Consultation Response

Consultation on the Social Services and Well-being (Wales) Bill

March 2013

Introduction

Age Cymru is the leading national charity working to improve the lives of all older people in Wales. We believe older people should be able to lead healthy and fulfilled lives, have adequate income, access to high quality services and the opportunity to shape their own future. We seek to provide a strong voice for all older people in Wales and to raise awareness of the issues of importance to them.

We are pleased to respond to the Committee's consultation on the Social Services and Well-being (Wales) Bill. We are active members of the Social Services and Well-being Bill Advisory Group, the Welsh Reablement Alliance and the Wales Carers Alliance, and endorse the joint responses produced by these groups.

Summary

In order to achieve the positive ambitions of the Bill and deliver real benefits to the people in Wales, we believe:

- Access to independent advocacy support must be included in the Bill to deliver voice and control – this is particularly crucial for adults at risk of abuse
- The 'adults at risk' definition should be revised, and care and support needs must not be a pre-requisite in the definition
- Clarity is needed in a number of areas, particularly how assessment, preventative services, eligibility and charging will work together
- Further detail is needed on the intentions for the eligibility threshold – this will have one of the biggest impacts on sustainability and individual outcomes
- General principles should be added to the face of the Bill, a crucial principle being to actively involve the person and their carer throughout the process

Questions

1. Is there a need for a Bill to provide for a single Act for Wales that brings together local authorities' and partners' duties and functions in relation to improving the well-being of people who need care and support and carers who need support? Please explain your answer.

Yes. We believe there is a clear need to simplify, consolidate and in some cases modernise

existing legislation into one statute, and we welcome the focus on improving wellbeing, both of people who need care and support and their carers.

However we do have reservations that these positive intentions may not be achieved with the current drafting of the Bill.

There is a lack of clarity in several sections which need to be resolved in order for the Bill to meet its stated aims. For example, it is not clear who would have access to preventative services, i.e. at what point a person will be deemed to have 'care and support' needs and how this will promote real prevention and early intervention.

The Bill needs to identify more clearly the steps that are envisaged to provide proportionate support to people, and the relationship between preventative services, assessment and the eligibility framework. Once this is clear it will be possible to identify when eligibility and charging are applied and ensure there are no unintended consequences. We note that the proposals for preventative services will not bring benefits if the threshold for accessing them is set too high.

The Bill contains a list of purposes for preventative services which are very process-driven rather than person centred; the focus should be improving wellbeing and quality of life for individuals. As members of the Welsh Reablement Alliance, we would like to see a reference to promoting enablement on the face of the Bill to ensure that preventative services are outcome focused. We welcome the powers to prescribe partnership arrangements between social services and health boards; (part 9, chapter 2), but we would suggest that such partnerships should also incorporate housing departments given the clear link between built environment and personal health.

Despite positive intentions, the wording is not strong enough on the need for a person centred approach. We believe the Bill must include provisions that require local authorities to actively involve the person throughout their experience of care and support services - please see our response to Question 2 for more detail.

We share the advisory group's concerns about whether all appropriate existing statutes have been properly considered for repeal and consolidation, given that the list of repeals is currently incomplete. For example, there is particular concern and uncertainty around the Chronically Sick and Disabled Persons Act 1970.

We note that it is important to have a standard definition of wellbeing across the Welsh Government, and for the Bill to reference other relevant policy and legislation such as the Framework for Independent Living, and the development of the Strategy for Older People.

We also note the White Paper for the Sustainable Development Bill aims to enhance: 'economic, social and environmental wellbeing of people and communities', but contains no reference to this Bill. We would hope that there was cross-government working to ensure these, and all, pieces of legislation complement each other and work together in practice.

2. Do you think the Bill, as drafted, delivers the stated objectives as set out in Chapter 3 of the Explanatory Memorandum? Please explain your answer.

No. Whilst we welcome the positive objectives as laid out in the Explanatory Memorandum, we do not feel that the Bill as currently drafted will deliver the stated objectives.

