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Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref DB-PO-0181-24

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

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Dear Mike,

Thank you for your letter of 18 June following my appearance before the Legislation, Justice and Constitution Committee to discuss the Health and Social Care (Wales) Bill.

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). I have already written to you about this topic. I am providing a response to the remaining points and questions you have raised in your letter of 18 June in the annex to this letter.

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

Yours sincerely,

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Annex

Points raised during Committee

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

The Minister has written separately to the chair of the committee to share some of the consideration and analysis, which sits behind Welsh Ministers' view that the provisions of the Bill dealing with the elimination of profit from children's services are compatible with Convention rights.

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).

"Public good" could extend to any purpose, which is capable of being a charitable purpose or a purpose having a community benefit, and which is connected in some way to the promotion of the welfare of children who are looked after by local authorities. If there was evidence there was a wider range of not-for-profit bodies whose purposes encompassed the provision of fostering services or children's homes, but did not meet the test in section 6A(3) because their objects or purposes did not primarily relate to child welfare, then the power could be used to describe wider sorts of public good, which have an intersection with the promotion of the welfare of children who are looked after by local authorities. Examples could include objects or purposes which committed the provider organisation to the provision of literacy and numeracy services for a wider range of beneficiaries than children looked after. In these circumstances Welsh Ministers may wish to consider whether specifying a new public good could allow that, while still being consistent with the policy.

Further questions

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

Welsh Government officials hold regular meetings with the UK Government's Department for Education to discuss our proposals to eliminate private profit from the care of looked after children, including around any implications of the proposed legislation on cross-border placements. A face-to-face meeting with the Director-General of the Department for Education was held in January 2024 and it was noted that the UK department is looking at profiteering in the sector and is concerned about rising costs and the increase in out-of-county provision.

Officials hold regular meetings about continuing healthcare (CHC) with policy counterparts from UK Government (Department for Health and Social Care) and more recently from the Northern Ireland Executive. Officials from England and Northern Ireland have been kept informed of policy objectives and progress regarding the Bill. Information and evidence shared with Welsh Government officials, as well as links to other stakeholders established as a result of these discussions,

has contributed to the development of the Integrated Impact Assessment and Regulatory Impact Assessment for this element of the Bill.

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?

The provisions are not intended to prevent a fostering service business or a children's home business from generating a trading surplus from their operation. In that sense, the Bill does not prevent providers of these services making a profit. However, the provisions of the Bill are intended to ensure that any trading surplus or profit is retained within the business to be re-invested in either growing the business or in improving the quality of the services which the business provides. The provisions of the Bill are intended to prevent a provider from extracting profit from the business in the way shareholders of a limited company, for example, are commonly rewarded. This is the sense in which the Bill is said to eliminate private profit from services providing care for looked after children.

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?

The policy intention is that sections 3 and 4 of the Bill will be brought into force in April 2026 inserting new section 6A into the Regulation and Inspection of Social Care (Wales) Act 2016 along with the transitional regime set out in new Schedule 1A. New section 6A will have the effect of preventing any new bodies registering as providers of restricted children's services unless they are not-for-profit entities, which comply with the test in that section. However, under Schedule 1A existing for-profit bodies (that do not comply with the test in section 6A) will be able to continue to operate despite not meeting the not-for-profit test by virtue of the transitional regime (although they will not be able to vary their registration to provide new restricted children's services or to provide them at new places).

Sections 10, 11 and 12 of the Bill will also be brought into force in April 2026, making amendments to section 75 of the Social Services and Well-being (Wales) Act 2014 and inserting new sections 75A to 75D. Welsh local authorities will be subject to the duty to take all reasonable steps to secure that they have sufficient placements of their own or with not-for-profit providers. They will have to prepare their first annual sufficiency plan which they will need to submit to the Welsh Ministers for approval four months prior to the start of the 2027-28 financial year.

Section 13 of the Bill, inserting new sections 81A to 81D into the Social Services and Well-being (Wales) Act 2014, will be commenced in April 2027, requiring Welsh local authorities to seek authorisation from Welsh Ministers for all ongoing placements of children with for-profit providers. From April 2027, if a Welsh local authority is unable to identify a not-for-profit placement for a looked-after child and wishes to place a child using available placements with for-profit providers in Wales, it will need to seek approval from the Welsh Ministers.

With effect from April 2027, Welsh Ministers will make regulations under paragraph 3 of new Schedule 1A (as inserted by section 4 of the Bill, see above), which will prevent any remaining for-profit providers in Wales (those that are still operating under the transitional provision in paragraph 2 of that Schedule) from taking placements from English local authorities other than in limited circumstances. At this point in time, regulations will also be made under the Social Services and Well-being (Wales) Act 2014 to provide that for-profit fostering service providers in Wales will not be able to approve new foster carers.

