

Proposed Provision of Mental Health Services LCO Committee

MH (3)-07-08(p.3): 13 May 2008



Cymdeithas y Cyfreithwyr
The Law Society

Ms A Daniel
Committee Clerk
Legislation Office
National Assembly for Wales
Cardiff Bay
CF99 1NA

24 April 2008

Dear Sir,

**Proposed Provision of Mental Health Services LCO Committee –
The National Assembly for Wales (Legislative Competence) (No 6) Order 2008
(Relating to Provision of Mental Health Services)**

This response has been prepared by the Law Society Wales Office following the Committee's call for evidence.

The Law Society is the representative body for over 100,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

Overview

We are interested in this proposed legislation as we keep under review and promote improvements in the law, practice and procedure affecting those with mental disabilities. The Law Society welcomes the basic aim of the Proposed Legislative Competence Order ("the LCO").

Our comments pay particular attention to whether the draft power set out in the LCO will allow an Assembly Measure to be made in order for the policy objectives set out in the Explanatory Memorandum to be achieved.

So as not to fetter future law making in this area the wording of the new Field in Schedule 5 should be as broad as possible. The making of LCOs is an important area of new law where the concept of 'future-proofing' legislation is paramount. In this instance particular care must be taken to ensure matters such as appeals against adverse decisions are considered to decide whether sufficient provision exists in current structures. The need to extend the power to include 'care' and services provided through local authority social services are also relevant: these are expanded upon below.

Replies to the Committee's Questions

1. Would the terms of the proposed order confer the appropriate powers on the National Assembly for Wales to allow for the implementation of the policy proposals outlined in the Explanatory Memorandum?

The objectives as stated in the Explanatory Memorandum are "earlier assessment and treatment of mentally disordered persons" (para 9) and "giving mentally disordered persons a right to independent mental health advocacy services in circumstances that will not be provided for under current legislation" (para 10). The LCO would provide power for these objectives to be pursued through legislation however there are questions about the breadth of the LCO in order to provide a thorough service as proposed.

See further under Questions 2 and 3 regarding the services provided and the role of local authority social services. Some consideration should also be given to an additional power under Field 15 within Social Welfare as the response to the issue here would require care and treatment from outside the health service particularly social welfare to maintain these persons in society.

2. Is the scope of the proposed Order appropriate, too narrow or too broad to allow the Assembly to bring forward the Measures to address issues you believe should be addressed via legislation in the field of Mental Health in Wales. If necessary, how should the proposed Order be re-drafted and why?

The Law Society assumes that the majority of people to whom this is intended to apply will be living in the community and will wish to remain so. This would seem to be the purpose: to promote voluntary engagement with services and hence possibly avoid in-patient care under compulsion.

In the evidence given by service users in pre-legislative scrutiny of mental health legislation at an England and Wales level circumstances were described where individuals had sought help from psychiatric services and the service had not responded until the situation became so serious that the service user had to be 'sectioned.'

A duty to assess is important but a key question is who will be entitled to request an assessment. Is it intended that the right be confined to the service user and those who look after her or him? If not, and the right to request an assessment is extended beyond the service user and the primary carer or nearest relative this might produce unwanted consequences. The LCO as currently drafted states that the right would be available where a person 'is or may be suffering from mental disorder.' If the right is

extended to other persons or bodies it might cause interference from others and be seen as a pre-sectioning procedure, potentially leading to harassment of mentally disordered people in the community.

Section 228 of the Mental Health (Care and Treatment)(Scotland) Act 2003 entitles a service user, a primary carer, or the service user's named person to make a request in writing for the service user's needs for services to be assessed. The relevant bodies must then respond within 14 days stating whether they intend to carry out the assessment and, if they do not, to give reasons why that is the case. This would be a good model which would not open the right to request an assessment to too many people.

The Mental Health (Care and Treatment)(Scotland) Act 2003 also places a duty on local authorities to provide "care and support"; "services designed to promote the well-being and social development of those persons"; and "assistance in travel". These provisions would not be possible under the LCO as it is currently drafted.

Consideration should also be given to what will become a 'right to treatment' which does not exist across current mental health provision.

3. The proposal is to impose duties on the Health Service to provide assessment of and treatment for mentally disordered persons. Should it cover duties on other bodies?

The Law Society considers that the duties to assess and provide treatment should be placed on local authority social services as well as the health service.

The duty to assess need for community care services currently falls on local social services authorities under s 47 of the NHS and Community Care Act 1990. The duty to assess need should therefore be placed on the health service and local social services authorities.

Treatment for mental disorder is defined in section 145 of the Mental Health Act 1983 as amended by the Mental Health Act 2007 as including nursing, psychotherapy and specialist mental health habilitation and rehabilitation. This will necessarily involve social services, since the duty to provide community services currently falls on local authority social services with the co-operation of health service bodies.

The proposed legislation should be amended to include local authority social services.

4. The parts of the proposed Matter which relate to assessment and treatment (paragraphs(a) and (b)) are limited to "the health service in Wales". Would this deal appropriately with any cross-border issues?

The Welsh Affairs Committee is considering the provision of cross border public services for Wales. This is not a matter on which the Law Society can comment.

5. In relation to assessment of persons and advocacy services, the matter applies to persons "who are or may be mentally disordered". What are your views on this?

The Law Society suggests that the phrase "may be mentally disordered" is too wide and that the formulation should be changed to ensure that there are some grounds on which the person is believed to be mentally disordered. The Law Society suggests that in clauses (a) and (c) the phrase 'who are or may be mentally disordered

persons' be replaced with 'who are or who appear to be suffering from mental disorder.'

6. Is it appropriate to limit legislative competence to exclude persons detained under the Mental Health Act 1983?

Yes, unless a wholesale review of mental health law is proposed it is appropriate to retain all current legislation and to introduce this power in a discrete area outside current provisions.

7. Is the definition of "mentally disordered persons" in the proposed Order appropriate? If not, how should the definition be re-drafted and why?

The definition is sufficiently wide to encompass the group who appear to be the intended beneficiaries of the policy.

8. Should the term "treatment" also be defined within the matter?

This term should not be defined in this LCO but left to be considered and defined when the Assembly Measure is made under the power gained.

The First Member Proposed LCO

We are pleased to comment on this the first member proposed LCO. We understand the Member has opened discussions with both Westminster and Whitehall ahead of the formal consideration of the proposed LCO. We look forward to following the progress of this LCO.

We trust our comments will be of assistance to the committee. We should be pleased to expand on our comments and provide further evidence to the Committee as required. We look forward to giving oral evidence to the committee on 13 May 2008.

Yours sincerely,

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