It states that the Welsh Government intends, "to improve the well-being outcomes for people who need care and support and carers who need support and to reform social services law" through, "providing people with stronger voice and greater control over services they receive…"

We very much welcome these principles; however, we are concerned that important sections of the Bill will not provide real voice and control as currently drafted. The language of some sections still maintain a traditional service led model (matching people to available services) rather than focusing on individual outcomes and finding ways to meet those needs.

The wording of the Bill needs to be stronger on a commitment to a person centred approach. We believe the Bill must include provisions that require local authorities to actively involve the person in the whole assessment and care planning process; to co-produce their care plans and outcomes, and to promote the options that are available for people to exercise voice and control. The outcome we wish to see is people being able to take informed decisions about their care and support.

We believe that the Bill needs to focus on individual outcomes, and feel that general principles on the face of the Bill would help to achieve this. We endorse the Law Commission's recommendation[1] that the statute should set out a checklist of factors that must be considered before a decision is made in relation to an individual. Thus the decision maker would be required to:

- Assume that the person is the best judge of their own well-being, except in cases where they lack capacity to make the relevant decision;
- Follow the individual's views, wishes and feelings wherever practicable and appropriate;
- Ensure that decisions are based upon the individual circumstances of the person and not merely on the person's age or appearance, or a condition or aspect of their behaviour which might lead others to make unjustified assumptions;
- Give individuals the opportunity to be involved, as far as is practicable in the circumstances, in assessments, planning, developing and reviewing their care and support;
- Achieve a balance with the well-being of others, if this is relevant and practicable;
- Safeguard adults wherever practicable from abuse and neglect; and
- Use the least restrictive solution where it is necessary to interfere with the individual's rights and freedom of action wherever that is practicable.

Advocacy

We maintain that in order to give people real voice and control, the Bill must make provisions to improve access to independent advocacy support services. We are disappointed that the

[1] Adult Social Care, Law Commission, 2011

new information and advice duties refer to “information, advice and assistance” rather than advocacy.

Independent advocates empower people by giving them voice, choice and control and helping to navigate through the complicated social care system. Welsh Government has acknowledged that advocacy services, particularly for older people, are patchy across Wales, but as yet has not committed to improving this.

Nevertheless, the Welsh Government is currently working with the Commissioner for Older People on a business case for a comprehensive independent advocacy service for older people in Wales, and we will be feeding into this process through the task and finish group led by the Commissioner. We note that time is of the essence on this matter; we believe that advocacy is a significant omission in the Bill and that it is important to rectify this at Stage 1 of the scrutiny process.

The first objective of Welsh Government’s own Strategic Equality Plan is to ‘Strengthen advice, information and advocacy services’, and we’d argue that in order to comply with this, the legislation should include wider access to independent advocacy.

We stress that access to independent advocacy is particularly crucial for adults at risk of abuse, and strongly believe it must be included in the Bill in regard to safeguarding.

Adults at risk of harm are amongst the most vulnerable people in our communities, and we must ensure that they have a voice and are safeguarded from abuse. Independent advocacy can help to redress the power imbalance that occurs in abuse and can enable the person to take back some control.

The Welsh Institute for Health and Social Care’s Review of ‘In Safe Hands’[2] recommended that, “Legislation should include a duty to consider advocacy support”, and the Scottish legislation includes a similar duty.

When the Bill was introduced in Plenary, the Health Minister stated:

“It is important that people, whatever their age, have a strong voice, and that is why we intend to put advocacy for the most at risk on the same footing as it is for children and young people with care and support needs”

We were encouraged to hear this statement, but in its current form, the Bill does not provide for this. We urge the Committee to seek clarification on this matter.

The Bill provides an excellent opportunity to reaffirm the Welsh Government’s commitment to access to independent advocacy, particularly in terms of safeguarding, and strengthen the national direction and provision across Wales.

