

**Y Pwyllgor Deddfwriaeth,
Cyfiawnder a'r Cyfansoddiad**

**Legislation, Justice and
Constitution Committee**

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Dawn Bowden MS
Minister for Social Care

18 June 2024

Dear Dawn

Health and Social Care (Wales) Bill

Thank you for attending our meeting on Monday 17 June 2024 to discuss the Health and Social Care (Wales) Bill. We have a number of additional queries relating to the Bill. As such, I would be grateful if you would respond to the questions in the Annex to this letter by Tuesday 9 July 2024.

Thank you also for agreeing to provide:

- I. Full details of the Welsh Government's assessment of the Bill's impact on children and their families, with particular reference to Article 8 of the European Convention on Human Rights, and the impact on service providers, with particular reference to Article 1 of the First Protocol to the Convention.
- II. Further details on what you consider "public good" to mean in the context of new section 6A(3)(b) being inserted into the 2016 Act (via section 3 of the Bill).

I am copying this letter to the Health and Social Care Committee.

Yours sincerely,



Mike Hedges
Chair

ANNEX

Question 1 - What discussions have you had with the other UK administrations regarding the provisions and policy objectives of the Bill?

Question 2 – Why have you decided to make reference to the elimination of private profit from the care of looked after children in the various explanatory documentation to the Bill, rather than referencing the fact that the Bill makes provision to restrict making a profit?

Question 3 - With regard to the restriction of profit-making for restricted children's services, the timelines for delivering this are not clear. The new Schedule 1A to the *Regulation and Inspection of Social Care (Wales) Act 2016* ("the 2016 Act") provides that the transitional period begins with the day on which section 6A(1) of the 2016 Act comes into force. According to paragraph 3.42 of the Explanatory Memorandum, section 6A(1) will come into force on 1 April 2026, but paragraph 3.42 also states that existing "for profit" providers will be subject to transitional provisions from 1 April 2027. Can you provide clarification regarding the dates, please?

Question 4 - Section 2 of the Bill inserts definitions into the 2016 Act, one of which relates to a care home service that is provided wholly or mainly to children. To fall within the definition, a provider will need to show that it intends to provide more days of accommodation to children than adults over a set period, but the Bill does not provide any detail about how this intention is to be demonstrated or assessed in practice. It also doesn't make it clear whether the periods of time referred to must be continuous or not, i.e. if it is a 12 month period with the previous 24 months, does this mean 12 continuous months or any 12 individual months within the preceding 24 months? Do you have any concerns that this may lead to confusion about what constitutes a care home service in this context?

Question 5 - The new section 6A(3) of the 2016 Act, as inserted by section 3(3) of the Bill, refers to a person's objects or purposes primarily relating to certain matters, however no information is provided as to how objects or purposes are to be determined. What is the reason for the omission of this detail? It appears from the wording of the new section 9A(1)(b), as inserted by section 6(3) of the Bill, that some form of determination method has been contemplated as that refers to "objects or purposes as determined in accordance with section 6A(3)", but the method of determination is not apparent from the wording of the Bill.

Question 6 - The Bill defines some terms with reference to existing legislation, for example, "looked after children", "company having share capital" and "substantial interest in a body corporate". However, there is a risk of confusion as "looked after children" is defined with reference to section 74 of the *Social Services and Well-being (Wales) Act 2014* ("the 2014 Act"), but section 74 does not use this term. Similarly, "company having share capital" and "substantial interest in a body corporate" are given specific meanings in the Bill, but the phrases are not used in such forms in the Bill. Can you

explain why this approach has been taken and, on reflection, do you consider that the drafting of these provisions could be clearer?

Question 7 - The new Schedule 1A to the 2016 Act, as inserted by section 4(3) of the Bill, refers to a service being “provided wholly or mainly to children”. This phrase is given a specific meaning in the new section 2A of the 2016 Act, as inserted by section 2(2) of the Bill, but this meaning is stated to only apply in section 2A(1). Is it intended that the phrase should have the same meaning in Schedule 1A as it does in section 2A(1), and if so, do you think that the drafting reflects this? The same issue applies in relation to section 75(4) of the 2014 Act, as amended by section 10(6) of the Bill, which uses the phrase “wholly or mainly to children” but offers no explanation as to how this is to be determined.

