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Y Gweinidog Gofal Cymdeithasol
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Llywodraeth Cymru
Welsh Government

Mike Hedges MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru

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28 June 2024

Dear Mike,

When I attended the Committee to give evidence regarding the Health and Social Care (Wales) Bill earlier this month, I offered to write with a more detailed explanation of the government's consideration of Convention Rights in relation to Part 1, Chapter 1 of the Bill (provision of social care services to children: restrictions on profit). Please find attached a note on this topic. I am also sharing this note with the Chair of the Health and Social Care Committee.

I will respond to the other questions you have raised in your letter of 18 June in due course, but I wanted to provide this to you as soon as possible.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Dawn Bowden', written in a cursive style.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Consideration of Convention Rights in relation to provision of social care services to children:
restrictions on profit

Part 1, Chapter 1 of, and Schedule 1 to, the Health and Social Care (Wales) Bill introduce new eligibility requirements for registration under the Regulation and Inspection of Social Care (Wales) Act 2016 (RISCA) for those who wish to provide care home services or fostering services for children in Wales, and restrictions on the circumstances in which local authorities can place children with providers who do not meet the new requirements.

The requirements on providers of care home services for children and fostering service providers include being legally constituted as one of a certain type of legal entity specified in the Bill (that will prevent the extraction of private profit), having objects or purposes that primarily relate to the welfare of children or another prescribed public good, and complying with certain rules on financial arrangements.

The provisions of the Bill also pursue the aim of ensuring that children in the care of local authorities are looked after in services which have the primary purpose of improving the welfare of children, instead of the maximisation of profit.

The Welsh Government has carefully considered the impact of the Bill's provisions both on providers' businesses and on children looked after, including detailed consideration of Convention Rights:¹

- Article 1 of Protocol 1 (A1P1) to the Convention Rights (the right to enjoyment of possessions);
- Article 8 of the Convention Rights (right to respect for family and private life, home and correspondence), and
- Article 14 of the Convention Rights (protection from discrimination in the enjoyment of Convention Rights).

The Welsh Government acknowledges that what is being proposed will interfere with the property rights of for-profit providers of children's home services and fostering services. It could potentially engage Article 8 if a child's placement is terminated by a provider. However, the transitional provisions in the Bill enable for-profit providers already providing a service to the child to continue to operate so as to not disturb a child's existing placement.² Even if there is an interference with Article 8 rights the Welsh Government is of the view that it would be justified and proportionate for the same reasons as under A1P1, as explored in more detail below.

As there are currently no registered for-profit providers of secure accommodation services in Wales, any impact on these services is a potential impact on future establishment and therefore is outside of the scope of Convention Rights which do not protect the right to future possessions.

The aim of the provisions of the Bill is a vitally important one: to achieve a more sustainable children's social care sector and to ensure improved services and life outcomes for children looked after by local authorities in Wales. The aim is to ensure

¹ See sections 108A(2)(e) and 158(1) of the Government of Wales Act 2006 for the definition of "Convention Rights".

² See also the consideration of children's rights impacts in the Explanatory Memorandum to the Bill.

that public money invested in the care of children looked after does not profit individuals or corporate entities, but instead is spent on children's services to deliver better experiences and outcomes for children and young people. The aim is to eliminate private profit from the care of children looked after, in order to develop services that are locally based, locally designed and locally accountable, and that improve the care experience for young people.

The provisions are carefully designed to strike a fair balance between the need to achieve these important aims on the one hand and (a) avoiding disruption in the lives of children looked after and (b) managing the impact on providers, and the need to allow time for the business adjustments which they will have to make.

The current market is dysfunctional and, in the view of the Welsh Government, unsustainable in its current form. This dysfunction in the market has deleterious impacts on service provision in Wales and thereby, the well-being and life outcomes of children looked after by local authorities in Wales. The Welsh Government has concluded that the maintenance of the status quo is not, therefore, an option.

The Bill, however, is one important part of an overall package of measures the Welsh Government is taking forward to deliver a new vision for Children's Social Care, focussed on values and needs. It is about fundamentally changing how it provides services to children and their families through community-based services that safeguard and promote the welfare of the young person.

The Welsh Government wants to see fewer children and young people entering care and improvement in the services provided to those that do enter care. For those young people looked after by their local authority, we want a system-wide approach so they remain close to home, can continue to be part of their community and for any stay in care to be as short as possible; consistent with best meeting their needs and supporting better outcomes.

The Welsh Government has concluded that although the potential for profit has an effect of drawing private capital and private enterprise into the area, the ability of for-profit providers to extract profit from the system puts the sustainability of the children's social care sector at risk and has an adverse effect on outcomes for children.

