

Mr David Reese AM
Chair of the Health and Social Care Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Dear Chair

I welcome the opportunity to provide evidence to inform the Health and Social Care Committee's (the Committee) scrutiny of the Regulation and Inspection of Social Care (Wales) Bill.

To help inform the Committee's considerations, our evidence below sets the context in which Care & Social Services Inspectorate Wales (CSSIW) regulates and supports the care system in order that people receive safe, good quality care. I have also made available a number of key documents:

- CSSIW's Annual Report for 2014/15¹
- Independent evaluation of quality judgement pilot in childcare by the Welsh Institute for Health and Social Care University of South Wales²
- CSSIW's guide for non-compliance and enforcement³
- Examples of completed inspection reports. Reports are publicly accessible on CSSIW's website⁴

CSSIW would also like the Committee to note that we have been engaged with the Welsh Government in developing its thinking and shaping of the Bill, the supporting notes and regulatory impact assessments. We welcome these discussions and will continue to work with the Minister for Health and Social Services and his officials to provide professional

¹ <http://cssiw.org.uk/our-reports/annual-reports/2013-2014/?lang=en>

² <http://cssiw.org.uk/about/strategic-plan/changing-the-way-we-inspect/?lang=en>

³ <http://cssiw.org.uk/providingacareservice/how-we-enforce/?lang=en>

⁴ <http://cssiw.org.uk/find-a-care-service/service-directory/?lang=en>

advice based upon our experience as a regulator to inform the development of future regulations and codes of practice to be made under the Bill.

CSSIW's role

CSSIW is the regulator and inspectorate for care⁵ and childcare⁶ in Wales. We also inspect and monitor local authority social services,⁷ and other services,⁸ and carry out these functions on behalf of Welsh Ministers. Our role is to ensure people can access and receive safe, good quality care which meets their needs and promotes their well-being. Our independence is protected through a Memorandum of Understanding (MOU) between the Chief Inspector and the relevant Welsh Ministers.

CSSIW's response to the Health and Social Care Committee's consultation questions

1. Do you think the Bill as drafted will deliver the stated aims (to secure well-being for citizens and to improve the quality of care and support in Wales) and objectives set out in Section 3 (paragraph 3.15) of the Explanatory Memorandum? Is there a need for legislation to achieve these aims?

Promoting well-being for citizens and improving the quality of care and support people receive requires a whole system approach which places people at the centre of services. This includes the way in which services are commissioned and regulated. This Bill, taken together with the Social Services and Well-being (Wales) Act 2014 (the 2014 Act), and supported by the Future Generations Bill, will provide a coherent legal framework in which the central focus is on outcomes for people and securing their well-being.

CSSIW has been creative in its application of the current law by shifting the focus of its regulatory practice from assessing standards to evaluating the outcomes for people using services. Our new methods and approaches to inspection and enforcement, introduced in 2012, have been effective in reducing the numbers of high risk services and in placing a new emphasis on "quality of life" across the sector. While these changes have been positive in improving the quality of care people receive, the current law has limitations which curtail our ability to pursue more effective solutions. In particular, CSSIW's ability to hold the right people to account for poor care and to take timely civil enforcement action.

CSSIW therefore views the provisions in the Bill as necessary and believes that they will provide strengthened powers and the architecture for a modern and flexible legal framework. This will enable both the service and workforce regulators to consolidate their approaches and respond to new models of care and workforce patterns. Together with the new duties on local authority social services departments, the Bill provides opportunities to

⁵ Those services within the scope of the Regulation and Inspection of Social Care (Wales) Bill – eg care homes, children homes and domiciliary care agencies

⁶ Child includes day-care, child-minders play , crèche and are regulated under the Children and Families (Wales) Measure 2011

⁷ This includes local authorities fostering and adoption services and their social world practice duties in respect of access, assessments and care management and review of care to individual's who receive social service support.

⁸ Boarding schools , Further Education colleges, residential special schools and residential family centres

influence the key levers for change across the system. Together, these will directly correlate to meeting the stated objectives of the Explanatory Memorandum.

