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Dear Committee Members,

Re: Consultation on the Social Services and Wellbeing (Wales) Bill

Thank you for the opportunity to provide initial written evidence to the Health and Social Care Committee on the general principles of the Social Services and Wellbeing (Wales) Bill.

As Commissioner, I have a statutory duty, as set out within the *Commissioner for Older People (Wales) Act 2006* and *The Commissioner for Older People in Wales Regulations 2007* to keep under review the adequacy and effectiveness of law affecting the interests of older people in Wales. Effective and robust scrutiny of the Social Services and Wellbeing (Wales) Bill, from the perspective of older people, is therefore a major priority for me in discharging my legal powers.

In my scrutiny of the Bill, I have three specific points of interest. Firstly, my overriding priority is to ensure the adequacy of the proposals from an older person's perspective i.e. that the intent of the proposed legislation will deliver the changes that older people have told me are needed.

Secondly, I will take a view on the extent to which the detail contained within the Bill reflects this intent, and thirdly, the level of assurance I have that the Bill will in practice deliver the outcomes that it aspires to.

As I outlined when I spoke with the Committee in a private session recently, it is crucial that the Bill remains focused, as the initial Framework for Sustainable Social Services did, on the impact it will have on the lives of people. It is essential that it remains a Bill about people, rather than a Bill primarily about systems and services.

From my perspective as Commissioner, there is much in the Bill that I welcome, including simplification of the ways that people's needs are assessed, improved rights for carers and a commitment to ensuring that high quality services are delivered more consistently across Wales. I particularly welcome the upfront focus on wellbeing and the central role for prevention. However, at this stage there are number areas of the Bill that, as currently drafted, limit its potential to make a real difference to the lives of older people. These areas are explored further in my response to the questions below, but in summary relate to:

- The absence of statutory principles on the face of the Bill.
- Lack of clarity around how the bill will deliver greater voice and control to older people and a failure to recognise the role of advocacy, particularly independent advocacy, within this
- Overreliance on regulations, particularly in respect of some high risk areas including eligibility criteria
- The need for further clarification and strengthening of proposals around adult safeguarding
- Potential risks around the practical implementation of new partnership and collaboration duties, which will require leadership, cultural and governance changes alongside legislation if they are to be effective

Consultation 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.

I have strongly and publicly supported the aims and aspirations behind the Social Services and Well-being (Wales) Bill to transform the way that social services are delivered, making them simpler and giving people stronger voice and more control. Older people frequently inform me that services are complicated, difficult to access and often fail to provide a little bit of help on a timely basis. Older people also raise with me their concerns about the unacceptable variations in the way that services are delivered across Wales.

A Bill that brings together local authorities' and partners' duties and functions in order to improve the well-being of people who need care and support is a significant, once in a generation, opportunity to 'reboot' our social services systems in Wales around the issue of wellbeing and ensure that in future they are more simplified, integrated and outcome focussed, and more importantly, informed by the voices of service users. It is imperative that we get this right.

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.

In general, the objectives set out in Chapter 3 of the Explanatory Memorandum are reflected by the areas covered within the Bill. However, there is one significant exception that is of critical importance to ensuring that the Bill delivers on its stated aims, and this relates to the current absence of statutory principles.

I have previously called on Welsh Government to introduce statutory principles on the face of the Bill in order to uphold the human rights of all those affected by it and I am extremely disappointed that this is not

reflected in the current draft. The overarching well-being duties currently included in the draft Bill (to promote the well-being of people who need care and support and of carers who need support) **are not statutory principles.**

Statutory principles should be included on the face of the Bill for three reasons:

1. They will provide a solid statutory foundation. This would make them 'hard' law as opposed to 'soft' law that is tucked away in a Code of Practice.
2. Core legal expectations should not be assigned to a Code of Practice. They should be on the face of the legislation to guide the reading and interpretation of it; they must be at the forefront of the mind rather than considered later.
3. Principles set out clear statutory parameters for those who must exercise professional judgement when using the legislation. They also provide a good basis for service users to assess and, if necessary, challenge decisions made about them. Decision making can be measured against the letter of the law and against the spirit of the principles.

The principles should:

1. Demonstrate the policy aims behind the legislation and maximise the probability that these are reflected in decision making. They should ensure that decision makers give effect to the purpose behind the legislation.
2. Reflect human rights principles.
3. be consistent with the requirements of related legislation, e.g. the Mental Capacity Act 2005, the Mental Health Act 1983.

