

Sue Olley at the Wales Office (Tel: 02920 89 8568 or e-mail: **susan.olley@walesoffice.gsi.gov.uk**)can answer legal queries about the instrument.

SCHEDULE 5

ASSEMBLY MEASURES

Part 1

Matters

(Text in bold is proposed to be added as a result of this Order in Council)

Field 1: agriculture, fisheries, forestry and rural development

Field 2: ancient monuments and historic buildings

Field 3: culture

Field 4: economic development

Field 5: education and training

Matter 5.1[1]

Provision about the categories of school that may be maintained by local education authorities.

Matter 5.2

Provision about the establishment and discontinuance of schools maintained by local education authorities, their change from one category to another and their alteration in other respects.

Matter 5.3

Provision about the admission of pupils to schools maintained by local education authorities.

Matter 5.4

Provision about the curriculum in schools maintained by local education authorities.

Matter 5.5

Provision about school attendance, the behaviour of pupils at school, school discipline and the exclusion of pupils from school (including the duties of parents in connection with those matters).

Matter 5.6

[1] Matters 5.1-5.10 were inserted by article 3(2) of the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007 (S.I. 2007/910). Matter 5.10 was amended by article 2(2) of the National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008 (S.I.2008/1036).

Provision about the making of arrangements for the provision of education for persons of compulsory school age who have been excluded from schools or who for any other reason would not otherwise receive suitable education.

Matter 5.7

Provision about entitlement to primary, secondary and further education and to training.

Matter 5.8

Provision about the provision of services that are intended to encourage, enable or assist people—

(a) to participate effectively in education or training,

(b) to take advantage of opportunities for employment, or

(c) to participate effectively in the life of their communities.

Matter 5.9

Provision about food and drink provided on school premises or provided for children at a place where they receive education or childcare.

Matter 5.10

Arrangements for persons to travel to and from the places where they receive education or training.

This matter applies to—

(a) persons receiving nursery, primary, secondary or further education or training;

(b) persons described in matter 5.17 receiving higher education.

This matter does not include any of the following—

(a) the regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used;

(b) road traffic offences;

(c) driver licensing;

(d) driving instruction;

(e) insurance of motor vehicles;

(f) drivers' hours;

(g) traffic regulation on special roads, pedestrian crossings, traffic signs and speed limits;

(h) public service vehicle operator licensing;

(i) the provision and regulation of railway services, apart from financial assistance which—

(i) does not relate to the carriage of goods,

(ii) is not made in connection with a railway administration order, and

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

(j) transport security;

(k) shipping, apart from financial assistance for shipping services to, from or within Wales;

(l) navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation;

(m) technical and safety standards of vessels;

(n) harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for communications between places in Wales;

(o) registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

Matter 5.11[2]

Provision for and in connection with securing the provision of facilities for post-16 education or training.

Matter 5.12

Provision for and in connection with the establishment and dissolution of—

(a) institutions concerned with the provision of further education, and

(b) bodies that conduct such institutions,

including the circumstances in which an educational institution becomes or ceases to be an institution concerned with the provision of further education.

Provision about—

(a) the conduct and functions of such institutions and bodies that conduct such institutions;

(b) the property, rights and liabilities of such institutions and bodies that conduct such institutions;

(c) property held by any person for the purposes of such an institution;

(d) the governance and staff of such institutions.

Matter 5.13

Provision for and in connection with securing collaboration—

[2] Matters 5.11–5.16 of this Schedule were inserted by section 27(2) of the Further Education and Training Act 2007 (c.25).

(a) between bodies that conduct institutions concerned with the provision of further education, or

(b) between one or more such bodies and other persons or bodies that have functions relating to education or training in Wales,

including, in particular, provision for and in connection with the establishment of bodies for the purpose of discharging functions on behalf of one or more persons or bodies that are party to arrangements for collaboration.

Matter 5.14

The provision of financial resources for and in connection with—

(a) education or training provided by institutions concerned with the provision of further education;

(b) post-16 education or training provided otherwise than by such institutions;

(c) the carrying out of research relating to education or training falling within paragraph (a) or (b).

Matter 5.15

The inspection of—

(a) education or training provided by institutions concerned with the provision of further education;

(b) post-16 education or training provided otherwise than by such institutions;

(c) the training of teachers and specialist teaching assistants for schools;

(d) services of the kinds mentioned in matter 5.8.

Matter 5.16

The provision of advice and information in connection with, and the carrying out of studies in relation to, any of the kinds of education, training or services mentioned in matter 5.15.

Matter 5.17[3]

[3] Matter 5.17 was inserted by article 2(3) of the National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008.

Education and training for—

(a) persons who have a greater difficulty in learning than the majority of persons of the same age as those persons;

(b) persons who have, or have had—

(i) a physical or mental impairment, or

(ii) a progressive health condition (such as cancer, multiple sclerosis or HIV infection) where it is at a stage involving no physical or mental impairment.

This matter does not include arrangements for persons to travel to and from the places where they receive education or training.

Interpretation of this field[4]

In this field—

"nursery education" means education suitable for children who have not attained compulsory school age;

"post-16 education" means—

(a) education (other than higher education) suitable to the requirements of persons who are above compulsory school age, and

(b) organised leisure-time occupation connected with such education;

"post-16 training" means—

(a) training suitable to the requirements of persons who are above compulsory school age, and

(b) organised leisure-time occupation connected with such training.

References in this field to an institution concerned with the provision of further education are references to an educational institution, other than a school or an institution within the higher education sector (within the meaning of the Further and Higher Education Act 1992), that is conducted (whether or not exclusively) for the purpose of providing further education.

Expressions used in this field and in the Education Act 1996 have the same meaning in this field as in that Act.