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

CSSIW recognises there are a number of potential barriers and challenges to the effective implementation of the Bill and its policy objectives. We also acknowledge that these can be addressed over time. It is important that there is sufficient flexibility in the system to enable a managed and phased transition to require existing providers to become compliant in line with a service based approach to registration. There are a number of providers who will find it challenging to meet the new registration requirements, in particular to:

- Appoint skilled and competent responsible individuals who will be prepared to take on a clear statutory role with duties and accountabilities defined in law.
- Ensure there is workforce capacity – managers and staff who have the right skills and qualifications to meet regulations and standards set by the workforce regulator to achieve market sustainability.
- Meet any increased expectations. The size and age of care homes has a big impact in the decline in provider profit margins⁹ and the sustainability of care homes. In Wales, small care homes account for 50% of the total placements. Some providers of older non-purpose built care homes currently struggle to meet the current standards and will struggle to remain viable as expectations rise.

We also note that some providers will choose to continue to organise and register their businesses on existing “establishment based” lines. This is because some organisations prefer to structure their business around individual or small clusters of settings and agencies for accounting, liability and taxation purposes. In addition, the reasonable assumptions in the Bill about how care companies are structured are not always matched by the often very complicated arrangements which emerge, even in local companies and partnerships. Operation Jasmine exemplifies this.

3. *Do you think there are any issues relating to equality in protection for different groups of service users with the current provisions in the Bill?*

The Bill may be an opportunity to:

- Cease the use of categories to end the arbitrary movement and restrictions of people with specific conditions, for example dementia.
- Explore with the UK Government reciprocal provisions for Wales and England service regulators (CSSIW and Ofsted) to have powers to make visits to children’s homes

⁹ See Knight Frank Trading Performance of Care – 2014
<http://content.knightfrank.com/research/548/documents/en/2014-2365.pdf>

registered across our borders for spot inspections of care of children placed away from home. These duties will be separate from those of the local authorities in ensuring the safe placement for children in their care.

CSSIW welcomes enhanced duties in the Bill to provide the service regulator with powers to inspect the delivery of care in a person's own home with their consent. This will support CSSIW's future inspection model of domiciliary care and other care services delivered at people's homes. CSSIW also views that similar arrangements should extend to fostering services regulated under the 2014 Act.¹⁰

4. Do you think there are any major omissions from the Bill or are there any elements you believe should be strengthened?

Below we set out key areas for consideration.

The wider system and commissioning

John Kennedy's care home inquiry¹¹ recommends that governments should:

“Regulate the market and take a whole system approach encompassing pay and conditions, staffing levels, commissioning practices and transparent tariffs. These are the factors which directly impact on the quality of care.”

The Bill goes some way towards this and, taken with the 2014 Act, the regulator will have a line of sight and powers of intervention across much of the system. We recognise the importance of the role of commissioners and the responsibilities they have to procure services which are sustainable, meet the needs of people using them and are fair to staff working in them. At present, too much commissioning is short-term and focused on containing immediate budget pressures. Commissioning structures are complex and vary across councils, with overlapping corporate and social services commissioning and procurement departments. CSSIW has limited corporate locus but will have strengthened powers to hold the statutory director for social services to account. However, there are also health commissioners who are very active in procuring services from regulated settings, with different structures in place across health boards. There needs to be a mechanism to include health commissioners within the regulatory system and we are aware that the Minister has announced a Green Paper, due to be published later this year, which will provide an opportunity for this to be considered.

Primacy of well-being

We note from our analysis of Operation Jasmine and other more recent cases, that the law, when formally applied, tends to favour the rights of providers. There is a legal precedent for this which was applied in respect of care homes linked to Operation Jasmine (Joyce –v- NCSC 2003). As the Bill and the regulations are developed, we would welcome

¹⁰ Schedule 5 of the Fostering Services (Wales) Regulations 2003 currently provide that authorities persons of Welsh Government to have access to intervene and visit foster parents at any reasonable time to seek views on how the foster parent is being supported by the agency. This does not provide for entry for the service regulator to inspect the direct provision of care to a child at this foster parents home.

¹¹ <http://www.jrf.org.uk/publications/john-kennedys-care-home-inquiry>

any opportunity to rebalance the application of regulation to give primacy to the “well-being” of people using services. The principle is already established in the 2014 Act (Part 2 refers) which creates an overarching duty to promote the well-being of people in need of care and support.

