



Y Gwir Anrhydeddus Elin Jones AS

Llywydd, Senedd Cymru

Right Honourable Elin Jones MS

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Russell George MS

Chair, Health and Social Care Committee

Mike Hedges MS

Chair, Legislation, Justice and Constitution Committee

10 June 2024

Dear Russell and Mike,

Health and Social Care (Wales) Bill: legislative competence and human rights considerations

In accordance with section 110(3) of the Government of Wales Act 2006 (the 2006 Act) and Standing Order 26.4, I have laid a statement setting out my view on whether the provisions of the Health and Social Care (Wales) Bill would be within the Senedd's legislative competence.

It is my view that one of the provisions of the Bill, paragraph 4 of Schedule 2, would not be within legislative competence as it requires Minister of the Crown consent, and such consent has not been received at the time of introduction. My statement on legislative competence reflects this position.

As Members will be aware, while I am required to make a statement setting out my views, the content of my statement does not affect whether or not a Bill may be introduced or complete its passage through the Senedd.

I have also considered the compatibility of the provisions in the Bill with the rights set out in the European Convention on Human Rights ("ECHR"). Whilst my overall conclusion is that the provisions in the Bill are compatible with the ECHR, my view is that the position in relation to

certain provisions is finely balanced, with persuasive arguments both for and against compatibility. As such, I believe these provisions would merit scrutiny by the responsible committees during Stage 1.

To help inform this work, I enclose a summary of the human rights considerations that are relevant to the Bill. If you would like further information and advice, the officials supporting the Committee will be pleased to assist.

I am copying this letter to the First Minister, the Minister for Social Care (as the Member in charge of the Bill) and all Members of the Senedd.

Yours sincerely,

A handwritten signature in blue ink that reads "Elin Jones".

The Rt. Hon. Elin Jones MS/AS

Llywydd

Human Rights considerations relevant to the Bill

1. Careful consideration should be given as to whether any provisions of the Bill engage any rights under the European Convention on Human Rights ("ECHR"), but particular consideration should be given to **Article 8 and Article 1 of the First Protocol to the ECHR**. The Explanatory Memorandum to the Bill makes no reference to the Welsh Government's views on the potential human rights impact of the Bill.

Article 8

2. Article 8 of the ECHR states:

Everyone has the right to respect for his private and family life, his home and correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3. Committees may wish to carefully consider the impact of the following sections of the Bill:
 - **Section 4** inserts a new Schedule 1A into the Regulation and Inspection of Social Care (Wales) Act 2016 ("the 2016 Act"), providing for transitional arrangements for registration as a provider of restricted children's services. Schedule 1A will allow the Welsh Ministers to, by regulations, set a date by which existing profit-making providers of restricted children's services must become non-profit-making, or no longer be registered. Article 8 may be engaged if service providers cease their provision of the service when they are no longer able to make a profit, which would have an impact on the rights of children who are cared for by such providers.
 - **Section 13** inserts new provisions into the Social Services and Well-being (Wales) Act 2014 ("the 2014 Act") to permit "supplementary placements" to be authorised by the Welsh Ministers, where a child may still be placed with a for-profit provider if the local authority decides that is the most appropriate placement and there is no not-for-profit alternative available. Again, this would have an impact on the rights of the children who require the placement.
 - **Section 10** of the Bill amends section 75 of the 2014 Act. Section 75, as currently drafted, provides that a local authority has a general duty to take steps to secure, as far as reasonably practicable, that it is able to provide certain looked after children with accommodation within the local authority's area. The amendment which section 10 seeks to make will mean that local authorities must take all reasonable steps to secure that such accommodation can be provided within or near to the local authority's area. This means that placements that are available to a local authority may be outside of its area. The Explanatory Note to section 10 notes there will be circumstances in which a child placed outside of a local authority's area may be nearer to their home community than if they were placed in a different part of the local authority's area, but this amendment could also result in children being placed further away from their home community. The purpose of section 10 is set out in the Explanatory Notes as to enable local authorities to

make arrangements with each other to develop new children's homes and foster care placements. The Explanatory Memorandum also states that, wherever possible, the Welsh Government wants to see placements provided for children and young people that will preserve their links with their local neighbourhoods and communities and allow as much continuity in their lives as possible.

Article 1 of the First Protocol ("A1P1")

4. A1P1 states as follows –

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

5. Committees may wish to carefully consider the impact of the following sections of the Bill:

- **Section 3** inserts a new section 6A into the 2016 Act, which imposes a requirement that children's care home services, fostering services and secure accommodation services be not-for-profit in order to be registered to provide restricted children's services.
- **Section 4** imposes a similar requirement on a transitional basis to existing providers of restricted children's services.
- **Section 8** amends the 2016 Act to make reference to the requirements set out in the proposed new section 6A when an application is being made to vary an existing registration to add the provision of restricted children's services.

6. Any provision that deprives an individual of their property will potentially engage A1P1. A1P1 says that every person "is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided by law."

7. The concept of possessions is very broadly interpreted in the case-law of the European Court of Human Rights. It is not confined to physical possessions and can include profit, although it has not been interpreted to mean future earnings.

- **Sections 4(4) and 4(5)** of the Bill amend the 2016 Act so that the Welsh Ministers may prescribe by regulations that it is an offence for a provider to fail to comply with conditions imposed in regulations made under the new Schedule 1A to the 2016 Act. Such an offence is punishable by a fine or a fixed penalty notice.

- Similarly, **section 14(3)** of the Bill makes it an offence to fail to submit or publish an annual return within the prescribed time limit, and a person guilty of such an offence is liable on summary conviction to a fine.
8. The issue of a fine engages A1P1, but deprivation of property is permissible where the policy is: justified on grounds of public interest, proportionate to the public interest aim pursued, done in accordance with domestic and international law and has legal certainty..