

Dawn Bowden AS/MS
Y Gweinidog Plant a Gofal Cymdeithasol
Minister for Children and Social Care



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-DB-10629-24

Mike Hedges MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
SeneddLJC@senedd.wales

25 October 2024

Dear Mike,

Thank you once again for your consideration of the Health and Social Care (Wales) Bill during Stage 1. I thank Committee Members for the detailed consideration of the Bill, and for their recommendations.

I have set out below my response to the recommendations.

I hope that the attached information helps to inform your further scrutiny as the Bill progresses through Stage 2. I look forward to continuing to work with Committee Members on the details of the legislation in the near future.

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

Yours sincerely,

Dawn Bowden AS/MS
Y Gweinidog Plant a Gofal Cymdeithasol
Minister for Children and Social Care

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Gohebiaeth.Dawn.Bowden@llyw.cymru
Correspondence.Dawn.Bowden@gov.wales

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.

Health and Social Care (Wales) Bill

Responses to the Legislation, Justice and Constitution Committee's recommendations

Conclusion 1:

As a general matter of principle, a Bill should not be introduced into the Senedd until all relevant impact assessments have been fully completed, such that all relevant information can be included in the Explanatory Memorandum that must accompany a Bill in accordance with Standing Order 26.6.

The Explanatory Memorandum and Regulatory Impact Assessment laid alongside the Bill at introduction included an assessment of impact and the Welsh Government will also seek to provide further information to Members of the Senedd during scrutiny where requested.

Conclusion 2:

As a matter of good practice, an Explanatory Memorandum should provide clear information about the Welsh Government's assessment of the potential impact of a Bill on human rights and accordingly, how it is compatible with the European Convention on Human Rights.

Ministers agree that it is helpful for an Explanatory Memorandum to provide clear information about the Welsh Government's assessment of a Bill's compatibility with Convention rights and all Explanatory Memorandums have included such information. Bill provisions are always subject to thorough assessment of legislative competence including Convention rights.

Conclusion 3:

We have concerns that the Bill was introduced too early and before all necessary preparatory work had been completed, including but not limited to, consulting on a draft version of the Bill and the preparation of impact assessments and the Statement of Policy Intent for Subordinate Legislation to be made under the Bill.

In line with Standing Orders, the Explanatory Memorandum and Regulatory Impact Assessment laid alongside the Bill at introduction included an assessment of impact. In order to aid the Senedd's consideration of the Bill, we endeavour to publish full versions of the documentation as soon as possible after the Bill has been introduced. The Government did consult extensively on these proposals in 2022. The reasons for not consulting on a Draft Bill are provided at paragraph 4.10 of the Explanatory Memorandum.

Conclusion 4:

As a general principle, we believe that legislation should clearly define terms that it uses, rather than require the reader to exercise a degree of interpretation when doing so, however simple that interpretation may be perceived to be by the relevant Welsh Minister.

Conclusion 5:

As a matter of principle, if information can be set out on the face of the Bill, that is where it should be placed, for reasons of transparency, certainty and good legislative practice.

We have considered and responded to conclusions 4 and 5 together.

As we have set out in *Writing Laws for Wales: A guide to legislative drafting*, “Legislation must be effective, but it should also be as clear as possible.” We always encourage comments on our approach to drafting legislation and we will reflect on the points raised by the Committee.

Recommendation 1:

The Minister should respond to the conclusions and recommendations we make in this report at least two working days before the Stage 1 general principles debate takes place.

I accept this recommendation in principle.

The Welsh Government endeavours to respond to the Committees as soon as reasonably possible but it is not always practical for Welsh Ministers to do this prior to the Stage 1 debate.

Recommendation 2:

The Minister should update the Senedd on the Welsh Government’s discussions with the UK Government regarding the outstanding Minister of the Crown consent required for paragraph 4 of Schedule 2 to the Bill.

I accept this recommendation.

I am pleased to confirm to the Committee and the Senedd that the Secretary of State for Wales has written to me to provide Minister of the Crown consent for the provisions in paragraph 4 of Schedule 2 to the Bill.

Recommendation 3:

The Minister should state whether she has had discussions with the Counsel General and the Welsh Government Cabinet about the priority which should be attached to the consolidation of the law on the regulation and provision of social care services and health care in Wales.

Recommendation 4:

The Minister should commit to assessing and scoping the consolidation of the law on the regulation and provision of social care services and health care in Wales, and report to the Senedd on this work within 12 months of the Bill being passed.

I have considered and responded to recommendations 3 and 4 together.

I accept recommendation 3, and I reject recommendation 4.