We also propose active consideration is given to housing support services, as recognised in Scotland. As such, services are currently only registered as domiciliary care agencies and we are not sighted on the range and volume of supported housing settings in Wales. Our local intelligence suggests that there are many settings which are essentially “care homes by another name”, with dedicated teams supporting people with very complex requirements, typically those with learning disabilities or mental health needs. A service based approach to registration would allow for all these settings to be identified, visible and brought into the scope of possible inspection.

We note that some health settings will continue to be regulated under the Care Standards Act and wonder if there is an opportunity for these to be considered at some point. These would fit well within a service based model of registration, for example those learning disability providers who operate a combination of independent hospitals, nursing homes and care homes in Wales as a broad continuum of care.

5. *Do you think that any unintended consequences will arise from the Bill?*

Any transition or change will precipitate a loss to the market in the short-term, particularly in respect of those providers who are coming towards the end of their business life and those operating weaker provision. However, we would expect a more resilient range of provision to develop in the medium term.

In Wales there is an historical legacy where a number of services do not meet the environmental standards that are now common across the rest of the UK.¹² If Wales is keen to drive improvement some of the weaker services may exit the market.

6. *What are your views on the provisions in Part 1 of the Bill for the regulation of social care services? For example moving to a service based model of regulation, engaging with the public, and powers to introduce inspection quality ratings and to charge fees.*

Service based model of regulation

CSSIW supports the proposals in the Bill to move to a service based model of regulation, in particular CSSIW welcomes:

- the ability to focus on performance at a provider level, and the power to pursue remedies and enforcement action at a service/provider level when systemic failings emerge, not just at each individual setting level as at present;

¹² Knight Frank Trading Performance of Care – 2014 <http://content.knightfrank.com/research/548/documents/en/2014-2365.pdf>

- the flexibility and proportionality which would be available when registering new services and locations with existing providers;
- the power to register and test the competence of responsible individuals and to hold them to account.

Engaging the public in regulation

CSSIW strongly believes that the rights and expectations of people using services should be at the centre of regulation and inspection practice. CSSIW has given a lot of attention to the engagement of the public in its work, and has considered past schemes in Wales (lay assessors) and across the UK (experts by experience in England (CQC)), and lay assessors in Scotland. We have also piloted the use of independent visitors. In addition, we have established our National Advisory Board (which comprises of over 50% of people who use services or their carers), and will be shortly implementing regional advisory boards to quality assure our work and to go out on local inspections to provide feedback on our practice.

We have concluded that the most effective use of public engagement is holding CSSIW to account, and helping us to shape our priorities and approaches. We do not believe the routine use of citizens in inspections is cost effective (we do not have the resources to do this) and our feedback from previous schemes, and current schemes elsewhere, is that people who become involved in routine inspections do not remain “lay” for very long. Rather than pursue the routine use of lay inspectors, we believe that we need to maximise engagement and feedback from the natural communities around services when undertaking inspections. We need to encourage people to be our “eyes and ears”, and bring concerns to our attention (over 2014/15 we received 2,170 concerns from residents, relatives, staff and professionals) and we are, and have been, developing web based and social media solutions with some success.

We have been using expert lay citizens on a targeted rather than routine basis to bring a citizen’s perspective to our thematic studies, bringing people’s experiences to bear in shaping our approach, gathering evidence, providing feedback and evaluating outcomes. These include Voices from Care and Sense Cymru. Similarly, we will be engaging with All Wales People First and the All Wales Forum of Parents and Carers in our forthcoming thematic inspections of learning disability services in Wales.

Introduction of ratings

CSSIW strongly believes the careful use of ratings will be fundamental to drive future improvement across both regulated services and local authorities social services functions, in particular their role as responsible commissioners to ensure outcome based care. Indeed, in his care home review, John Kennedy recommends that governments “regulate the market to compete on quality” and having a national rating framework is a key mechanism for achieving this. The public want clear information about quality of care offered across different settings/locations,¹³ demonstrated by the increased access of

¹³ The [‘find a care service’ page](#) where people can also search for a service received 31,968 unique page views

CSSIW's directory of services (over 31,968 visits in 2014/15¹⁴). In the absence of ratings, we have streamlined our inspection reports to provide the public with clear information of our judgements about services and include information on areas where the service is failing and is not compliant with the law. CSSIW recognises the benefits and challenges of introducing ratings as highlighted in the evaluation of our early pilots in childcare.