Charging

[2] A review of the Welsh Assembly Government’s guidance on the Protection on Vulnerable Adults in Wales, Welsh Institute for Health and Social Care, 2010

Age Cymru, along with other members of the advisory group and the third sector are concerned about the powers to allow charging for services; particularly for information, advice and assistance and preventative services. We have concerns that this could potentially work against the intended aims of the Bill. We maintain that information and advice should be free, independent and accessible as a basic principle, and would welcome clarification on this.

Carers

The 'purpose' section of the Explanatory Memorandum states that, "The Bill will also, with the exception of provisions for portability, provide equivalent rights for carers, putting them on a similar legal footing as the people they care for".

We and other members of the Wales Carers Alliance welcome the move towards equality for carers but strongly feel that there is no sufficient justification for excluding them from the right to a portable assessment and support plan. This move will undermine the policy intention to extend the same entitlements to carers as the people for whom they care. We believe this must be rectified.

We believe that the Bill should also make carers assessments portable, and linked to service users' assessments to give them the same rights and facilitate a streamlined process. This was recommended by the Dilnot Commission[3].

Partnership working and integration

The Explanatory Memorandum lists another purpose of the Bill as to, "Strengthen collaboration, provide a framework for integration of key services".

We do not feel this will be achieved with the current drafting. We and other members of the advisory group are concerned that the role of partners (such as Local Health Boards) remains unclear. We are unsure how the Bill extends the role of partners beyond that which is already in place.

We would also highlight that without a meaningful relationship between local authorities and the health service there could be potential conflicts about charging. Although the Bill provides for local authorities to be able to charge, LHBs will be unable to do this. This could cause conflict in terms of joint working between health and social care rather than encourage cooperation.

3. The Bill aims to enable local authorities, together with partners, to meet the challenges that face social services and to begin the process of change through a shared responsibility to promote the well-being of people. Do you feel that the Bill will enable the delivery of social services that are sustainable? Please explain your answer.

It is extremely important that the Bill enables the delivery of sustainable social services. We believe that further clarification is needed on a number of areas in order to accurately assess

[3] Fairer Care Funding, The Report of the Commission on Funding of Care and Support, 2011

the sustainability; without this there is the possibility that the Bill will not be sustainable long-term.

Potential threats to sustainability include:

Eligibility threshold

We welcome in principle the proposed introduction of a national eligibility framework, but the crucial issue, and one of the biggest implications of the Bill, will be the level at which the bar or eligibility threshold is set.

A national eligibility framework will be a huge change for local authorities and it is vital that clear and consistent definitions are produced for category levels. It is important to note that a national framework will only promote prevention and early intervention if the level of eligibility to receive services is reasonable, and is not set so high that it would exclude a significant number of people. The Welsh Government must also ensure that no one is worse off as a result of the reforms.

It is impossible to envisage how the proposals outlined in the Bill will work in practice without knowing the plans for eligibility criteria. We need to know the Welsh Government's vision and intentions around eligibility, so we can best understand whether the proposals will meet the needs of individuals for care and support services.

We are also concerned that without knowing the current numbers of people currently within each level of 'need' in the current system then it is impossible to estimate the financial (and other) implications for individuals and local authorities of any proposed changes.

We are also concerned about a potential three stage process – assessment of needs, eligibility tests and financial tests – and how this will work in relation to promoting well-being, prevention and managing needs. We are particularly concerned that some people might not receive the right amount of support due to potential charges applied. We would like to see more clarity about this.

Provisions for charging for services

Provisions in the Bill will allow local authorities to charge for information, advice and assistance and preventative services. While we acknowledge that the provisions are powers and not necessarily intentions, they do raise some strong concerns and we and would welcome indication from the Welsh Government about its policy intentions.

If charges have the effect of deterring people from receiving the information, advice and preventative services they need to prevent their needs from escalating, then the Bill will not make social services more sustainable.

Lack of clarity around preventative services

We welcome the inclusion of preventative services in the Bill but believe the current drafting raises issues for implementation. Preventative services are important to both making social services financially sustainable and in promoting wellbeing and positive outcomes.