It is my view that more must be done to ensure that the Bill takes a human rights approach for both adults and children. Statutory principles MUST be included on the face of the Bill in order to uphold the human rights of all those affected by it. Through the discharge of my statutory duties my formal advice, as Commissioner, is that inclusion of principles in a Code of Practice is not sufficient, and the lack of statutory principles will significantly undermine the impact of the Bill.

I am currently preparing a separate paper on potential wording of these statutory principles which I will forward to the Committee sedately.

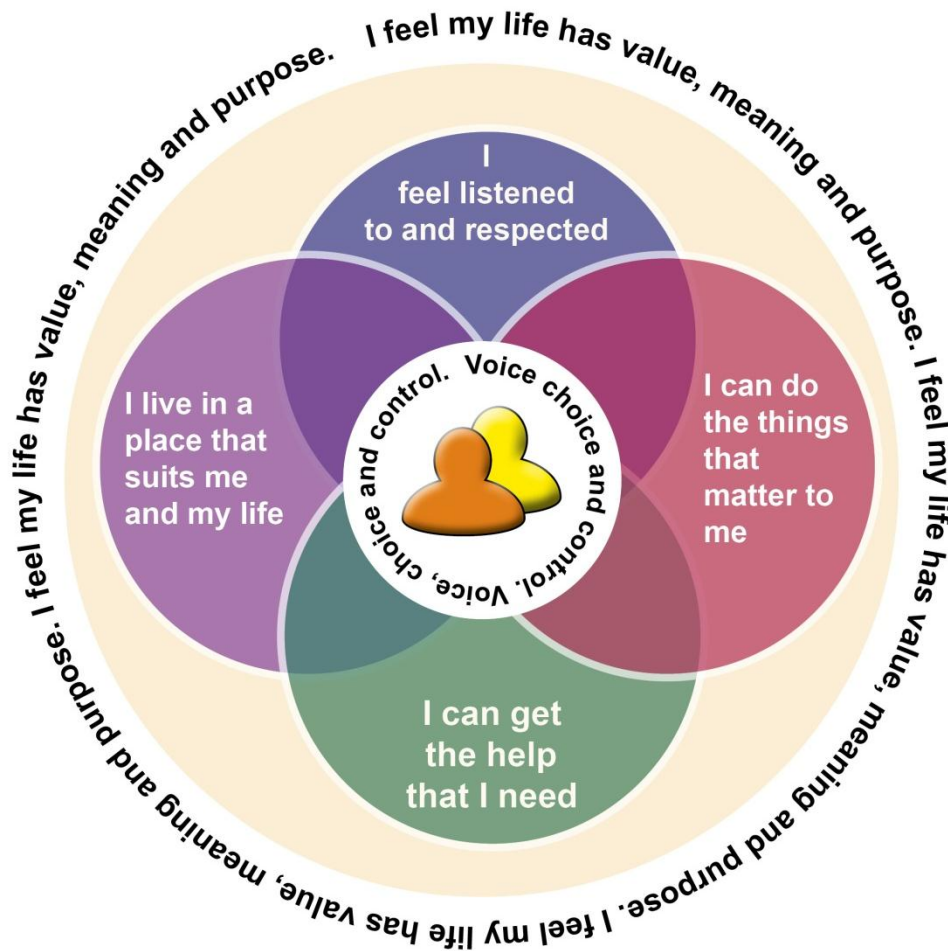
3. The Bill aims to enable local authorities, together with partners, to meet the challenges that face social services and to begin the process of change through a shared responsibility to promote the well-being of people. Do you feel that the Bill will enable the delivery of social services that are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

I have strongly and publically welcomed the renewed focus on wellbeing in the draft Bill. The inclusion of 'domestic, family and personal relationships' and 'contribution to society' within the definition of wellbeing strongly resonates with the issues that older people often tell me matter to them. Issues such as loneliness and isolation have a huge impact on physical health, as well as quality of life, yet older people tell me that they don't feel these issues are taken seriously, or given priority by providers of public services. The new duty on service providers under the general functions of the Bill to promote social and economic wellbeing as well as physical wellbeing is therefore welcome.

It is my view that the Bill needs to strengthen its definition of wellbeing and place it in a context that is more outcome focused and more closely aligned towards the intent of the legislation rather than services or systems.