Question 8 - Section 4(3) inserts a proposed new paragraph 1(1)(b), in a new Schedule 1A to the 2016 Act. Paragraph 1(1)(b) specifies that the transitional period for a restricted children’s service ends with the day appointed by the Welsh Ministers by regulations. In the Statement of Policy Intent you state that “The power recognises that it will be necessary to consider the progress of local authority disengagement from the use of for-profit placements in order to determine the appropriate point at which to bring the transition period to a close”. If one local authority, for whatever reason, struggles to disengage from the use of for-profit placements, does this mean the transition period across Wales will continue for all local authorities until all are ready?

Question 9 – Section 4(3) of the Bill inserts a new regulation-making power which enables the Welsh Ministers to specify enactments for the purposes of which the new paragraph 2(3) of Schedule 1A does not apply. Why are these enactments not listed in the Bill? The Statement of Policy Intent also states that the new powers in paragraph 2(4)(a) of Schedule 1A allow the Welsh Ministers to specify other instances where a provider should be treated as not meeting the not-for-profit requirement; what instances are envisaged here?

Question 10 – Section 11 inserts new section 75A into the 2014 Act relating to the preparation and publication of local authority annual sufficiency plans. On the face of the Bill, it appears that the new section 75A(2)(d)(iii) and (vi) are two separate regulation-making powers. However, the Explanatory Memorandum and Statement of Policy Intent refer to them in the singular. Can you confirm our understanding that there are two powers in section 75A(2)(d)(iii) and (vi)?

Question 11 – The Statement of Policy Intent sets out the reasons why a regulation-making power is needed in section 14 to set a time limit for the publication of an annual return. What time frame do you anticipate setting for this, and why would such a time frame ever need to be changed? Is a flexible time frame appropriate for the publication of an annual return?

Question 12 - Section 19 of the Bill permits interim orders to be extended by a panel in fitness to practise cases. Section 19(1) states that the power is to extend the order for up to 18 months, but section 19(2)(b) requires that “the extension does not result in the interim order having effect for a

period of more than 18 months". This wording implies that the interim order as a whole, not just the extension, cannot endure for more than 18 months, which is different to what section 19(1) says. Can you clarify the intention here?

Question 13 - Paragraph 7 of the new Schedule A1 to the 2014 Act, as inserted by section 20(2)(d) of the Bill, requires regulations made under the Schedule to specifically provide that direct payments under section 117 of the *Mental Health Act 1983* have to reflect the amount that the local authority estimates would be required to pay for the service in question. The power to make these regulations is a discretionary power, so if this power is not exercised, how will paragraph 7 be given effect? Why would it not be more appropriate to include these requirements about the direct payments on the face of the Bill?

Question 14 - Section 20(2)(a), (d) and (e) insert new provisions with regulation-making powers into the 2014 Act. The Explanatory Memorandum states that these powers replace existing powers, but then later goes on to say that "the negative procedure would be more appropriate". This gives the impression that the scrutiny procedure has changed for these powers, can you confirm whether this is the case and why the Explanatory Memorandum uses this wording?

Question 15 - Section 24(2) of the Bill inserts a new section 10B into the *National Health Service (Wales) Act 2006* ("the 2006 Act"), which makes reference to a person lacking capacity. This term is given a meaning by the new section 10B(8)(b) of the 2006 Act, but it is defined with reference to the *Mental Capacity Act 2005* as a whole. The phrase is given meaning by section 2 of that Act, so why is the reader not directed to that provision?

Question 16 – Section 24(2) of the Bill inserts a new section 10C into the 2006 Act, which allows the Welsh Ministers to make regulations relating to direct payments. Some of the matters that such regulations may cover, as indicated in the new section 10C(2), are detailed and potentially complex. Why do you consider that the negative scrutiny procedure is appropriate for such regulations?

Question 17 - Section 28(2)(a) of the Bill contains a Henry VIII power and it allows regulations to "amend, modify, repeal or revoke any enactment". Section 28(3) sets the requirements for which delegated powers in the Bill, when exercised, will be subject to the draft affirmative procedure. This provision only refers to "amend, modify or repeal". The Explanatory Memorandum further describes the draft affirmative scrutiny procedure applying when regulations "amend, repeal or otherwise modify", while the Statement of Policy Intent uses the phrasing "amend or repeal". Can you provide clarification as to whether you intended any difference in meaning or application of the provision in section 28(3), and explain the drafting inconsistencies.