

**Health and Social Care Committee**  
**HSC(4)-06-12 paper 1**  
**Inquiry into residential care for older people – Evidence from**  
**the Older People’s Commissioner for Wales**

**Introduction**

The Older People’s Commissioner for Wales has four general statutory functions:

- (a) to promote awareness of the interests of older people in Wales and of the need to safeguard those interests;
- (b) to promote the provision of opportunities for, and the elimination of discrimination against, older people in Wales;
- (c) to encourage best practice in the treatment of older people in Wales;
- (d) to keep under review the adequacy and effectiveness of law affecting older people in Wales.<sup>[1]</sup>

The Commissioner is an independent advocate for older people in Wales. This response to the Consultation is in accordance with the Commissioner’s general statutory functions. The Commissioner’s position is that she will generally make comment relating to core principles. This approach is taken in order to avoid any potential compromise of the Commissioner’s regulatory functions. Any practical suggestions made in this document are based on concerns and information brought to the Commissioner by older people.

**United Nations Principles**

The Commission commends the UN Principles for Older Persons as the basis for the provision of residential care services. Those which relate directly to care are:

1. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.
2. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.
3. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

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<sup>[1]</sup> Commissioner for Older People (Wales) Act 2006, s.2(1)

4. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.
5. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

**Observations related to some of the terms of reference set out for the Committee's inquiry are detailed below:**

### **Entry into care**

Admission into care is often preceded by a crisis or period of ill-health.

In our work, the Commission has seen evidence that the nature of decision making has a notable impact on older-people's adjustment to life in care homes.

When individuals do enter care, it is often in traumatic circumstances, for example admittance via hospitals, and there is a risk of being labelled with challenging behaviour.

Advocacy can be crucial in decision making about entry to a care home.

'Decisions about entry into care can all too easily be made by relatives and professionals whose interests and views may not concur with those of the older person. Such decisions might also be taken whilst the older person is in a particularly vulnerable position, such as at the point of hospital discharge. Similarly, in an evidence review of access to advocacy, Townsley et al (2009) acknowledge its potential benefits when entry into residential care is a possibility'

A Scoping Study of Advocacy with Older People for OPCW by Andrew Dunning.

Access to information and advice services is variable. There remains anecdotal evidence of residents 'lost in care' especially when individuals have a cognitive impairment.

Much of our direct engagement with care homes suggests that older people have low expectations of care homes prior to admission and that they have low satisfaction thresholds once admitted. For example one man in his 90s told the Commission that he was assisted with

getting dressed and had his meals prepared and bed made and that was all that he could want in life at his age.

### **Capacity and staffing**

During our various interactions with care homes, the prevalence of cognitive impairment amongst the older residents was notable. This was also a common theme during our first Review into dignity and respect for hospital inpatients. One of the recommendations of that Review called for better knowledge of the needs of older people with dementia, together with improved communication, training, support and standards of care.

Anecdotal evidence from our engagement with the care home sector is that staffing levels are being reduced. This can impact the amount of time staff can spend with residents for informal engagement and conversation. Residents have told us that they felt more staff are needed to enable time for more informal interaction.. We note that evidence received by the committee from older people and relatives expresses concern over the level of activity for residents. This theme also emerged strongly from our hospital review. The UN Principles refer to the importance of 'social and mental stimulation'. It is vital that people in residential care are able to engage in activities of their choice.

## **Role of Independent Mental Capacity Advocates (IMCAs) and Deprivation of Liberty Safeguards**

Older people are the biggest client group to which IMCA services in Wales provide support.

IMCA services have identified a number of concerns to the Commissioner regarding the implementation of the Mental Capacity Act, although they were keen to recognise that a large number of older people have been adequately safeguarded by Mental Capacity Advocates (MCAs) and IMCAs.

Evidence provided to the Commissioner suggests that the Mental Capacity Act (MCA) is misunderstood by some professionals and its provisions and requirements are not entrenched into practise. There is a lack of awareness of the statutory duties under the MCA and particularly about what constitutes best interests, and whose best interests.

