

Social Services and Well-being Bill Advisory Group response to the Health and Social Care Committee call for evidence (Stage 1)

About the Advisory Group

The Advisory Group aims:

To help ensure that the Social Services and Well-being (Wales) Bill delivers robust outcomes for the people of Wales who need access to social care services to live full and independent lives.

We are made up of representatives from a series of third sector and professional organisations who work with people who use social care and support services in a range of settings throughout Wales.

Our members are:

Leonard Cheshire Disability Cymru (co-secretariat)
Sense Cymru (co-secretariat)
Age Cymru (co-secretariat)
Barnardo's Cymru
British Association of Social Workers (BASW) Cymru
Carers Wales
Chartered Society of Physiotherapy
College of Occupational Therapists
Hafal
Mencap Cymru
MS Society Cymru
NAS Cymru
NSPCC Cymru Wales
RCN Cymru
Scope Cymru
WRVS

We welcome this opportunity to respond to the call for evidence. We have limited our response to those areas where all members of the group are in agreement.

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.**

We broadly support the Bill's aim to bring together duties and functions in relation to well-being of people who need care and support and carers who need support. We support the idea of bringing legislation together and modernising it. We believe the legislation should be clear and accessible for people who are affected by it.

We do, however, have some concerns. As the Bill is currently worded local authorities would have a duty to maintain well-being for people who need care and support and carers who need support. However, it remains unclear about whether this covers people with a need or an eligible need, and how this would work in terms of preventative services or self-funders. This must be resolved in order for the Bill to meet its stated aims.

Repeals

There are positive intentions around well-being. However, without a clear list of repeals and more explicit reference to which legislation is being replaced it is unclear whether this is achieved. The Bill clearly aims to move current legislation into a Welsh statute. However, as the list of repeals is as yet incomplete we are concerned about whether all appropriate statutes have been included.

For example, in current legislation the Chronically Sick & Disabled Persons Act 1970 (Section 2) requires local authorities to assess the needs of a disabled person (as defined by National Assistance Act 1948, Section 29). The Welsh Government has said it would like to simplify existing legislation into a single statute, so we expect the single duty to assess in the Social Services and Well-being Bill would replace the duty in the 1970 Act and the others that exist in other Acts. However, the assessment duty in the 1970 Act exists in legislation covering England and Wales.

A further example exists in the definition of a disabled child. The Bill draft will mean that the specific definition of disabled child provided under the Children's Act 1989 17(11) will in theory be replaced by the more general definition of disability contained in this Bill. Under the existing legislation if a child meets the specific definition of disabled child they will automatically be seen as a child in need and therefore come under the local authorities' duty to

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provide a range and level of services appropriate to their needs. The 1989 Act definition of a disabled child, while not perfect, meant that disabled children were legally defined as children in need, which acted as a 'passport' to assessment and services. The Bill as currently worded therefore could potentially be seen to dilute the rights of disabled children to assessment and services.

We believe this and other relevant parts of existing legislation would need to be revoked to make way for the Social Services & Well-being Bill. We suggest that the Committee examines these examples to assess how the Bill will affect existing care and support.

Sustainable Development White Paper

We also note that the White Paper for the Sustainable Development Bill aims to enhance: 'economic, social and environmental wellbeing of people and communities'. However, it contains no reference to the Social Services and Well-being (Wales) Bill (and vice versa), which is a cause for concern. 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.

We believe there should be a common definition of well-being adopted across the Welsh Government.

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.

We fully welcome the positive objectives as laid out in the Explanatory Memorandum. However, we are concerned that these aspirations are not realised within the current drafting of the Bill.

Voice and control

We welcome the principle of the person centred approach of voice and control for people using care and support services. However, we are concerned that important sections of the Bill will not achieve voice and control, as it is currently drafted. In parts the Bill still keeps a service led model (matching people to available services) rather than focusing on individual outcomes and finding ways to meet those needs.

Co-production

We would like to see provisions that require local authorities to actively involve the person in the whole assessment and care planning process; to co-produce the care plans and outcomes, and to promote the options that are available for people to exercise voice and control. This applies across all local

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authority duties and is not restricted to individual methods, such as direct payments.

However, in the direct payments example we know there is limited take up in Wales. People can access direct payments as the law stands now, but there is a proportion of the population that does not know about them or understand what they are. In this area the Bill should result in people being provided with accessible information about direct payments, so that they can decide whether or not to use them. The outcome we would wish to see is people being able to take informed decisions about their care and support.

Collaborative working (e.g. LHBs)

We are concerned that the role of partners (such as Local Health Boards) remains unclear. We are unsure that the Bill extends the role of partners beyond that which is already in place, or how it will encourage work between NHS and social services and with social enterprises, co-operatives and third sector.

For example, in the case of assessments we had hoped to see local authorities/LHBs able to delegate this to each other, where appropriate. However, the Bill allows for people to undertake assessments at the same time but not to delegate. The person's overall experience of the system would be improved – and resources could be saved - by an assessment being undertaken by one appropriate person or team.