The Government's priorities for the consolidation and codification of Welsh law in this Senedd are set out in our Future of Welsh law programme (revised January 2024). The Counsel General will be laying the next annual report on progress against that programme before the Senedd in due course, but Members will be aware the consolidation and codification of historic environment has been completed, the second Bill in the programme has just been introduced on 21 October, and the Government will be bringing forward the consolidation of planning law in Wales next year.

The Committee's continuing commitment to the accessibility of Welsh law and support for consolidation is helpful. However, the current accessibility of law programme does not include proposals for this Senedd term on the consolidation of social care services or health care law in Wales so I am unable to accept Recommendation 4 at this time. Nonetheless, the findings in the Committee's report will be taken into account as proposals for future consolidation projects are developed and I have shared the Committee's views on this matter with the Counsel General.

Recommendation 5:

The Minister should amend the Explanatory Memorandum (including the Explanatory Notes) by the start of Stage 3 proceedings to ensure it accurately reflects the intention of the Bill to restrict rather than eliminate the making of profit from the care of looked after children.

I reject this recommendation.

The provisions of the Bill are intended to prevent the extraction of profit from the provision of a restricted children's service. Any trading surplus or profit is retained within the organisation providing the service, and can be re-invested. This is clearly explained in the Explanatory Memorandum and we believe it is also understood by stakeholders that this is the way in which we are seeking to eliminate private profit from the care of looked after children.

Recommendation 6:

The Minister should table amendments to the Bill to include a date on which the transitional arrangements to be introduced under Part 1 of the Bill will end, and to enable such a date to be amended by regulations subject to the draft affirmative procedure.

I reject this recommendation.

The Welsh Government has not pursued the option of including an end date for the transition period on the face of the Bill which could be extended by subordinate legislation. That approach would mean that children settled in placements with for-profit providers might be aware of a date approaching by which their placement will automatically be ended, unless the date was extended by subordinate legislation. The end date could potentially be subject to multiple extensions to avoid disruption to children, but this could, in itself, be distressing for children who may be aware of the deadlines approaching and then being extended.

Instead, the power already in the Bill will allow Welsh Ministers to determine the end of the transitional period for restricted children's services in a manner sensitive to the needs of children still in such placements, and will allow placement disruption for children and service providers to be avoided or minimised.

Recommendation 7:

Should the Bill receive Royal Assent, the Minister should ensure that information is provided to all stakeholders about the transitional arrangements that will apply under Part 1 of the Bill in such form that the arrangements can be easily understood.

I accept this recommendation.

As part of our communications plan for the eliminating profit programme, we will provide information to stakeholders about the transitional arrangements.

Recommendation 8:

The Minister should explain clearly how any phased ending of the transitional arrangements under Part 1 of the Bill would work in practice, including how the rights of children will be affected if they have to move placements.

I accept this recommendation.

As part of our communications plan for the eliminating profit programme, we will provide further information on how the transitional arrangements will work in practice including how children may be affected. We accept that it has a degree of complexity and we may need to come back to it from time to time to reassure and to explain to those affected by it. The aim of the flexible transitional period is precisely to avoid the need for children to have to move placements as a result of the status of the provider of the foster carer or the children's home. This opens the way to the ending of the transitional period in a way which avoids any interference with the rights of children caused by ending a placement.

Recommendation 9:

The Minister should explain clearly:

- **why it is appropriate to potentially treat local authorities individually and therefore differently in respect of Part 1 of the Bill, but not in respect of Part 2;**
- **the implications for health and social care in Wales of such an approach.**

I accept this recommendation.

The Welsh Government is happy to provide an explanation for the approach taken to these two policies.

In Part 1, Chapter 1 of the Bill, the Welsh Government is seeking to eliminate private profit from the care of looked after children across Wales, so that in future, residential care, secure accommodation and foster care of looked after children in Wales will be provided by the public sector, or by charitable or not-for-profit organisations.

Some parts of Wales are likely to reach a point where all of their relevant provision is not-for-profit before other parts. It is therefore appropriate that powers in the Bill can enable the Welsh Ministers to end transitional arrangements for those parts of Wales that have eliminated private profit, so that this progress is not reversed.

Part 2 of the Bill contains powers to enable direct payments in health care. While in England direct payments were piloted in certain parts of the country, this is unnecessary in Wales as we can learn from the experience of implementation in England. It is therefore intended that regulations to enable direct payments for continuing healthcare will apply across Wales and that implementation will take place across the whole of Wales over the same period.