There are issues around establishing a clear picture of the care and support needs of a person, so that these can be managed and reduced. The current drafting implies that a person will receive a needs assessment to establish what their care and support needs are and how they might be reduced through preventative services.

We would welcome an indicative definition of preventative services on the face of the Bill to ensure that local authorities provide both general, universal prevention and more targeted, individual-level prevention. We cannot see how the Bill will incentivise early intervention. Our concern is that prevention work will not bring benefits if the threshold for accessing them is set too high or prohibitive charges are applied.

The Bill suggests that the application of preventative services will be discretionary, that is not subject to an eligibility framework. However, we would like to see a transparent and fair framework for deciding individual entitlement to prevention services.

Incomplete costs analysis

We have concerns about the Regulatory Impact Assessment. These are dealt with in responses to Question 5 and 7 b).

4. How will the Bill change existing social services provision and what impact will such changes have, if any?

It is clear that access to good quality information and advice needs major improvement; Age Cymru know that many older people and their families currently find the care system complicated and daunting, and do not know where they can access information, or what their rights and entitlements are. Current provision of information and advice is patchy across Wales, largely as a result of unequal funding and support in different areas.

The new provisions in the Bill around information and advice, and preventative services have the potential to deliver a positive impact, both in terms of individual's wellbeing and a long-term reduction of pressure on social services, providing they are clarified and implemented correctly.

We stress that information and advice must be free, independent, and provided in accessible formats at the earliest opportunity, as a basic principle. We would like the Bill to clarify that the provisions will also proactively apply for self-funders, as many self-funders do not go through social services when arranging care provision, and often do not have access to information or advice services.

As members of Age Alliance Wales, we would like to see the introduction of a duty to ensure that the NHS and social services provide relevant information on the support available for older people who are being discharged from hospital or who begin receiving social care support. This is currently not happening consistently and we believe it should be built into this

section of the Bill to ensure people can access support at the right time whilst recovering, and to avoid preventable readmissions to hospital.

We note that the Chronically Sick and Disabled Persons Act 1970 contains a duty to provide aids and adaptations, so there is the potential for people to lose this right if this duty is not explicitly included in the Bill.

Safeguarding

Our Rule Out Abuse campaign called for legislation to safeguard adults at risk and strengthen adult protection processes, so that tackling adult abuse is given the priority it deserves. We are pleased the Welsh Government has committed to do so and has accepted many of the campaign's recommendations with new duties on public bodies to investigate, report, cooperate and provide information.

We welcome the new legislative framework on safeguarding and improved powers with regards to adults at risk of abuse; this has great potential for positive impacts on older people and reducing and tackling elder abuse. However, we have some concerns which we believe must be addressed in order to achieve these outcomes for older people in Wales:

Adults at risk definition

We do not agree with the current definition of adults at risk:

To qualify as an adult at risk, a person must have care and support needs and be unable to protect themselves **as a result of those needs**. However it can often be the case that a person may not have identified care and support needs, but they are being abused and are consequently unable to protect themselves as **a result of the abuse**; such cases would be excluded from legislative support under the current drafting. Therefore we strongly believe that care and support needs should not be a pre-requisite in the definition for an adult at risk.

We also feel that issues such as coercive control and breach of trust are important factors in abuse which must be considered, but aren't sufficiently addressed in the section.

For the previous consultation, Age Cymru worked with other experts in the field including the Older People's Commissioner and Professor John Williams from Aberystwyth to propose an alternative definition of an adult at risk, and will continue this partnership working to suggest amendments to improve the current definition.

We note that there is no definition for "abuse or neglect" in the Bill. We believe it would be beneficial if a broad definition were included, and would like clarification as to why this is not the case.

It is important to note that safeguarding as a concept includes protection but is wider and more proactive. To safeguard adults, the powers should include support and protection as equal priorities for practitioners. We believe that support and prevention must have a stronger emphasis in this section of the Bill, which currently reads as very 'protection' focused.

As previously mentioned we believe that access to independent advocacy support for adults at risk of abuse is vital to achieving positive outcomes, and giving voice and control. We strongly believe it should be included in the Bill.