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.

More detail around the Welsh Government's intentions for charging would be particularly welcome.

Eligibility

We welcome in principle the proposed introduction of national eligibility criteria as we would not want to see care restricted by local authority boundaries.

The eligibility framework is important because it will set the criteria used by local authorities to decide whether or not a person's needs or desired outcomes will be met by local authority social care and support services. So, it is impossible to envisage how the proposals outlined in the Bill will work in practice without knowing the plans for eligibility criteria.

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

We would like 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 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 and details of at what point the local authority has discharged their duty in relation to people who need care and support services.

Well-being

We think there should be a standard definition of wellbeing across the Welsh Government. Within the Bill there should be a clear reablement duty based on the concept of improving wellbeing.

The intention of the Bill to ensure that wellbeing is enhanced and that services respond flexibly to the developing needs of individuals, their family and carers is excellent. The Bill needs to identify more clearly the steps envisaged to provide proportionate support to people. This links to the national eligibility criteria and assessment, and to the intention to promote self responsibility and voice and control.

Likewise we believe the preventative services section should define prevention in terms of well-being to ensure that there is a clear definition of services at an individual and community-wide level that could be considered preventative.

Duties to meet needs in different ways

The Bill identifies the importance of providing advice, information and signposting to anyone who requests it. The Bill is clear that preventative services should be provided to prevent people developing needs for care and support or to reduce those needs but it lacks clarity about who would have access to preventative services; the difference between when a person 'needs' some targeted intervention to prevent them needing care and support and the point at which they are deemed to have 'care and support' needs. Once this is clear it will be possible to identify when eligibility and charging are applied and ensure there are no unintended consequences for this Bill.

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Thus, the Bill needs to be explicit about social services' duties to:

1. Provide universal/self management/'normal' community support (information, advice, signposting or generic services accessible to the general population)
 2. Provide targeted/preventative interventions (what makes a person 'eligible' for these? These should be before financial tests and eligibility tests as they must be provided to people who are traditionally 'low' priority or they will not achieve their intended effect)
 3. Undertake full integrated assessment and provision of support for complex needs and thus entry to significant services, which should attract financial assessment given the potential for making a contribution to care costs (and what makes a person 'eligible' for these?)
- 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.**

Charging

Provisions in the Bill will allow local authorities to charge for information and advice. We are concerned about these provisions and would welcome indication from the Welsh Government about its policy intentions, i.e. what kind of information and advice services might be subject to charging.

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

Preventative services

We welcome the acknowledgement 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 if possible. 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.

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The Bill's current drafting allows for preventative services to include universal services, e.g. libraries for information 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, person-level prevention.

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. At present we cannot see how local authorities will decide who is entitled to receive prevention services.

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. We believe the model proposed for John Bolton has considerable merits: with universal services, targeted interventions for lower level needs and eligible services for those who will have ongoing needs.

Assessments

We think that formal assessments are the best way to establish people's care and support needs. We would be anxious to ensure, therefore, that access to assessments is not restricted in any way by the Bill.

By not making carers' assessments portable we believe the Bill 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.

Resource implications

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

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

Information and assistance services

Information services are vital to promote voice and control, so that people have the support they need to access services to raise their wellbeing. The availability of information needs to be improved. We would recommend that the Carers Strategies (Wales) Measure could be used as a good practice model for adults, e.g. that information should be made available at the earliest possible opportunity.

Advocacy

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Advocacy is also vital to promote voice and control, but is currently largely missing in the Bill. Access to independent advocacy will be important to enable people to access new service models brought about by the Bill.

Promotion of co-operatives, social enterprises, user led services and the third sector

We welcome the principle of promoting co-operatives, social enterprises, etc and believe there is great potential in the idea. However, we would like to see the Bill change practice and realise the policy intention, so we believe that the current list in the Bill of examples of services should be expanded; The list of care and support services given as examples in section 20 of the Bill is not helpful as helpful as a clear definition of a care and support need would be.

We are keen to ensure the any repeal or replacement of the equipment and adaptation provisions in the Chronically Sick and Disabled Persons Act 1970 does not mean that the duty to provide these is lost.

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

As previously stated, we welcome the aspirations stated in the Explanatory Memorandum that the Bill aims to deliver. However, there are many potential barriers to implementation of the provisions of the Bill.

Costs

We see the main barrier as the cost projections and are especially concerned about the lack of clarity on this. As already stated we are concerned by the lack of clarity in the Bill and Explanatory Memorandum. As mentioned the Explanatory Memorandum does not sufficiently cover 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 concerns about the Regulatory Impact Assessment. For example, the only cost listed to implementation of the Bill is 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, including health, housing, education and welfare.