Recommendation 10:

The Minister should table an amendment to the Bill so that when calculating the number of days for the purpose of new section 2A(2) of the Regulation and Inspection of Social Care (Wales) Act 2016 (to be inserted by section 2(b) of the Bill), it is clear that the 12-month period must be continuous.

I reject this recommendation.

The Welsh Government is going to give further consideration to the wording of new section 2A(2) of the 2016 Act (to be inserted by section 2(b) of the Bill) which is likely to render this proposed amendment superfluous.

Recommendation 11:

The Minister should clarify why the term ‘looked after children’ is to be introduced to the Social Services and Well-being (Wales) Act 2014 by the Bill when the term is not used in the operative provisions of the original Act.

I accept this recommendation.

The term “looked after children” is used in the cross heading to Part 6 of the 2014 Act and in a number of the section headings so that it is plain to the reader that the phrase “looked after” means the same whether it is placed before the words “child”, or “children”, or after.

Recommendation 12:

If the Minister decides to continue with the use of the term ‘looked after children’, the Minister should table an amendment to the Bill to clarify its meaning including, if necessary, by defining the term within new paragraph 1(3B) of Schedule 1 to the Bill (to be inserted by section 2(c) of the Bill).

I accept this recommendation.

The Welsh Government will table an amendment at Stage 2 to clarify the meaning of the term ‘looked after children’ in the amendment inserted into the Regulation and Inspection of Social Care (Wales) Act 2016.

Recommendation 13:

The Minister should table an amendment to the Bill to include a definition of ‘public good’ in new section 6A of the Regulation and Inspection of Social Care (Wales) Act 2016 (to be inserted by section 3(3) of the Bill).

I reject this recommendation.

The power to prescribe other public goods which could allow an organisation to meet this condition, in order to deliver a restricted children’s service, would only be used to specify an additional acceptable public good, in addition to the welfare of children.

The other condition and requirements would still apply to these providers.

The Welsh Government does not believe that this requirement is exceptionally broad or in need of further definition. As a point of comparison, in the definition of community benefit society in section 2(2) of the Co-operative and Community Benefit Societies Act 2014, the test around an organisation’s purposes is "that the business of the society is being, or is intended to be, conducted for the benefit of the community". The community interest test for a community interest company is equally wide and is defined by reference to what a reasonable person would consider are activities being carried on for the benefit of the community or a section of the community.

Recommendation 14:

The Minister should table an amendment to the Bill to apply a super-affirmative procedure to the making of regulations under new section 6A(3)(b) of the Regulation and Inspection of Social Care (Wales) Act 2016 (to be inserted by section 3(3) of the Bill).

I accept this recommendation in part.

Whilst the Welsh Government does not consider that a super-affirmative procedure is appropriate in these circumstances it is willing to apply the draft affirmative procedure.

Recommendation 15:

The Minister should consider tabling an amendment to the Bill to clarify how objects or purposes are to be determined, and by whom under new section 6A(3) of the Regulation and Inspection of Social Care (Wales) Act 2016 (to be inserted by section 3(3) of the Bill).

I accept this recommendation in part.

I am happy to provide clarity on how and by whom objects and purposes are to be determined. The task of determining whether a provider’s objects or purposes comply with regulation 6A(3) will be for the regulator, that is to say Care Inspectorate Wales carrying out the functions of the Welsh Ministers. All relevant providers will have their objects/purposes set out in their governing documents and Care Inspectorate Wales will have a margin of discretion in deciding whether these primarily relate to the accepted purposes or not. I consider that having made a statement to that effect removes the need for a clarificatory amendment.

Recommendation 16:

The Minister should table amendments to section 3 of the Bill to remove the definition of a ‘company having a share capital’ to be inserted into new section 6B(6)(b) of the Regulation and Inspection of Social Care (Wales) Act 2016 and replace it with an appropriate definition in respect of the phrase ‘without a share capital’.

I accept this recommendation in principle.

The Welsh Government will give consideration to the drafting of the relevant provision with a view to addressing the point raised by the Committee.

Recommendation 17:

The Minister should consider tabling an amendment or amendments to ensure that it is clear what ‘wholly or mainly to children’ means in each place that it is used in the Bill.

I accept this recommendation in principle.

I am happy to commit to giving consideration to how best to avoid confusion or a lack of clarity about the intentions behind the use of “wholly or mainly to children”.

Recommendation 18:

The Minister should table an amendment to the Bill to remove the regulation-making power from paragraph 2(4)(b) of new Schedule 1A (to be inserted by section 4 of the Bill).

I accept this recommendation.

The Welsh Government will table an amendment at Stage 2 to remove the regulation-making power.