There appears to be inconsistencies around whether mental capacity issues are flagged and the IMCA services are not receiving the number of referrals they should. There are significant variations across different areas regarding the referral numbers.

The Commissioner has been informed by a number of practitioners that there is a lack of understanding regarding Deprivation of Liberty Safeguards especially in drawing distinctions between restricting and depriving liberty. In practice, we are concerned that the threshold of what constitutes a DOLS may be set too high thus seriously reducing the number of cases registered. There are examples where temporary arrangements of restriction remain in place well beyond the threshold for triggering DOLS. There is also evidence of inconsistency in the application of DOLS. For example, it has been reported to the Commission that there is significant variation in the number of Deprivation of Liberty Safeguard procedures between the northern and southern parts of one local authority area

Reporting and monitoring is problematic. There is no all-Wales recording system.

### **Welsh Government Section 7 Guidance: 'Escalating concerns with, and closures of, care homes providing services for adults'**

In 2010, the Commission was contacted by a considerable number of older people and their relatives who were affected by potential care home closures. These homes were under threat of closure due to a change in the local authority's policy about residential accommodation. The Commission spoke with the local authority to

express concerns about the uncertainty and worry that this threat was causing residents and relatives. We also contacted the Welsh Government and were told that the 'Escalating concerns with, and closures of, care homes providing services for adults' guidance should be applied by the local authority. However, a careful reading of the guidance indicated that the guidance as it stands does not provide a directly relevant framework for dealing with the threat of closure of local authority care homes as a matter of policy.

On 31 January 2011 the Commissioner wrote to the Welsh Government expressing concern. A copy of the letter is attached at Appendix 1. The main concerns were:

1. the lack of clarity in the 'Escalating concerns' guidance about how it applies where the threat of closure is as a result of a policy decision rather than due to concerns about quality of care or safety or financial viability;
2. the haphazard nature of any consultation process, the point at which it takes place and its, sometimes, indeterminable length;
3. the lack of independent advocacy for older people; and
4. the lack of Independent Mental Capacity Advocates for those older people who lack capacity.

The Commissioner received a response, dated 13 April, which responded in part to the issues raised (also at Appendix 1).

We raised the matter with the researchers from Swansea University carrying out the work on care home closure. We also commissioned a specific piece of work to look at the issue in more depth.

A draft copy of the Swansea University research findings and recommendations has already been submitted to the Health and Social Care Committee by the University as evidence (RC 72) and we would draw the Committee's attention to Chapters 6, 7 and 8 in particular. We will not repeat the issues here. The Commissioner strongly supports the recommendations made by the researchers in relation to updating the Welsh Government's guidance so it better protects the interests of older people in Wales.

In our view, the 'Escalating concerns' guidance and commissioning guidance fall short of providing a framework that ensures older people's interests are properly protected during home closures. Discussion with representatives from seven local authorities in Wales

showed that local authorities are not routinely using the 'Escalating concerns' guidance when they close homes as a result of a policy decision. The representatives saw the guidance as having been designed for a different purpose and did not see it as adequate guidance applicable to a policy based closure. They also did not think that commissioning guidance is directly applicable, viewing it as relevant mainly in a contextual sense. They would welcome the creation of bespoke best practice guidance.

### **Financial security of care home providers**

The care sector is increasingly reliant on private sector providers, but a significant proportion of its income still comes from the public purse via local authority funded residents.

The Welsh Government and local authorities therefore have both the right and the responsibility to assess the financial stability of private companies who they entrust with vulnerable people's care. Financial stability should be a key consideration in the commissioning and awarding of contracts, and in the monitoring of care standards in homes in Wales.

Older people in a care home are not a commodity, they are human beings who have the right to be cared for properly and treated with dignity and respect. When care homes are run by businesses whose basic structures are less than robust, they are gambling with the wellbeing of the vulnerable older people who trust them with their care. It is vital that businesses which provide care are able to cope with difficult times as well as good.

The Commission would encourage the care sector in Wales to tell people what steps it will take to ensure that circumstances such as those surrounding the Southern Cross situation do not happen again. In particular it must look at how it manages risk, and consider ways of insuring itself against financial crisis, as other sectors do. Above all, residents must not become victims of financial crises which are not of their making.