The impact of profit extraction in children's residential and foster care is an under-researched area.³ However, whilst there is no categorical evidence that the policy will provide guaranteed better outcomes for children or that residential care would be cheaper, there is evidence that for-profit services are more likely to be rated as low quality when compared with not-for-profit and local authority service providers,⁴ that

³ Ablitt, Jonathan, Jimenez, Patricia & Holland, Sally (2024). *Eliminating Profit from Children's Residential and Foster Care Evidence Review*, available at [Eliminating profit from children's residential and foster care: evidence review | GOV.WALES](#)

⁴ Bach-Mortensen, A.M., Goodair, B. and Barlow, J., (2022). Outsourcing and children's social care: A longitudinal analysis of inspection outcomes among English children's homes and local authorities. *Social Science & Medicine*, 313, 115323, <https://doi.org/10.1016/j.socscimed.2022.115323> .

for-profit fostering agencies are more likely to use inexperienced foster carers,⁵ and that greater use of outsourcing to for-profit providers of residential care is associated with greater levels of placement instability⁶ and higher levels of out of area placements.⁷ There is evidence that the cost of placements with independent fostering agencies is higher than local authority fostering services.⁸

There is also evidence that the provisions in the Bill (coupled with the investment of £68 million in developing local authority/not for profit/third sector provision) are likely to lead to better outcomes for children in residential care homes, based on a reduction in out of area placements and better local commissioning to meet needs. The planning and design of residential care placements will be driven by the needs of children, and not by the overarching requirement to make a profit.

The Competition and Markets Authority found in its market study of the supply of children's social care in England, Wales and Scotland that a highly fragmented, complex and dysfunctional market means individual local authorities find it hard to plan for and provide their own residential and foster care. The report found that a lack of placements of the right kind, in the right places, means that children are not consistently getting access to care and accommodation that meets their need. The report concluded that the largest private providers of placements are making materially higher profits, and charging materially higher prices, than would be expected if the market were functioning effectively.

All these factors have been amplified by the rise in the number of children being looked after by local authorities in Wales. The Welsh Government's reform of the arrangements for the provision of these services goes hand in hand with the steps taken to bring these numbers down and to enable local authorities to apply greater resources to the task of helping families stay together.

The Welsh Government understands the concern that care provided to children who are unable to be safely cared for by their birth families by providers that extract private profit from those services can be viewed as the commoditisation of those children. The Welsh Government has been told by children and young people in care, and by Voices from Care and the Children's Commissioner for Wales that children and young people have strong feelings about being cared for by privately owned organisations that extract a private profit from their experience of being in care.

⁵ Sellick, C. and Connolly, J. (2002). Independent fostering agencies uncovered: The findings of a national study. *Child and Family Social Work*. 7(2): 107-120, <https://doi.org/10.1046/j.1365-2206.2002.00235.x> ; and Steen, J. and Smith, S. (2012). An organizational view of privatization: Is the private foster care agency superior to the public foster care agency? *Children and Youth Services Review*. 34: 851-858, <https://doi.org/10.1016/j.childyouth.2012.01.016> .

⁶ Bach-Mortensen, A.M., Goodair, B. and Barlow, J., (2023). For-profit outsourcing and its effects on placement stability and locality for children in care in England, 2011–2022: A longitudinal ecological analysis. *Child Abuse & Neglect*, 144, 106245, <https://doi.org/10.1016/j.chiabu.2023.106245> .

⁷ See note 6 above.

⁸ See Sellick and Connolly 2002 at note 5 above; Narey, M. and Owers, M. (2018). *Foster Care in England*, available at [Foster Care in England: Review \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744847/foster-care-in-england-review.pdf), and Competition and Markets Authority, (2022). *Children's social care market study final report*, available at [Children's social care market study final report - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/1144847/childrens-social-care-market-study-final-report.pdf) .

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Despite the impact on the rights of for-profit providers, the Welsh Government considers that provisions of the Bill are proportionate in their overall effect. The aims being pursued are of vital importance, and the Welsh Government considers that the provisions in the Bill will advance those aims. The Welsh Government considered alternatives to the elimination of profit, such as capping fees and/or profit, limiting dividends or setting a percentage of profit that must be reinvested in the service provided by the provider. However, such alternatives would either be administratively complex and would cost considerable sums to operate (thereby reducing the funding available for meeting the needs of children) or would not deliver the fundamental change which the Welsh Government considers is required.

The Bill's provisions provide for a transition period to avoid disruption for children already placed with providers who will become ineligible to provide the service(s) and to allow local authorities to use available capacity in that sector during the period while local authorities are building up sufficient numbers of placements themselves and with not-for-profit providers.

During this transition period local authorities in Wales can apply to the Welsh Ministers for approval to place a child with a for-profit provider that does not meet the new requirements, subject to certain conditions and safeguards. This ensures that the rights of children are protected and that the impact on placement-choice is limited while the sector transitions to the new model of care. It also provides time for for-profit providers to convert to an eligible not-for-profit business model or make other business adjustments.

In conclusion, we are confident that these provisions of the Health and Social Care (Wales) Bill are compatible with Convention Rights and will bring about positive change for children and families in Wales. We look forward to working with the Senedd and stakeholders to ensure its successful implementation.