Field 6: environment

[4] Interpretation provisions were inserted by article 3(2) of the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007, section 27(3) of the Further Education and Training Act 2007, and article 2(4) of the National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008.

Field 7: fire and rescue services and promotion of fire safety

Field 8: food

Field 9: health and health services

Matter 9.1[5]

Provision for and in connection with the provision of redress without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales.

Interpretation of this field

In this field-

"the health service in Wales" means the health service continued under section 1(1) of the National Health Service (Wales) Act 2006;

"illness" has the same meaning as in that Act;

"patient" has the same meaning as in that Act;

"personal injury" includes any disease and any impairment of a person's physical or mental health;

"qualifying liability in tort" means liability in tort owed in respect of or consequent upon personal injury or loss arising out of or in connection with breach of a duty of care owed to any person in connection with the diagnosis or illness or the care or treatment of any patient.

Field 10: highways and transport

Field 11: housing

Field 12: local government

Matter 12.1[6]

Provision for and in connection with—

(a) the constitution of new principal areas and the abolition or alteration of existing principal areas, and

(b) the establishment of councils for new principal areas and the abolition of existing principal councils.

"Principal area" means a county borough or a county in Wales, and "principal council" means a council for a principal area.

Matter 12.2

Provision for and in connection with—

[5] Matter 9.1 and the interpretation provisions for field 9 were inserted by article 3(3) of the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007.

[6] Matters 12.1–12.5 were inserted by the Local Government and Public Involvement in Health Act 2007 (c. 28), section 235 and Schedule 17.

(a) the procedure for the making and coming into force of byelaws, and

(b) the enforcement of byelaws.

"Byelaws" means those of a class which may be confirmed by the Welsh Ministers (but the provision which may be made includes provision to remove a requirement of confirmation).

Matter 12.3

Any of the following—

(a) the principles which are to govern the conduct of members of relevant authorities,

(b) codes of conduct for such members,

(c) the conferral on any person of functions relating to the promotion or maintenance of high standards of conduct of such members (including the establishment of bodies to have such functions),

(d) the making or handling of allegations that members (or former members) of relevant authorities have breached standards of conduct, including in particular—

(i) the investigation and adjudication of such allegations and reports on the outcome of investigations,

(ii) the action that may be taken where breaches are found to have occurred,

(e) codes of conduct for employees of relevant authorities.

For the purposes of this matter—

"relevant authority" has the same meaning as in Part 3 of the Local Government Act 2000, except that other than in paragraph (d) it does not include a police authority,

"member" includes a co-opted member within the meaning of that Part.

Matter 12.4

Provision for and in connection with strategies of county councils and county borough councils for promoting or improving the economic, social or environmental wellbeing of their areas or contributing to the achievement of sustainable development in the United Kingdom, including provision imposing requirements in connection with such strategies on other persons with functions of a public nature.

Matter 12.5

Provision for and in connection with—

(a) the making of arrangements by relevant Welsh authorities to secure improvement in the way in which their functions are exercised,

(b) the making of arrangements by relevant Welsh authorities for the involvement in the exercise of their functions of people who are likely to be affected by, or interested in, the exercise of the functions, and

(c) the assessment and inspection of the performance of relevant Welsh authorities in exercising their functions.

The following are "relevant Welsh authorities"—

(a) a county council, county borough council or community council in Wales,

(b) a National Park authority for a National Park in Wales,

(c) a fire and rescue authority in Wales constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies,

(d) a levying body within the meaning of section 74(1) of the Local Government Finance Act 1988 in respect of which the county council or charging authority referred to in section 74(1)(b) of that Act was a council or authority for an area in Wales,

(e) a body to which section 75 of that Act applies (special levies) and which as regards the financial year beginning in 1989 had power to levy a rate by reference to property in Wales.

Field 13: National Assembly for Wales

Matter 13.1

Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly.

Matter 13.2

Conferral of functions on the Assembly Commission for and in connection with facilitating the exercise by the Assembly of its functions (including the provision to the Assembly of the property, staff and services required for the Assembly's purposes).

Matter 13.3

Provision for and in connection with the payment of salaries, allowances, pensions and gratuities to or in respect of Assembly members, the First Minister, any Welsh Minister appointed under section 48, the Counsel General and any Deputy Welsh Minister.

Matter 13.4

Provision for and in connection with the creation and maintenance of a register of interests of Assembly members and the Counsel General.

Matter 13.5
Provision about the meaning of Welsh words and phrases in-
(a) Assembly Measures,
(b) subordinate legislation made under Assembly Measures, and
(c) subordinate legislation not so made but made by the Welsh Ministers, the First Minister or the Counsel General.

Matter 13.6
Provision for and in connection with the procedures for dealing with proposed private Assembly Measures, including, in particular-
(a) procedures for hearing the promoters of, and objectors, to proposed private Assembly Measures,
(b) the persons who may represent such promoters and objectors, and the qualifications that such persons must possess,
(c) the imposition of fees for and in connection with the promotion of proposed private Assembly Measures, and
(d) the assessment of costs incurred in connection with proposed private Assembly Measures.

Field 14: public administration

Field 15: social welfare

Matter15.1

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

This matter does not include any of the following—

(a) child support;

(b) tax credits;

(c) child benefit and guardian's allowance;

(d) social security;

(e) independent living funds;

(f) motability.

Interpretation of this field

In this field—

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

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

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

(a) physical and mental health and emotional well-being;

(b) protection from harm and neglect;

(c) education, training and recreation;

(d) the contribution made by them to society;

(e) social and economic well-being;

(f) securing their rights.

Field 16: sport and recreation

Field 17: tourism

Field 18: town and country planning

Field 19: water and flood defence

Field 20: Welsh language