

**Y Pwyllgor Iechyd a
Gofal Cymdeithasol**

**Health and Social Care
Committee**

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Dawn Bowden MS
Minister for Social Care

12 June 2024

Dear Dawn

Health and Social Care (Wales) Bill and general scrutiny session

Thank you for attending our evidence session on 6 June, along with your officials, to discuss the Health and Social Care (Wales) Bill and for a general scrutiny session.

During those sessions, there were a number of areas where you agreed to provide further information. We also have a number of additional questions that we would like to put to you. For convenience, I have included all of these matters in the annex to this letter.

You have agreed to come back to the Committee on 17 July to discuss the Bill further. It would be helpful to have your response to this letter in advance of that, by **Friday 28 June**, so that we can take full account of it.

A copy of this letter goes to Mike Hedges MS, Chair of the Legislation, Justice and Constitution Committee, and Peredur Owen Griffiths MS, Chair of the Finance Committee.

Yours sincerely



Russell George MS
Chair, Health and Social Care Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg. We welcome correspondence in Welsh or English.

Annex

Health and Social Care (Wales) Bill

Restricting profit

Human rights considerations

1. What is your assessment of the human rights considerations in relation to this Bill, particularly as to whether the provisions of the Bill restricting the ability to make profit could engage the rights under Article 8, and the right to peaceful enjoyment of possessions under Article 1 of the First Protocol to the European Convention on Human Rights? Have any other rights been considered?

Principle behind legislation

2. In your statement on introducing the Bill, you said the starting point for this legislation was the principle of not making profit from the care of vulnerable people. There is also reference to children and young people's views on profit being a key driver for the Bill. What consideration has the Welsh Government given to removing profit from children's social work agency staff, given the latest figures suggest 17.5% of children's social workers in Wales are employed by an agency.

Unreasonable or inappropriate payment

3. Section 6 of the Bill requires the Welsh Ministers to consider whether, amongst other matters, a provider of a restricted children's service has entered into a financial arrangement with a relevant person which is unreasonable or disproportionate in all the circumstances. Other key phrases in this provision have been given a specific meaning in the Bill, but "unreasonable or disproportionate" has not. What do you consider would constitute an unreasonable or disproportionate financial arrangement for the purposes of the Bill, and why have you chosen not to define this term on the face of the Bill?

Regulation making powers

4. The provisions relating to the restriction of profit-making include a number of regulation-making powers.
 - a) Why this approach has been taken rather than including more information on the face of the Bill, for example, why can "public good" not be defined on the face of the Bill?
 - b) Table 5.1 says this approach permits "future-proofing". What aspects do you consider may need potential changes in the future?
 - c) Why have you chosen to apply the negative procedure to the majority of the regulation-making powers relating to restricting profit, with the result that the Senedd has limited opportunity to scrutinise them?

- d) How did you decide which powers would be subject to the draft affirmative procedure, and why have you chosen to apply a different procedure on some occasions to the first time a power is exercised, as opposed to any other time?

Reference to Unregistered Placements

5. Section 13 sets out the ways in which looked after children are to be accommodated in “the most appropriate placement”. The Explanatory Notes state that a placement can be in “unregistered accommodation (on a temporary basis or in cases of urgency)”, a reference not in the 2014 Act and not on the face of this Bill. The Bill uses the same terminology as the definition of placements in the existing s81(6)(d), which states that a placement can be made in accordance with arrangements that comply with regulations made for the purposes of that section (currently the Care Planning, Placement and Case Review (Wales) Regulations 2015). Can you clarify what has changed, if anything, in respect of unregistered placements?

Risks of undermining practices

6. What have you identified as the full range of risks that could mean that the policy aims of the Bill are undermined by practices which go against its spirit and intention, such as the charging of excessive fees by parent companies of not-for-profit services, which could amount to the taking out of profit by other means. How have all of these risks been mitigated in the Bill?

Wales wide/regional commissioning

7. The Competition and Markets Authority’s assessment of the position in Wales is that “a ban or profit cap is not necessary to deliver a well-functioning placements market”. It emphasises the need for improved commissioning and refers to procurement collaboration occurring nationally, saying “we are clear that excessive fragmentation in the processes of forecasting, market shaping and procurement are key drivers of poor outcomes in this market, and must therefore be addressed if we are to see significant improvement in the outcomes.” What consideration did you give to changing the current local authority based arrangements, and why did you not pursue the option of regional or national forecasting and commissioning?

Investment in the Bill to date

8. How many new ‘not for profit’ placements have been created to date as a result of the £68 million allocated by the Welsh Government. What percentage does this represent in the forecast need for placements. What will be the annual financial commitment from Welsh Government going forward to develop the not-for-profit provision?

Regional variation

9. What is the estimated percentage of private sector placements/not-for-profit placements by Welsh local authority?

Cross border implications for children placed from England and Scotland

10. How many children do you estimate are currently placed in private placements in Wales by local authorities outside of Wales? How do you envisage their circumstances will be covered by the transitional arrangements within the Bill?

End date of the transition period

11. The Bill as currently drafted allows for the end date of transition to be specified in regulations. What is the estimated range of dates you have considered and what is the latest date you would think is reasonable for transitional arrangements to end. Have you considered specifying the end on the face of the Bill with powers to amend that by regulation as a means of mitigating a lengthy transitional period which undermines the aims of the Bill?

Annual sufficiency plan

12. Section 11 places a new duty on local authorities to prepare and publish an annual sufficiency plan for accommodation for looked after children. Can you outline the sorts of reasons why the Welsh Government might anticipate rejecting a sufficiency plan? What will happen in the event that the second draft of a sufficiency plan is rejected, and why is the Bill silent on this?