We also recognise the potential to use ratings to identify trends over time, to consider provider performance across a number of settings and the performance of commissioners by collating and comparing ratings on an area basis.

We are currently working with the local authorities and the regulated care sector in the development of a new inspection framework aligned to the well-being outcomes under the 2014 Act. People are positive about this approach and early work on this will include testing the concepts of what a future ratings system could look like.

Strengthened powers of enforcement

CSSIW welcomes the provisions in the Bill. In particular, we believe the ability to issue improvement notices will resolve the current problems faced with undefined and often extended timescales when taking civil enforcement action. Improvement notices offer a targeted and time bound solution, which is focused on securing improvement in the first instance and is therefore less likely to create anxiety for those using or working in services compared with the current arrangement, which commences with a notice of proposal to cancel the registration of the service.

Power to charge fees

We would support retaining regulation making powers in the Bill to introduce fees and support a system of phased introduction of fees so that providers make a contribution to the costs. We acknowledge the financial model will need to be fair and flexible so that fees can reflect the cost of the services and that subsidies are directed to support those who need them. However, we also see in the medium to longer term that fees could be a catalyst to strengthen the responsibilities of both providers and commissioners to facilitate the local market and drive improvements in care. For example, providers who consistently need CSSIW's intervention to require them to make sustained improvements in response to poor inspection or concerns raised by the public to CSSIW's helpline (over 2170 in 2014/15). We believe there are circumstances where proportionate use of fees should be met by the provider, for example to offset the cost to CSSIW in extra site visits linked to our enforcement and re-inspection activity.

CSSIW is firmly of the view that the Welsh Government's current subsidy of the Disclosure and Barring Service (DBS) certificates for the former enhanced criminal record checks required at registration and renewal periods should cease. Registration with the UK Disclosure and Barring Update on-line service should be used as the mechanism to provide proof to the regulator of people's credentials to work with vulnerable people. We

¹⁴ Over 2014/ 2015 the CSSIW website received a total of 672,617 unique page views.*

are already taking action to remove our subsidy in the registration of childcare. The Welsh Government's consultation on extending regulation of childcare signals our intentions on this.

7. What are your views on the provisions in Part 1 of the Bill for the regulation of local authority social services? For example, the consideration of outcomes for service users in reviews of social services performance, increased public involvement, and a new duty to report on local markets for social care services.

The importance of a whole system approach on outcomes to enable people to achieve well-being across both local authorities' duties for social services and those for service regulation is noted earlier. Successful delivery of good quality care relies on a number of functions which are highly interdependent. Together, the Bill and the 2014 Act will provide cohesion in assessing the performance of local authorities social services functions in the assessment, care planning, commissioning, and then oversight and delivery of regulated care. The increased range of CSSIW's inspections, intervention and review of local authorities social services functions is positive, and will enable CSSIW to focus its work around particular aspects of one or more local authorities functions.

CSSIW believes that local authorities will find it challenging to prepare market stability reports. Our 2014 national review¹⁵ of local authorities commissioning in Wales found that local authorities and health boards need to make major changes to the way they plan and commission services for people with dementia. CSSIW's 2014 Annual Report points to the challenges local authorities face in their commissioning of both children and adult services.

The proposals for the directors' annual reports and CSSIW reports on their reviews of local authorities social services functions should be laid before the National Assembly for Wales is welcomed. This will ensure transparency and scrutiny at local and national level on local authorities' performance. There is an opportunity to link with the proposals in the Welsh Government's White Paper – Power to Local People, which would require the four main Audit, Regulation and Inspection (AIR) bodies in Wales “to produce a joint annual assessment of the state of local government in Wales”¹⁶.

It is important that production of multiple reports and assessments of local authorities' performance required in this Bill, and other statutes, are flexible and proportionate to avoid duplication. It is also important that local authorities can respond to, and report on, local and national determined objectives that do not detract from the main focus of delivering good care and outcomes for people.

8. What are your views on the provisions in Part 1 of the Bill for the development of market oversight of the social care sector? For example, assessment of the financial and corporate sustainability of service providers and provision of a national market stability report.