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?**

Providers will know whether their intention is to come within the thresholds set out in the Bill (i.e. which will make a place from which they operate a care home service a place where a care home service is provided wholly or mainly for children). There will be some instances where the provider seeks a change to its registration status because it is certain it will meet the threshold and there will be other cases where the provider seeks a change to its registration status because it recognises that it *may* cross the threshold.

As far as calculating the number of days is concerned, the calculation depends on the provider having provided, at a particular place, more days of accommodation to children than to adults over a 12-month period within the last 24 months. This makes clear that the calculation of days must take place within a continuous period of 12 months. The provision would not make sense if the days making up the 12-month period could be randomly selected from within the 24 month period. However, we will give further consideration to the drafting of this provision prior to Stage 2.

In testing compliance with the requirement, the regulator will be able to inspect a provider's admission records to determine whether the threshold has been crossed such as to require the provider to be registered as the provider of a restricted children's service.

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.

The task of determining whether a provider's objects or purposes comply with the requirement in section 6A will fall to the Welsh Ministers as regulator for regulated social care services under Part 1 of the 2016 Act. Welsh Ministers' functions as regulator are carried out by Care Inspectorate Wales. There is no detail about this on the face of the Bill.

All of the aspects of determining applications for registration, including elements which require the exercise of judgement about whether statutory tests are met are functions of the regulator. Examples of these are determinations of whether an applicant is a "fit and proper person" and whether a "responsible individual" is both "eligible" and "fit and proper".

We do not think it necessary to include provision to set out how the regulator will apply the new "not-for-profit" test for restricted children's services. We think it is clear from the context that judgements about the compatibility of a provider's objects or purposes with the test will simply be an additional aspect of the regulator's function of determining applications for registration.

This will be a judgement made on the basis of the regulator's reading and analysis of the provider's objects clauses and testing them for compatibility with the not-for-profit condition in section 6A(3).

However, we see from the question posed that the drafting was not understood in this way and we will look again at this prior to Stage 2.

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?

"*Looked after children*" is a term used in section 2 of the Bill inserting new section 2A and new paragraphs (3A) and (3B) into Schedule 1 to the 2016 Act. The term is defined in new paragraph (3B) by reference to section 74 of the Social Services and Well-being (Wales) Act 2014 ("the 2014 Act"). Section 74 of the 2014 Act defines the

term "*child who is looked after by a local authority*". The Part heading for Part 6 of the 2014 Act (of which section 74 is the opening section) is "Looked after and accommodated children". We believe the definition is reasonably clear but could be clarified and propose to introduce an amendment at Stage 2 to address this point.

We believe the drafting of "*company having a share capital*" is clear. The reason this phrase is defined by reference to a Companies Act definition (in new section 6B(6)(b), inserted by section 3(3) of the Bill) but is not used word-for-word elsewhere in the Bill is in the interests of brevity and ease of comprehension, the words "without a share capital" are used in the labels in new section 6A(4)(a) and (d); new section 6B(2)(b) and (5)(b) then set out that "without a share capital" means not having a share capital, and section 6B(6)(b) makes it clear that the concept of having or not having a share capital is to be understood as per section 545 of the Companies Act 2006.

"*Substantial interest in a body corporate*" is defined in new section 9B(3)(d) of the 2016 Act (inserted by section 6(3) of the Bill). New section 9B(2)(e)(i) refers to "*a body corporate in which …[a person]…has a substantial interest*" and section 9B(2)(e)(ii) refers to "*a body corporate in which …[persons]…have a substantial interest*". We believe in the context the relationship between the term and the phrasing used in new sections 9B(2)(e)(i) and (ii) is clear.

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.

The test for determining whether a service is provided wholly or mainly for children is set out in the new section 2A(2) and establishes the meaning of "children's home" as a form of "restricted children's service" in section 2A(1). The definition of "restricted children's service" is stated in section 2A(1) to be for the purposes of Part 1 (of the 2016 Act). Although this extends to Schedule 1A which is introduced by section 6C the phase "wholly or mainly to children" does not relate to a use of the term "restricted children's service" in paragraph 2(1)(a). We propose to introduce an amendment at Stage 2 to address this point.

As far as the reference to "wholly or mainly for children" in section 75(4) of the 2014 Act is concerned, the definition directs the reader to interpret the phrase "children's home" as a place in respect of which a person is registered under Part 1 of the 2016 Act. However, we believe greater clarity would be provided for the reader if this was signposted in a more explicit way and we will introduce an amendment at Stage 2 to address the point.

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?

Paragraph 1(3) of Schedule 1A makes clear that section 187 of the 2016 Act applies to the regulation-making power in paragraph 1(1). Section 187(1)(b) provides that regulation-making powers under the 2016 Act can be used to make different provision "for different purposes, for different cases and for different areas". In the scenario described it would be open to Welsh Ministers to bring the transition period to an end in a staged way, allowing local authorities whose task of removing reliance on for-profit providers is more difficult to have more time but introducing full implementation for other areas sooner.