Accommodation 'near to' the local authority

13. The Bill amends existing legislation so that local authorities will be required to take all reasonable steps to secure accommodation "near to" the child's local authority rather than "within" it. The EM suggests this is a more pragmatic approach that will allow for placements just over the local authority border. What is your assessment of the potential unintended consequences arising from this, for example if local authorities are under pressure, children could be more likely to be placed further away from their home area because of placement availability rather than their 'best interest'.

Supplementary placements

14. Can you confirm that supplementary placements will have to be outside of Wales after the end of the transition period, given that not for-profit-providers cannot legally register here under the Bill's provisions.
15. Section 13(3) of the Bill amends the 2014 Act to insert a new section 81B: Ways in which looked after children are to be accommodated and maintained: application for approval of a supplementary placement. Is the intention that the function of approval and rejection of

supplementary placements under this new section be undertaken directly by Welsh Ministers or by Care Inspectorate Wales on their behalf?

16. How would the procedure for requesting a supplementary placement function in the case of an emergency, for example, a short notice same-day need to place a child? Is this provided for on the face of the Bill?
17. What is the criteria for Welsh Ministers to assess / approve / reject a local authority application for a "supplementary placement" (other than the 'catch all' provision in the Bill that it would be inconsistent with the local authority's principal duty in relation to looked after children under section 78 of the 2014 Act)?
18. Linked to question 17, table 5.1 of the EM refers to regulations issued under section 13(3) relating to prescribing other information to be contained in an application for a supplementary placement to be 'administrative in nature'. Can you clarify they would therefore not include any criteria for approval / rejection of supplementary placements.
19. The Explanatory Note says a placement can be in "unregistered accommodation (on a temporary basis or in cases of urgency)". This reference is not in the 2014 Act nor in the Bill. Can you clarify why this term has been specified in the Explanatory Notes?

Direct Payments

20. In England, the equivalent to direct payments (Personal Health Budgets) have been permitted for both adults and children's Continuing Healthcare (CHC) since 2014. Could you explain why the Welsh Government has focused this Bill on adult CHC only, and whether there is an intention to extend this to children's continuing care in the future?
21. The Welsh Government's consultation proposed to give a power to local health boards to give assistance in connection with direct payments. However the wording of the Bill gives a power to the Welsh Ministers to make regulations about the arrangements a local health board can make. Why did you decide not to give the power to local health boards on the face of the Bill as originally proposed?
22. Given the existing issues with direct payments (low take-up and a lack of consistency in supporting people), is there an argument for strengthening the legal provisions to provide information and advice to promote direct payments, and to provide support to help people manage them? Further, during our meeting, you offered to provide additional information on the take-up of direct payments in social care, including potential incentives/disincentives for health boards in promoting the use of direct payments for CHC. We would be pleased to receive this.

23. How do you plan to raise public awareness about service users' new entitlement to direct payments for CHC (this will be a significant new option in CHC which the public won't be aware of)?
24. It is expected that the numbers of people using CHC will increase if direct payments are permitted (and fewer people will refuse CHC assessments). How are you supporting services to prepare for and manage this increased demand?
25. Given the lack of capacity in social care, could an unintended consequence be that some families could feel pressured to take on direct payments (and family members become carers/PAs) due to a lack of available care services rather than out of choice?
26. Can you explain more about the savings you expect to be made which will offset the costs. Where did the savings come from in England and what was the timescale for them to be realised?
27. According to local authorities, the eligibility bar for access to Continuing Healthcare has continued to increase over time, meaning fewer and fewer people are granted access. Could this apparent "gatekeeping" approach be a barrier to achieving the aims of this Bill (i.e. is there a risk people will be wrongly denied CHC following assessments meaning they cannot benefit from the legislation)?
28. Paragraph 7.144 of the RIA says the average cost for Personal Health Budgets in England ranges from £46,000 to £120,000, with a median of £80,000. It notes there is "likely to be a similar variation across packages in Wales". However, you have used an "exemplar cost at the lower end of this scale" for Local Health Board projected expenditure on Continuing Healthcare direct payments. Why is this, given the likely complexity of cases?
29. Whilst not using the range of the average cost of Personal Health Budgets in England, you have applied the percentage cost reduction reported by NHS England following their introduction: 11% for all Personal Health Budgets and 16% for Personal Health Budgets direct payments. In which document did NHS England report these cost reductions, and why do you think it is a reasonable basis for the reduction in outturn for Local Health Board Continuing Healthcare direct payments?
30. You seem to have applied the cost reduction reported by NHS England to arrive at a net cost of Continuing Healthcare direct payments for Local Health Boards. Why is this cost reduction not reported as a potential benefit of the Bill, as you've done for existing CHC recipients who transfer to direct payments and new CHC packages which are delivered via direct payments?

Other social care provisions

31. Section 18 of the Bill adds childcare workers to the definition of a 'social care worker'. The [original consultation](#) also proposed adding play workers, to “clarify the statutory role which Social Care Wales plays” for all childcare and play workers. What is the rationale for not including play workers in the Bill as drafted?
32. The Bill makes amendments to the Social Services and Well-being Act. This Committee has previously heard evidence about the omission of the UN Convention of the Rights of Persons with Disabilities on the face of the Act, in contrast with the rights of the child and the UN principles for older persons. Would the Welsh Government be willing to take this opportunity to rectify this, to ensure the rights of disabled people have equal prominence in the legislation?

Follow-up actions from the general scrutiny session

During the general scrutiny session that immediately followed the session on the Bill, you agreed to write to the Committee with the following information:

33. To confirm the number of vacancies currently across social care, including the equivalent percentage of the workforce that number represents.
34. To provide an update on the work being undertaken to support unpaid carers, including young carers.