### **Choice and Diversity of provision**

With local authorities increasingly disengaging from providing care and a widespread move towards independent provision, it is important to address residents' fears about what impact these changes may have on their care. Independent provision is the subject of some myths, and these should be dealt with through clear and open communication, good information and advice, and the provision of advocacy where appropriate.

To ensure a robust care sector, and allow people a wide range of choice, the Commissioner believes it is important to maintain a diverse selection of private and publicly run residential homes. The One Wales document from the previous Welsh Government contained an undertaking to look into the viability of not-for-profit nursing care, and there is merit to considering a similar approach in residential settings.

### **Paying for Care**

There is a general recognition that the current arrangements for paying for care are unfair and unsustainable. Any new system for care funding should be mindful of the UN Principles and of the need to end discrimination on the grounds of age.

Prior to the last UK General Election, the governments in London and in Cardiff held a consultation on paying for care. In Wales, the findings implied that there were opportunities for a differing emphasis in Wales. In reality the ties between care provision and benefit entitlement mean that developments in Wales are linked to developments in England and decisions made by the UK Government.

The report of the Dilnott Commission and its recommendations represent a real opportunity to address many of the inconsistencies and inequities in the current system. We have urged the UK government to act on the report's findings. We should do all we can in Wales to improve the current situation for older people.

**The Commission is engaged in a range of activities which are pertinent to the subject matter of the Committee's current inquiry. These include:**

- **Undertaking a Review into advocacy arrangements which safeguard the interests of older people in care homes**

This Review was first announced in September 2011 and will report in June 2012. The Review builds on two substantial pieces of research. The first was a scoping study on advocacy in Wales undertaken by Andrew Dunning from Swansea University (attached). Secondly the Commission funded Age Cymru to publish 'Advocacy Counts 3' in 2011(also attached). This report highlights the current state of advocacy provision in Wales and enables comparisons to be made with previous studies in 2007 and 2008.

The Review covers the advocacy arrangements of the following:

- Welsh Government (Minister for Health and Social Services and Deputy Minister for Social Services and Children),
- Local authorities in Wales,

- Local Health Boards in Wales where there are joint commissioning arrangements in place, and
- Local authority and independent care and nursing homes.

The initial phases of the Review have involved desktop research in the majority of local authority areas (13), where data applicable to four care homes per authority were considered in detail. The Review encompasses residential, nursing and 'elderly mentally infirm' care homes. It includes homes run by local authorities and the voluntary and private sectors. Visits were made to three care homes in each of five demographically distinctive local authority areas in Wales.

The Commission is currently analysing the findings of the Review before framing recommendations for a range of organisations. The bodies subject to the Review will be required to follow these recommendations. As the committee will appreciate, we cannot share much at this stage because the work is not yet complete but we would welcome the opportunity to share our detailed findings and recommendations with the Committee after the Review report has been published in June. Some of the general observations made during our visits do, however, strike a common chord with earlier work undertaken by the Commission in relation to residential care.

- **Undertaking a call for evidence on the experience of older people in receipt of domiciliary care**

The call for evidence commenced in September 2011 following some well-publicised concerns about commissioning processes for domiciliary care and the impact of change on service users, as well as the variability in quality and consistency of care provided. The Equality and Human Rights Commission inquiry in England also highlighted the need to begin developing a Welsh perspective on the experience of older people receiving care at home. The sustainability of domiciliary care is pivotal in off-setting the need to enter residential or nursing care.

The Commission has received over 200 responses and is developing this evidence base further by circulating questionnaires to home care users in 4 local authority areas to represent the breadth of older peoples experiences throughout Wales. The Welsh Institute of Health & Social Care has commenced the analysis of responses.

- **The Commissioner has commissioned research on whistle-blowing culture in Wales, together with a call for evidence which was launched earlier this month**

The Commissioner has specific legal powers to review arrangements for whistle-blowing in Wales. Before determining any future action on this issue we want to establish an evidence base about the culture that



surrounds whistle-blowing in Wales. This work is being conducted on our behalf by Cardiff University and will report in late Spring/early Summer 2012.