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?

We believe the only circumstances when the effects of paragraph 2(3) need to be disapplied are in relation to aspects of the regulatory regime in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016. One additional circumstance where paragraph 2(3) needs to be disapplied is for the purposes of an application by a service provider under section 11(1)(a)(ii). We will review the need for the regulation-making power in paragraph 2(4)(b) of Schedule 1A prior to stage 2.

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)?

The drafting of the Bill creates two separate regulation-making powers in section 75A(2)(d)(iii) and (iv) though they are similar in nature: one relating to information about for-profit accommodation providers in Wales and the other to information about private providers in England. They present as a pair and for that reason have

been referred to in the Explanatory Memorandum in the singular. This is inaccurate and we will amend the Explanatory Memorandum at the next opportunity.

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?

It is proposed the service provider should be required to publish the annual return within 30 days of submitting the report to the Welsh Ministers. We do not anticipate at this stage that this timescale will change, and we are not intending to provide a flexible timeframe for the publication of an annual return.

However, prescribing the timeframe within regulations, rather than on the face of the Act, will give Welsh Ministers the flexibility to extend or reduce the timescale should CIW encounter any unforeseen issues in practice.

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?

Section 144(6)(b) of the Regulation and Inspection of Social Care (Wales) Act 2016 provides a fitness to practise panel with the power to set an interim order for up to a maximum of 18 months. However, if that panel initially makes an order for a shorter period and then finds that their investigations take longer and that there is a need to extend it, the panel does not have the power to do so. Section 148(1) requires the panel to apply to the First Tier Tribunal (the Tribunal) for an extension or a further extension to an interim order.

This creates an incentive for panels to routinely set the maximum deadline on interim orders, to minimise the administrative and cost burden of repeated applications to the tribunal. The amendment will provide a panel with the power to set an interim order for a period less than 18 months and then, if necessary, extend that interim order up to a maximum of 18 months without the need to apply to the tribunal. Any request for an interim order to go beyond 18 months would require the panel to apply to the tribunal as is the case currently.

We accept that there is a degree of ambiguity in the wording of the overview in section 19(1) and will review this ahead of Stage 2.

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?

The ability of health boards to offer direct payments for mental health after care services is entirely contingent on the making of the Regulations – health boards will not be able to offer direct payments without the Regulations being in place and the statutory framework must therefore include the restriction discussed.

Paragraph 1 of the substituted Schedule A1 gives the Welsh Ministers the power to make regulations that require or allow a local authority to make direct payments in lieu of providing services to meet an individual's need for after-care services following detention under the Mental Health Act 1983.

Paragraph 7 of that Schedule contains a limitation on the use of the regulation-making power in paragraph 1.

The effect of this limitation is that should the Welsh Ministers exercise the power in paragraph 1 to make regulations to enable the making of direct payments for local authority-funded after care services they must include a provision which specifies that a direct payment for after care services must be at the rate the local authority estimates to be equivalent to the reasonable cost of securing or providing services to meet the assessed needs.

The inclusion of the requirement in paragraph 7 will have the effect of ensuring that an individual who chooses to receive a direct payment to secure their own services to meet their needs for local authority after care services will not be required to contribute to the costs of their direct payment by way of contribution or reimbursement because after care services must be provided free of charge.

The requirement of paragraph 7 could have been included on the face of the Bill but we do not see that this would be any more appropriate, or give any greater advantage, than the drafting approach which has been taken.

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?

The phrase "the negative procedure would be more appropriate" is used to convey that procedure is more appropriate than the affirmative procedure in a general sense, rather than as a specific change to the procedure which applied to the provisions as drafted in the 2014 Act. As the explanation in the last column in the

relevant row of the table in Chapter 5 states, the procedure applied is the same one which applies to the existing powers in the 2014 Act.

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?

Defining "mental capacity" by reference to the Mental Capacity Act 2005 generally as opposed to a more specific reference to section 2 is the more common practice in the statute book. It is the same formulation used in section 197(5) of the 2014 Act.

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?

The regulations will set out technical matters relating to the administration and operation of the direct payments and so the negative procedure would be appropriate. The procedure set out in the Bill mirrors the use of the negative procedure for the existing powers to make regulations in relation to direct payments in social care. Although there is a level of complexity in the detail, the important points of principle are set out in the enabling powers.

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.

The reason that section 28(2)(a) refers to "amend, modify, repeal or revoke" and section 28(3) refers to "amend, modify or repeal" only is that "revoke" is the term which applies to the removal of provisions in secondary legislation and section 28(3) is only concerned with effects on primary legislation.

The omission of a reference to regulations which "modify" primary legislation is an inaccuracy in the Statement of Policy Intent but has no practical impact or implication.

Annex

The reference in the Explanatory Memorandum to regulations which “otherwise modify” is wording which acknowledges that, in non-legal parlance, amendment and repeal are ways in which legislation can be modified.