¹⁵ CSSIW National Review of Commissioning - <http://cssiw.org.uk/our-reports/national-thematic-report/2014/review-of-commissioning-for-social-care-13-14/?lang=en>

¹⁶ Page75, section 8 – Welsh Government White Paper – Power to local people .

We believe there is a lot to be gained in developing a market oversight approach. There is enormous of potential in making better use of the existing intelligence held by the regulator and commissioners and extending the range of information being collected. This would improve market intelligence and strengthen market shaping, as well as help public authorities to assess and anticipate potential risk of service failure. CSSIW's new computer database has the potential to make a significant contribution in this area, especially when service based registration is introduced, and we will be able to collect and analyse basic returns from providers as part of their annual reporting.

We would, however, sound a note of caution. We cannot offer complete assurance or be sighted on the unknown. We are aware from our conversations with CQC of the complexity of setting up these arrangements, the matter of commercial sensitivity and the very significant costs involved in setting up secure systems, and of employing financial experts with forensic accounting and analytical skills. We note that CQC have (from April 2015)¹⁷ established a scheme in line with new legal requirements and the success of this scheme is to be evaluated. However, the scheme is focused only on the few, very large "difficult to replace" providers (eg more than 2000 residents in care homes). The care market in Wales is quite different. Our register indicates 70% of providers currently operate one establishment and only 2%¹⁸ operate 10 or more. In CQC's consultation on the arrangements, providers advised of the burden and difficulties in supplying the financial information required. Local authorities were as concerned with the impact of the failure of smaller local providers in the areas as much as the failure of bigger companies, a position which would be akin to Wales. CQC has put in place a pathway in response to increasing risk which involves local authorities at the end stage. In Wales we have a more responsive approach, normally driven by the "escalating concerns" procedure which is brought into place when services are likely to fail.

In any market oversight scheme there are a number of major technical problems. Financial returns and company records lack currency and can be up to two years out of date. In addition, local current accounting data can be inaccurate, incomplete and hard to access or interpret. We learnt from Southern Cross that whilst individual services appear profitable, the liabilities and risks can be dependent on factors far removed from the operation of social care companies and commonly off shore. The domiciliary care market is currently a case in point where, behind the scenes and with no consequent effect on registration, companies are constantly merging and changing hands, some with complex debt structures. We have been and will continue to work with other pan UK regulators on this, most particularly CQC, to remain sighted on the large pan UK providers.

Within these constraints, and with some increased capacity, CSSIW could deliver simple market profiles of general oversight and trends. We should be able to identify known and quantifiable risks, such as services in administration, or where financial markers are perverse (eg lack of spend on building and repairs) or where concerns have been raised about unpaid bills or reductions in costs, quality of food or staffing levels. We would not, however, be able to collect or analyse more sophisticated financial data and trading indicators as now planned in England.

¹⁷ CWQC Oversight of Social Care Market <http://www.cqc.org.uk/our-new-role-market-oversight-care-homes-and-other-social-care-services>

¹⁸ CSSIW register 2014/15

9. What are your views on the provisions in Part 3 of the Bill to rename and reconstitute the Care Council for Wales as Social Care Wales and extend its remit?

We have no firm view as to the new name for the Care Council for Wales but the new title does not acknowledge their role to support and build capacity in workforce standards and qualifications for the broader childcare sector in Wales, including what is currently considered as “early years” provision. We understand that this is an area of increasing importance to the Council given the Government’s commitment to a ten year workforce development plan for the sector. CSSIW is therefore pleased to see the wide regulation making powers to extend the categories of persons as a social care worker [Section 78(2) refers] includes child minding and day care services.

In respect of the extended remit of Social Care Wales, we note the improvement function in Section 68 – *the power to provide advice and support (including grants) to any person providing a care and support service*. There will be a need to clarify how this role will be discharged and protocols established to ensure that service regulation, and the improvement functions of Social Care Wales are complementary and do not come into conflict.

10. What are your views on the provisions in Parts 4 - 8 of the Bill for workforce regulation? For example, the proposals not to extend registration to new categories of staff, the removal of voluntary registration, and the introduction of prohibition orders.