I will shortly be publishing my own four year Framework for Action which focuses around four key themes that older people have told me are central to their wellbeing, or to living a life that has value, meaning and purpose, based around effective voice choice and control. These are:

- I feel listened to and respected
- I can do the things that matter to me
- I get the help I need, when I need it, in the way that I want it
- I live in a place that suits me and my life



These themes have a strong alignment to the wellbeing outcomes referred to in Part 9 of the draft Bill. I have already shared my own approach to wellbeing outcomes with members of the Health and Social Care Committee who found this approach to definition very useful, and suggested that it would be helpful if this was replicated in the next draft of this Bill. Further work is currently underway by my office in respect of how this model could be integrated.

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

I strongly welcome the Bill's ambitions to shift the balance of social care more firmly towards prevention. This will, if properly executed, increase older people's independence and help shift the balance of service provision in favour of early intervention rather than supporting people once they have already reached crisis point. This is a significant step forward, and one which I strongly welcome as a means to enhancing older people's wellbeing and quality of life.

The Bill contains some excellent proposals in relation to prevention, in particular the proposed duty on local authorities to provide (or arrange the provision of) a range of services to meet the public's need in relation to prevention), within which I see a strong role for the Third Sector.

One exception and an area of concern for me relates to potential charges for preventative services. The over-arching objective of the Bill in this regard is to expand access to prevention and to ensure that local authorities are providing services which can prevent an individual's need from escalating. However, the Bill also states: "*Regulations may make provision about charges for... information, advice or assistance*" (p39, lines 32 and 34).

Whilst I accept that charging for preventative services may be necessary, it seems impossible to reconcile the ambition of expanding access to prevention with making provision for authorities to charge for information and advice which might signpost individuals towards those services. I am deeply concerned that this measure would actually reduce the likelihood of older and vulnerable people seeking support rather than widening access.

Older people frequently tell me that some information and advice on a timely basis is often all they are looking for, and that getting the basics of this right would make a huge difference to their experiences of public services. There should not be any question of authorities being allowed to charge for information and advice services, which are critical in directing individuals towards preventative service. This needs to be made clear in the Bill.

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

One of the stated aims of the Social Services and Wellbeing Bill is to transform the way social services are delivered, promoting people's independence to give them stronger voice and control. However, I am concerned that, as it stands, the realisation of this is missing in the Bill and there is a risk that the Bill will not deliver on one of its key aspirations.

The current draft of the Bill does not recognise the vital importance of advocacy, in particular independent advocacy, and fails to make any legal provision for independent advocacy in a social services context. This is a significant omission. Current definitions of advocacy in law are restricted to the Independent Mental Capacity Advocacy, Independent Mental Health Advocacy, proposals in the Mental Health Measure and Community Health Council complaints advocacy

Independent advocacy, as part of a spectrum of advocacy provision, is required for individuals in key situations of vulnerability, where information and advice is not sufficient or where there are no family or friends to stand up and speak out on their behalf. Independent advocacy, at times of major decision making such as hospital discharge or entry into residential care, can be essential in supporting a person to express their views and wishes, pursue their rights, make their own informed decisions, and to explore and understand the options available to them. It is also particularly important when an older person is at risk of harm.

I would strongly encourage the Health and Social Care Committee to consider the impact of failing to include advocacy, and in some circumstances independent advocacy, for people in situations of vulnerability, on the face of the Bill. It is my view that the legislation would be significantly enhanced, and would go much further towards meeting its aims of increasing choice and control, by the inclusion of a legal duty to assess the need for independent advocacy for people in particular situations of vulnerability and to provide this when such a need is found to exist.

Another significant potential barrier relates to the capacity and capability of social services departments to respond to the duties within the new legislative framework. Linked to this, the level of formal partnership working and collaboration between health and social services needs to be much stronger if the Bill is to deliver its intended outcomes. CSSIW's annual report for 2011-12 published recently stated that,

The viability and prospects for the success of the partnership with health services was assessed by CSSIW as a significant risk in more than a third of the councils in Wales.

Current problems largely stem from the difficulties of different systems working together. The present regime for continuing healthcare funding is just an example of this, whereby perverse incentives exist to cost shift from one sector to the other. It is evident that effective partnership working will not be achieved simply through legislation, and if the ambitions of the Bill in this area are to be realised, a whole range of leadership, cultural and governance issues across health and social care organisations need to be considered alongside legislative drivers.