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

There are significant potential barriers to implementation of the provisions of the Bill which are not sufficiently addressed.

As discussed in previous answers, the lack of clarity and ambiguity in the current drafting of key areas of the Bill is a potential barrier to effective implementation, as certain provisions may be open to interpretation by local authorities, for example the preventative services section. Thus the current postcode lottery in access to services could be maintained across Wales.

Another potential barrier is the amount of detail that is being left to regulations and the code of practice – these will not be subject to the same level of scrutiny as the Bill and could result in unintended negative consequences.

Costs

We see the main barrier as the incomplete cost projections as we do not feel that the Explanatory Memorandum sufficiently covers all the costs that will be incurred. We are also concerned that, as currently drafted, the Bill will not produce the savings predicted through lawyers' fees, because we believe some areas of the Bill are unclear and may lead to challenge. We have major concerns about the Regulatory Impact Assessment, please refer to our response to question 7 b) for further details.

There is wide agreement in the advisory group and the wider third sector that a more thorough cost analysis is required.

Lack of joint working

We are concerned by the lack of explicit duties on the health service, and believe there the Bill currently misses the opportunity to advance and enforce better joint working. We feel that what is drafted could maintain the status quo, and the tendency to work in silos rather than improve joint working.

Charges may also cause difficulties in NHS and social services collaboration. A person who is already in receipt of care and support from social services and then develops a need for prevention may have charges applied. However, a person unknown to social services who develops a need for prevention services after a stay at hospital may have their services covered by the NHS (i.e. without charges). The risk is that this may lead to 'cost shifting' between NHS and social services

6. In your view does the Bill contain a reasonable balance between the powers on the face of the Bill and the powers conferred by Regulations? Please explain your answer.

No. We do not believe there is an adequate balance between the powers on the face of the Bill and details that will be left to regulation. We would like to see a series of additions on the face of the Bill.

We are concerned that there are some key definitions which seem to have been overlooked in the drafting of the Bill. For example, “assistance”, “abuse of neglect”, and “people who need care and support” are not defined.

As previously discussed, more clarification is also needed around preventative services, and how they will interact with assessment, eligibility and charging for services.

We believe there should be a reference to promoting enablement on the face of the Bill, as well as general principles which set out factors to be considered before making a decision (as recommended by the Law Commission) – please see our response to Question 2 for further details.

We would also like to see a statement on the Welsh Government’s commitment to a Human Rights based approach and to the UN Principles for Older Persons on the face of the Bill.

The Scottish Adult Support and Protection Act 2007 has positive, person centred general principles on the face of the Act[4] which we feel would also be beneficial to include in the safeguarding section of the Bill.

Regulations

We and the advisory group believe that in places the Bill could be more prescriptive about what ‘must’ be detailed, rather than what ‘may’ be detailed in regulations. The advisory group’s joint response gives an example of this in relation to funding of Safeguarding Boards.

7 (a). What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

We recognise the need for some issues to be left to regulation. However, we have concerns that the balance is inappropriate. We are particularly concerned that much of the detail of regulations is yet to be drafted and would like assurances that this is published before Assembly Members are required to vote on the Bill’s general principles at the end of Stage 1.

We are particularly concerned with the level of subordinate legislation that is left to negative rather than affirmative procedure. For example regulations on “carrying out financial assessments” (Section 48 in the table in the Explanatory Memorandum) should be subject to ‘affirmative’ procedure to ensure the regulations are given proper scrutiny, due to the significant impact these regulations will have on individuals. We would like to see this table looked at again, with the needs of those who use social care and support services taken into account.

Adult protection and support orders

[4] http://www.legislation.gov.uk/asp/2007/10/section/2

We have some concerns regarding the proposed adult protection and support orders.

We do agree that in order to adequately protect those adult most at risk and affected by abuse, legislation should include powers of intervention, but would like further clarification on these orders.