Recommendation 19:

The Minister should table amendments to section 6 of the Bill to ensure that the drafting of new sections 9B(2)(e) and 9B(3)(d) is in line with conclusion 4 of our report.

I reject this recommendation.

As I set out in my letter on 9 July, we are content that no difficulty or ambiguity of interpretation is created by the current drafting.

Recommendation 20:

The Minister should table an amendment to section 14 of the Bill to include the timeframe for the publishing of an annual return by a service provider in new section 10(4A) of the Regulation and Inspection of Social Care (Wales) Act 2016.

Recommendation 21:

The Minister should consider tabling an amendment to section 14 of the Bill to enable regulations subject to the draft affirmative procedure to change the timeframe for the publication of an annual return by a service provider (to be set out in new section 10(4A) of the Regulation and Inspection of Social Care (Wales) Act 2016 Act as a consequence of recommendation 20).

I have considered and responded to recommendations 20 and 21 together. I reject both recommendations.

To set a timescale for the publication of annual returns on the face of the Bill would constrain the regulator in its necessary work to agree a process for working with providers post-submission to ready them for publication. This process will inform the timescale set out in regulations. Stipulating a timescale on the face of the Bill is inconsistent with the approach already taken in the 2016 Act in relation to the time limit for submitting an annual return, which is set out in Regulations made under the negative procedure.

Recommendation 22:

The Minister should table an amendment to section 19(1) of the Bill to ensure its wording is consistent with the policy intention set out in section 19(2).

I accept this recommendation.

An amendment will be tabled at Stage 2 to make this amendment.

Recommendation 23:

The Minister should table an amendment to the Bill to require that paragraph 7 of new Schedule A1 to the Social Services and Wellbeing (Wales) Act 2014 (to be inserted by section 20 of the Bill) is free-standing and its policy intent does not require repeating in regulations to be made under paragraph 1 of new Schedule A1.

I reject this recommendation.

For the reasons set out in our response on 9 July, the Welsh Government does not believe that this amendment to the Bill is required. 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.

Recommendation 24:

The Minister should provide detail on all the services that could be subject to direct payments using the provisions to be inserted into the National Health Service (Wales) Act 2006 by section 24. This information should be provided no later than the commencement of Stage 3 proceedings.

I accept this recommendation in principle.

The power will enable direct payments in health care to recipients with a wide range of conditions and diagnoses. It would not be appropriate to provide an exhaustive list of where a direct payment could be made in lieu of services. In addition, it would be taking a 'medical model' approach and would not be in keeping with the social model of disability to be prescriptive in terms of type of condition or disability. However, I would be happy to provide the Committee with indicative information.

Recommendation 25:

The Minister should review the breadth of the provisions in section 24 including whether the Bill may allow the Welsh Ministers, at some point in the future, to make payments to people who have not been assessed as having a primary health need. Having done so, the Minister should make a statement to the Senedd about the outcome of this review no later than the commencement of Stage 3 proceedings.

I reject this recommendation.

The provisions in section 24 have been the subject of careful consideration during the drafting and scrutiny processes and should be retained as drafted to allow for the introduction of direct payments for CHC.

Recommendation 26:

If the Minister's intention remains to exercise the regulation-making power under section 10B(5) of the National Health Service (Wales) Act 2006 (to be inserted by section 24 of the Bill) solely for all Local Health Boards at the same time, the Minister should table an amendment to the Bill to reflect that intention (and remove the ability for it to be exercised in respect of one Local Health Board only).

I reject this recommendation.

The Welsh Government does not believe that this amendment to the Bill is required. The Minister has already set out to the Committee the Government's intention to exercise the power for all health boards at the same time.

Recommendation 27:

The Minister should table an amendment to the Bill such that the meaning of 'a person lacking capacity' as set out in new section 10B(8)(b) of the Social Services and Well-being (Wales) Act 2014 (to be inserted by section 24(2) of the Bill) is described by all relevant provisions of the Mental Capacity Act 2005 that specify its meaning.

I reject this recommendation.

As set out in earlier correspondence with the Committee, 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.

In addition, because the definition in section 2 is subject to additional provision in section 18(3) (referred to in section 2(6)), in our view it is more appropriate to refer to the definition by reference to the whole Act.

Recommendation 28:

The Minister should table an amendment to the Bill such that regulations to be made under section 10C(1) of the National Health Service (Wales) Act 2006 (to be inserted by section 24(2) of the Bill) are subject to the draft affirmative procedure.

I accept this recommendation.

The Welsh Government will table an amendment to apply the draft affirmative procedure to this regulation-making power.