We have also commissioned a piece of work by Public Concern at Work which will be published in the Spring.

- **The Commission has been a partner in research carried out by Swansea University into care home closures.**

We are aware that Swansea University has shared a copy of this important report with Committee Members already and we would strongly advise the Committee to consider its recommendations in detail. Motivated by the volume and nature of calls on the poor management of care home closures, the Commission helped to initiate this work. We have identified the need either to enhance the 'Escalating concerns' guidance or produce additional guidance. This is discussed in more depth elsewhere in this paper.

- **The Commission conducted a series of seminars on frailty, one of which was held in March 2011. This was on the emerging findings of the care home closure research referred to previously and on the capacity of extra care housing to meet the needs of those with significant cognitive impairments and with deteriorating conditions**

The Commission's interest in extra care housing builds on a joint seminar held with the Joseph Rowntree Foundation in May 2009 and on research undertaken by the Centre of Innovative Ageing in Swansea University (Extra care – meeting the needs of fit or frail older people? – Burholt et al – July 2010). Whilst being impressed with many of the schemes which she and her staff have visited, the Commissioner was concerned to learn about differential approaches to residents whose health conditions worsen and the limited eligibility criteria of other schemes.

- **Taking a more coherent approach to meeting the information and advice needs of older people**

In January 2012, the Commission hosted a conference to consider a more coherent approach to meeting the information and advice needs of older people. A report into the state of information and advice provision currently is available on the Commission website. The report highlighted particular challenges in the health sector. The provision of information enabling timely informed choices to be made for future care options often at very short notice is of particular importance and was highlighted by the Institute of Welsh Affairs in its publication for the Commission 'Adding life to years' (Osmond, June 2010). The Commissioner is considering issuing guidance in this area.

**Commission representatives will be happy to elaborate on these and any other initiatives when meeting the Committee.**

Link to Advocacy Counts 3 – Report and Executive Summary

[http://www.olderpeoplewales.com/en/news/news/11-03-01/Advocacy\\_Counts\\_3.aspx](http://www.olderpeoplewales.com/en/news/news/11-03-01/Advocacy_Counts_3.aspx)

Link to scoping study of advocacy arrangements in Wales and Executive Summary

[http://www.olderpeoplewales.com/en/news/news/11-08-11/A\\_Scoping\\_Study\\_of\\_Advocacy\\_with\\_Older\\_People\\_in\\_Wales.aspx](http://www.olderpeoplewales.com/en/news/news/11-08-11/A_Scoping_Study_of_Advocacy_with_Older_People_in_Wales.aspx)

## Appendix 1



# Older People's Commissioner for Wales Comisiynydd Pobl Hŷn Cymru

Cambrian Buildings  
Mount Stuart Square  
Cardiff  
CF10 5FL

Mr Steve Milsom  
Head of Adult Social Services  
Policy Division  
Welsh Assembly Government

31 January 2011

Dear Steve,

### **Re. Statutory Guidance: Escalating Concerns With, and Closures of, Care Homes Providing Services for Adults**

In recent months, I have been contacted by older people who live in care homes facing potential voluntary closure because the care home is said to be no longer financially viable. These older people and their representatives have shared with me concerns about the uncertainty of the situation in which they find themselves. They have told me about the worry, and sometimes distress, they are caused by not knowing what their future holds.

Members of my staff have been looking carefully at this matter in order to promote awareness of the interests of these older people and encourage best practice when dealing with matters that affect their home life. We have also spoken with some Directors of Social Services, particularly about their use of the 2009 'Escalating Concerns' Statutory Guidance. This has led us to think that there is a gap in the guidance in relation to care homes where there are no concerns about quality of

care, no concerns about safety and where there has been no final decision about closure.