There was consensus amongst our focus group with older people for the previous consultation that powers of intervention were required so that experts could “step in” to protect adults at risk, albeit “to be used in extreme circumstances”. Evidence from colleagues in Scotland is that similar powers contained within the Adult Support and Protection (Scotland) Act 2007 are invoked only in extreme situations but act as a significant deterrent

However the danger is that if handled inappropriately, such powers can actually increase an individual’s risk of being abused. As we understand it, the orders will give powers of entry and assessment but the Bill does not clarify what will happen next, which is the crucial issue. If you enter a home, identify a person is a risk, what is the next step?

Without robust powers, the legal duties would increase practitioners’ opportunities to identify issues, but do little to increase opportunities to tackle abuse, particularly in the most extreme circumstances where an adult, who has capacity, is suspected to be coercively controlled and at risk of harm.

We urge the Committee to seek clarification and further information on these orders. We believe that powers of intervention should include a power of access and assessment and an injunction order: the aim of which would be to reduce the risk posed to the adult at risk by the perpetrator in the most supportive and least restrictive means possible

The “General principle on intervention in an adult’s affairs” in the Adult Support and Protection (Scotland) Act 2007 enshrines this principle in legislation, and we consider this principle valuable for the Welsh Government to adopt within the Social Services (Wales) Bill. These principles can provide checks and balances for professional judgement.

The Welsh Government should consider how these orders will sit with other legislation, covering areas such as domestic violence, to ensure a consistent approach to interventions.

Consent from the adult at risk should always be sought before proceeding with any intervention, however intervention should not rely explicitly on consent in situations where there is evidence to suggest coercive control. It is important to ensure that the person at risk of harm has the right to an independent advocate to assist them to navigate through this process and help them weigh up their situation.

7. (b) What are your views on the financial implications of the Bill?

We have major concerns about the Regulatory Impact Assessment, which we do not feel provides a full cost analysis of the Bill. For example, the only cost listed in regards to implementation of the Bill is the cost of staff training in social services. This seems limited and does not account for the wider social care workforce or implications on other budgets beyond social services. We note that there will be additional costs that are not included such as for

the establishment of new national safeguarding boards, and the provision of information, advice and assistance, as well as preventative services.

We also believe it is critical to understand the cost implications if Welsh Government were to continue the current FACS four-level eligibility levels in the new system. We are concerned that the Government is unaware of the number of people currently receiving care at each level[5], therefore making it difficult to predict whether any new model will have cost implications.

The Welsh Government recently published research[6] on the cumulative impacts of welfare reform, which indicates the proposed changes by the UK Government through the welfare reform agenda could increase spending on social care and support services. We would like to see these costs accounted for in the Regulatory Impact Assessment.

We would like to see a fully drafted regulatory impact assessment which takes into account the full costs of implementing the proposed changes in the Bill, as set against the proposed costs of maintaining the status quo.

We believe publication of a more detailed cost analysis is needed before the end of Stage 1, which takes into account the full cost of the Bill, including preventative services.

8. Are there any other comments you wish to make about specific sections of the Bill?

Paying for care

We are concerned that there is no detail about paying for care in the Bill, i.e. the cost to individuals for paying for the care and support that they need. The Dilnot Commission report Fairer Care Funding was published in July 2011 and the UK Government have recently announced their plans for reform. We would welcome the Welsh Government publishing their proposals for the cost of care as soon as possible, and would have liked to have seen them alongside this Bill.

Safeguarding (see previous responses)

Please see our earlier comments on the safeguarding section, particularly on the need to include a duty to consider independent advocacy support for adults at risk of abuse, and our concerns regarding the adult at risk definition and adult protection and support orders.

Conclusion

We hope this response is useful to the Committee. Please do not hesitate to contact us for any further information. We would be very pleased to give oral evidence to the Committee on this vital legislation for older people in Wales.

[5] Written Assembly Question 61983 and WAQ61984, answered on 25 January 2013
[6] http://wales.gov.uk/topics/educationandskills/publications/reports/analysingreforms/?lang=en