We are also concerned that the cost of maintaining the status quo is not listed. We recognise the argument that change is needed in order to make social services sustainable. However, we would therefore assume that there is a model which includes costs of how much social care services would cost

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if the changes were not made. We expected to see this in the Explanatory Memorandum.

Collaborative working

We are concerned by the lack of explicit duties on the health service, and would have liked to see further scope for better joint working in the Bill. We feel that what is drafted will maintain the status quo, and cultivate silo working rather than meaningful joint working. We have already stated our concerns around joint working, particularly with LHBs.

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.

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, particularly relating to definitions (such as what is an assessment) on the face of the Bill. Our response to Question 7a deals with regulations in more detail.

We are concerned that the Bill as currently drafted formalises current practices in law rather than delivering the Welsh Government's vision and objectives.

Definitions and clarity

We would welcome social care and support legislation that is easier to understand. However, we believe some definitions in the Bill are either not as clearly defined as we would like or defined in a way that may have unwelcome consequences.

The Explanatory Memorandum states that: [The Bill]

“Integration and simplification of the law for people will also provide greater consistency and clarity to people who use social services, their carers, local authority staff and their partner organisations, the courts and the judiciary.”

We are concerned that there are some key definitions which seem to have been overlooked in the drafting of the Bill. We believe following concepts are not defined:

- Assistance.
- Abuse and neglect.
- A care and support need.
- Disabled child.

We also note that it is not currently clear what is meant by ‘preventative’ services. The Bill contains a list purposes for services which are very process-driven rather than person centred; the focus should be improving wellbeing and quality of life for individuals. We believe there should be a reference to promoting enablement on the face of the Bill to ensure that preventative services are outcome focussed.

Principles

On outcomes we believe the Bill needs to focus on the person and individual outcomes, not fitting people into existing services. We are especially keen to see a set of principles which someone receiving care and support can expect to be abided by.

We endorse the Law Commission’s recommendation¹ that the statute should set out a checklist of factors that must be considered before a decision is made in relation to an individual. While we recognise that these are with reference to adult social care and support only we believe that they provide a good starting point to draft principles that work for both adults and children.

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.”

¹ Adult Social Care, Law Commission, 2011

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Regulations

We also have concerns that in places where regulations are appropriate the Bill could be more prescriptive about what ‘must’ be detailed, rather than what ‘may’ be detailed in regulations.

There are many examples of this. One example exists in Section 115:

115 Funding of Safeguarding Boards

(3) Regulations **may**—

(a) require payments to be made by a Safeguarding Board partner towards expenditure incurred by, or for purposes connected with, the Safeguarding Board on which it is represented, and

(b) provide for how the amount of those payments is to be determined in respect of a specified period.

There is a clear case that regulations ‘**must**’ require partners to make requirements and provisions as listed in (a) and (b).

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)?

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.

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 regulation 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 One.

We are particularly concerned with the level of subordinate legislation that is left to negative rather than affirmative procedure. An example of this is Section 48 in the table in the Explanatory Memorandum, Chapter. Regulations on “carrying out financial assessments” is a significant issue which should be subject to ‘affirmative’ procedure to ensure the regulations are given proper scrutiny. It may be minor in terms of the number of regulations but it will have a huge impact on individuals who need care and support and carers who need support.

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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 and more accountability in the National Assembly of Welsh Ministers.

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

In answering this question you may wish to consider Chapter 8 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

We have concerns about the Regulatory Impact Assessment. For example, the only cost listed to implementation of the Bill is 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.

Please refer to our comments on costs in our answer to question 5.

We note that there will be additional costs that are not included such as for the establishment of new national safeguarding board.

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 level², therefore making it difficult to predict whether any new model will have cost implications.

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 would like to see a more detailed cost analysis published before the end of stage 1, which takes into account the full cost of the Bill, including preventative services.

There are other implications that we think the Explanatory Memorandum has not adequately dealt with:

- Equality impacts.
- Adherence to relevant UN conventions and principles, such as UN Convention on Rights of the Child and on Persons with Disabilities, and the UN Principles for Older Persons.

² Written Assembly Question 61983 and WAQ61984, answered on 25 January 2013

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 has been taken into account by UK Government announcements. 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. For example, the Dilnot review suggests the current social care and support system is underfunded.

There are some concerns in the third sector about the diminishing of children's safeguarding in consolidating the legislation; that creating a single safeguarding board could undermine the current provision for children, rather than enhance it for everyone.

Cumulative impacts of welfare reform

The Welsh Government recently published research on the cumulative impacts of welfare reform, commissioned from the Institute of Fiscal Studies, which indicates the proposed changes by the UK Government through the welfare reform agenda could increase spending on social care and support services.³

We would like to see these costs accounted for in the Regulatory Impact Assessment. They could also help the Welsh Government make the case for change and give a robust analysis of the Bill's effects.

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³ Welsh Government, Analysing the impact of the UK Government's welfare reforms in Wales – Stage 2 analysis, February 2013