For example, there are an increasing number of local authority areas where the possibility of care home closure is announced and thereafter follows a long period of consultation and, sometimes, delay. In such scenarios, we have found that older people may be told that although no decision has been made to close the care home they must still visit other care homes with a local authority social worker so they can decide where they would like to go when the care home closes. If they express that they would rather wait until a final decision to close is made, they are told that if they wait until then they will 'miss out on a good place'. We are deeply concerned about what seems to be an insufficient use of Independent Mental Capacity Advocates in these situations. Local authorities and NHS bodies have a duty to instruct IMCAs where accommodation arrangements are being made on behalf of an older person lacking capacity without friends or family. Neither are we convinced that older people have access to independent advocacy services at an early enough stage to allow them to voice their opinions about the potential closure, for example, from the point when potential closure is first announced and then followed by a period of consultation. Local authorities do not seem to be sufficiently clear about the role of the statutory guidance and have expressed to us a need for further clarity.

The Older People's Commission is supporting research by Swansea University into the prevalence, process and impact of care home closure in Wales. We are holding a set of seminars to look at the emerging findings from this research and other research evidence on extra-care facilities. However, we do not want to wait until the final outcome of these initiatives before raising our concerns about the statutory guidance with the Welsh Assembly Government.

I would welcome a meeting to discuss these concerns more fully. I see this as an opportunity to make the statutory guidance even more widely applicable, which will in turn promote and safeguard the interests of older people in Wales.

Yours sincerely,

Ruth Marks

Older People's Commissioner for Wales



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

Ruth Marks  
Older People's Commissioner for Wales  
Cambrian Buildings  
Mount Stuart Square  
Cardiff, CF10 5FL

15 APR 2011

Dyddiad/ Date: 3 April 2011

Dear Ruth

**STATUTORY GUIDANCE: ESCALATING CONCERNS WITH, AND CLOSURES  
OF, CARE HOMES PROVIDING SERVICES FOR ADULTS**

Thank you for your letter of 31 January concerning the above guidance. I must first apologise for the delay in replying but I understand that you met with the Deputy Minister for Social Services more recently and discussed this matter although I understand it was not covered in any great detail.

It is always a matter of regret when care homes providing good quality services are subject, for whatever reason, to proposals that could affect their future operation and I can appreciate the uncertainty and distress that such situations cause. From the information contained in your letter it would appear that representations made to you might have been from older people living in local authority owned care homes which could be facing "voluntary" closure.

As you will be aware, it is the statutory responsibility of each local authority to assess the social care needs of its resident population and to provide, or commission as appropriate, a range of social care services to meet those needs. As such the Assembly Government is not in a position to intervene in any proposals affecting service provision at a local level or indeed influence any decisions over service provision. However, in line with the Assembly Government policy, local authorities have been reviewing their social service provisions to ensure they meet the needs of their resident populations and can respond to future demands. As a result a number of authorities have reviewed their current residential provision to consider whether their homes are fit for purpose with a view to re-providing services in other settings. As a consequence this could lead to the closure of some homes.

Parc Cathays  
Caerdydd  
CF10 3NQ

Cathays Park  
Cardiff  
CF10 3NQ



BUDDSODDWR MHEIN FODL  
INVESTOR IN PEOPLE

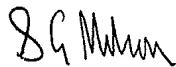
Ffôn • Tel: 029 2082 3206  
GTN: 1208 3206  
Ffacs • Fax: 029 2082 3924

E-bost • Email: [steve.milsom@wales.gsi.gov.uk](mailto:steve.milsom@wales.gsi.gov.uk)

I can assure you that of paramount importance in any circumstance where the future of a care home is uncertain is the welfare of residents and to ensure appropriate steps are taken in a timely manner to safeguard each resident's future care. Local authorities and/or the LHB will need to ensure the welfare of residents is not compromised and that a full assessment of their long term care and accommodation needs is undertaken and full support is provided during any necessary move to new accommodation.

I hope I have been able to provide some further clarity on this issue and I can advise you that I will bring the specific issues you have raised to the attention of CSSIW. If as a result of discussions with my colleagues it is considered necessary to review any aspect of the guidance I will ensure you are advised accordingly.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S G Milson'.

**STEVEN MILSOM**  
Head of Adult Social Services Policy Division, Health & Social Services  
Directorate General/ Yr Is-adran Polisi Gwasanaethau Cymdeithasol Oedolion,  
Cyfarwyddiaeth Gyffredinol Iechyd a Gwasanaethau Cymdeithasol