We are pleased to see regulation powers will enable the registration of the workforce to be extended. We also support the inclusion of inspectors within the list in Section 78 of the Bill to include the majority of service areas that CSSIW currently inspect. We have been working with the Care Council for Wales in developing a new qualification framework for CSSIW inspectors and believe that over time requiring inspectors to have the new inspection qualification will significantly enhance the role, status and skills of inspectors. It will also provide a professional career pathway to attract high calibre social care, childcare and nursing professionals to become inspectors, and align arrangements with Estyn who operate a register of inspectors for schools.

11. What are your views on the provisions in Part 9 of the Bill for co-operation and joint working by regulatory bodies?

CSSIW currently shares information and works collaboratively with the workforce regulator, the Care Council for Wales, and a number of AIR bodies in Wales and across the UK, as well as local authorities and local health boards, in particular in relation to the protection of people. However, the inclusion of both general and specific duties on the face of the Bill in relation to co-operation between the services, workforce regulator and relevant public bodies is welcomed. It signifies and promotes the importance of reciprocal arrangements between all parties to share intelligence and, where relevant, joint action across the whole system to improve people’s well-being.

Sharing of evidence to meet the Bill objectives will enable both the service and workforce regulator to jointly address and improve poor performance, or failings in management of the responsible individual for a service. The delegation of functions between CSSIW and the workforce regulator could be helpful in some circumstances, but needs to be worked through into practice.

12. In your view does the Bill contain a reasonable balance between what is included on the face of the Bill and what is left to subordinate legislation and guidance?

Yes, however, we note that there is significantly more prescription on the face of the Bill. This can be positive, but may also lead to potential barriers, intentionally or otherwise, if a similar approach is taken in the development of regulations and codes of practice. From a service regulator's perspective, we believe that the law and systems must be sufficiently flexible to enable us to continually improve on our performance, and the performance of those we inspect, through regular review and adjustment to our inspection methods to meet changing patterns of care and best practice. For example, regulations to be made under Section 35 in respect of the criteria to be applied in CSSIW's ratings of a service. We acknowledge, however, the broad spectrum of powers in the Bill together with those in the 2014 Act will future proof the system through secondary law and support the National Assembly for Wales' scrutiny of key regulations through the affirmative procedure.

13. What are your views on the financial implications of the Bill as set out in parts 6 and 7 of the Explanatory Memorandum?

CSSIW has provided indicative costs to the Welsh Government to inform the financial implications as set out in the Explanatory Notes and Regulatory Impact Assessment to the Bill. Costs will vary depending on the detailed arrangements of the system to be effected through regulations, codes of practice and CSSIW's own operating policies and guides. We will work closely with the Welsh Government in their development to ensure proportionality and efficiency.

There are significant and inevitable costs related to transition. CSSIW wishes to emphasise to the Committee the importance of having robust transitional arrangements for the re-registration of the current cohort of providers under the new rules to ensure the accuracy and integrity of the service regulator's register of providers, and to ensure the effective administration of the new regulatory and inspection regime. The problems which stemmed from transition in 2002 when the Care Standards Act came in were, in part, reflected in some of the issues which emerged in Operation Jasmine. More recently, we have seen the impact of transition in England when CQC was established and the focus went from maintaining day-to-day inspections to completing the transfer of registration and registering new services.

CSSIW is also the regulator for childcare¹⁹, which is also subject to reform, but will continue to operate a register of establishments. Like many public service and regulatory bodies, CSSIW has made efficiencies (a reduction of £2.1m over three years to an annual operating cost of £14.4m in 2014/15) in its operation of its common registration, inspection

¹⁹4,446 , childcare providers as of March 2014.

and enforcement model across both its childcare and other regulated services to be regulated under the Bill. CSSIW's future operation of two different regulatory systems for childcare and care and support, will require CSSIW to change its business and delivery model and will not achieve the critical mass needed to offer the same level of efficiency in CSSIW's financial performance.

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

None at present but CSSIW welcomes the opportunity to discuss our views in more detail in our oral evidence to the Committee later this month.

Yours faithfully

A handwritten signature in blue ink that reads "Richardson". The signature is written in a cursive style.

Imelda Richardson
Chief Inspector
CSSIW – Care & Social Services Inspectorate Wales