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.

The Explanatory Memorandum accompanying the Bill makes it clear that a significant proportion of the legislation will be subject to supporting regulations, delegated to Welsh Ministers. Whilst I am aware of the rationale for this approach, in my view there are some potentially 'high risk' areas that are being devolved to regulations, and are therefore of particular concern to me.

Whilst I welcome for example, the proposals for common eligibility criteria, and believe that in principle, this will help reduce inconsistencies across local authority areas (an issue which is often raised with me by older people) I am strongly of the view that eligibility must be dealt with much more explicitly in the Bill. Without seeing the detail of proposals around

eligibility, it is impossible to comment on them in any meaningful way.

I would strongly urge the Committee to seek more details on the proposed eligibility criteria from the Welsh Government. Without this information, there can be no meaningful discussion on the potential impact. The Welsh Government needs to outline openly its proposals on eligibility (or at the very least give an indication of the desired direction of travel) and explain how this links to the proposed duty on preventative services.

The final position on eligibility must be open to strong and critical scrutiny and robust impact assessment. This is an area that as Commissioner I will be taking an ongoing interest in.

7. 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)?

In answering this question, you may wish to consider Chapter 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

The provisions within the Bill for Welsh Ministers to make subordinate legislation are numerous and wide ranging. I understand the intention behind this approach in that it will allow Ministers to develop legislation that is flexible, responsive and that will be fit for purpose over a long time period. However as my response to the previous question indicated, there are significant risks associated with this approach and my overriding concern is that provisions that are subject to subordinate legislation will not be subject to the same level of scrutiny as the overall Bill.

As Commissioner, I will be taking a strong interest in the extent to which regulations, orders and directions are considered by the National Assembly and the openness and transparency of this process. It is imperative that all subordinate legislation is subject to robust scrutiny and proper impact assessment and not simply 'nodded through'.

7. Other Comments

I strongly support the aspirations of the Bill to strengthen powers for safeguarding adults at risk, so that vulnerable people older people in our society can be protected more effectively. I believe the Bill sets out the right direction of travel in this respect and I welcome many of the functions laid out in Part 8 of the draft legislation. However, a number of the specific safeguarding functions must be further strengthened if the Bill is to offer sufficient protection to adults at risk.

The definition of 'adult at risk' still relies too heavily on the previous definition that defined vulnerable adults as those in receipt of social services. It currently reads that *because* a person has care and support needs they cannot protect themselves from harm; whereas the true situation is that *because* a person cannot protect themselves from harm they have care and support needs.

Under the current drafting, a local authority has no duty to make enquiries unless they suspect a person may be an adult at risk. In many situations it will be impossible to determine whether or not a person is an adult at risk *until* enquiries have been made.

In relation to the duties on Safeguarding Boards to co-operate, the current wording states that Safeguarding Boards *may* co-operate with each other; this should be changed to say *must* unless the legislation envisages the National Independent Safeguarding Board enforcing requests to co-operate from regional Safeguarding Boards (i.e. a vertical duty to the NISB). The same point applies to the sharing of information between Safeguarding Boards.

I support the introduction of adult protection and support orders and these directly reflect our advice to the Government in as far as they go. There remains a question around what would be done if a person is under the psychological control of another and is unable to take the step of leaving an abusive situation. It is likely that in the majority of cases such a situation would also fall under the definition of domestic abuse and there may be solutions via the police; however, I do not think the legislation goes far enough and would support an additional order that allows a social worker to remove someone to a place of safety against their will in

rare situations where a Justice of the Peace can be convinced that such a court order is necessary in order to protect a person who cannot protect themselves.

My final point relates to the quality of the equality impact assessment that has been undertaken. The Bill must ensure that it reflects and takes into account the needs of all older people, as defined by the Equality Act 2010. I am not currently convinced that sufficient scrutiny has been afforded to the Bill in line with the public sector equality duties. My office has already begun some more detailed work on this and I will be happy to share this with you over the summer.

I look forward to giving further evidence to the Committee to support the Bill's progress through the detailed scrutiny process.

Yours sincerely,

A handwritten signature in black ink that reads "Sarah Rochira". The signature is written in a cursive, flowing style.

Sarah Rochira

Older People's Commissioner for Wales