

## **Paper to note: Social Services & Well-being Bill Advisory Group briefing to Health Committee (Stage 1)**

### **Paper summary**

The advisory group welcomes the opportunity to comment on the provisions of the Bill. Our comments and recommendations follow the summary:

#### **1) Definitions and legal issues**

The lack of clarity on a number of definitions – or their removal from law - may give rise to unwelcome or unintended consequences.

#### **2) Principles on the face of the Bill**

On balance we favour principles on the face of the Bill to agencies when they give effect to the promotion of wellbeing. It is crucial that the person is involved, their best interests and wishes respected etc. Principles would also guide interpretation and the writing of regulations for a Bill that the Public Service Ombudsman described as ‘widely drawn’. The Welsh Government has placed two of the seven of the Law Commission’s principles for adult social care in the Bill and we would suggest the remaining five are added too.

#### **3) Wellbeing**

The advisory group believes the Bill should be more explicit about the link between a person’s wellbeing and the need for care and support services. The Bill also needs more consistency about when it refers to ‘people with needs’ as a whole and ‘persons with needs’ as individuals. We also believe the wellbeing definition should include a safe home/accommodation.

#### **4) Repeals**

There are interactions with numerous pieces of England and Wales and Wales law. The Welsh Government must make clear how existing duties will be replaced by new duties and why certain existing duties will not be carried forward into this Bill.

#### **5) Access to services**

A person’s access to services must be supported by a transparent framework that includes the assessment process, where their needs are understood by themselves and the assessor; the eligibility process, where the local authority decides what it will do to meet a person’s needs; and any financial or charging thresholds to determine whether and how much a person will contribute to their care.

#### **6) Proportionate assessments**

The concept has potential to make a more responsive and less bureaucratic system of needs assessment. However, we would like it to be defined and supported by minimum assessment standards to ensure that access to assessments does not vary across Wales.

#### **7) Duties to meet outcomes**

There is lack of clarity in the Bill about what the local authority could or must do in relation to the outcomes an adult wishes to achieve in day to day life if those outcomes are not eligible for services.

### **8) Availability and ability to provide care and support informally**

We think consideration of this 'capacity' to provide care and support informally can be part of assessment but only when safeguarded by general principles in the Bill and specific safeguards to ensure the focus is on wellbeing and outcomes and not reducing local authority support.

### **9) Preventative services**

We think these should be available to persons with both ineligible and eligible needs. There has been some ambiguity about whether preventative services are targeted or universal interventions. The group favours targeted preventative services and agrees with ADSS that the evidence suggests long term benefits result from specific rather than general prevention.

### **10) Passporting**

The Welsh Government has mentioned the concept of passporting to care and support services, which needs to be further clarified.

### **11) Charging**

We are anxious to ensure charges do not become a barrier to receiving care and support services that have a preventative effect or a positive effect on wellbeing.

### **12) Voice and control**

Aspirations to increase voice and control need further Bill provisions to be realised. Involvement, access to advocacy, accessible information and a definition of co-production need to be added.

### **13) Carers**

The advisory group is concerned about a number of provisions in the Bill that will affect carers.

### **14) Barriers to implementation**

Finance has been mentioned as a barrier to implementation and we would welcome further cost modelling from the Welsh Government.

### **15) Collaboration and integration**

Alongside the powers and duties in the Bill we believe health and social services should come to a common understanding and agrees aims around concepts like 'integrated care', 'prevention', 'care' and 'support'.

### **16) Commissioning**

The majority of social services are commissioned externally by local authorities. The Bill could make provision for regulations on standards of commissioning, including wider value tests beyond cost.

### **17) Advocacy**

Access to advocacy is crucial, particularly at points in the process in which an individual needs a voice to protect their wellbeing.

### **18) Safeguarding**

The safeguarding section is significant and needs amendments. The advisory group favours a funding formula for regional safeguarding boards and measures to ensure independent chairs and representative membership. The Bill drafting also omits a definition of neglect and corporate accountability for abuse and neglect. We would recommend the 'adult at risk' definition needs further clarity and there appear to be omitted duties around children at risk.

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## 1) Definitions and legal issues

There is lack of clarity around some definitions in the Bill:

### a) People who need care and support

While we welcome in principle the idea of using a definition of 'people who need care and support' rather than 'adults' or 'children' in need, there has been substantial evidence from the children's sector that expresses concerns about this approach.

### b) Disabled child

Removing section 17 of the Children Act 1989 means the removal of the current category of a 'child in need'. The most concerning result of this is the removal of the definition of a 'disabled child'. At the moment a 'disabled child' has automatic entitlement following assessment because they are automatically defined as a 'child in need'. This means access to important services, including respite. The Bill currently proposes to replace this with an eligibility test for children (section 23) that is yet to be defined. This could dilute the current duty. Although medically focused we think continuing the definition of a 'disabled child' in the Children Act would be compatible with aspirations for the Bill.

We believe that children who are currently a 'disabled child' have specific needs, such as the particular support needed for their development as a child, and we are anxious to ensure that these needs are addressed. Disabled children should not miss out on services as a result of the new eligibility test. We would also highlight that this could have an effect on entitlements, such as automatic exemption from the social size criteria for housing benefit.

### c) Disabled person

There has been discussion in evidence session about the definition of a disabled person (most notably with the Deputy Minister on the April 18 and Disability Wales on the May 2). The definition of a disabled person, as currently drafted in the Bill, uses the Equality Act 2010 definition. This means someone's disability must be substantial and long term to entitle them to a range of services with the aim of 'minimising the effect on disabled people of their disabilities' (in 6(2)(d) of the Bill). **We suggest the committee takes legal advice both on possible alternative definitions of 'disability' and also how the social model of disability might be enshrined practically in law.**

## 2) Principles on the face of the Bill

### a) The case for principles

There has been a mixed response from committee witnesses about whether principles on the face of the Bill are needed. The Deputy Minister is not currently minded to include them and the WLGA has voiced some concerns. However, we would strongly argue in favour of them to guide interpretation of the Bill and writing of regulations in order to ensure the promotion of wellbeing and delivery of services is in line with agreed principles.

WLGA said: “The Bill is a useful vehicle, but we are not convinced that, as it stands in all those areas, it strengthens the expectations on local government. In some cases, it probably confuses those expectations”. **We share some of the confusion about how the Bill is drafted and believe one solution to this would be a set of principles on the face of the Bill.** Another is ensuring greater clarity about duties it lays on local authorities to enable people to maximise their independence and participate in ordinary daily and social life, such as accessing home, work, education and social interaction.

This appears to have support from the Older People’s Commission and from the Public Services Ombudsman for Wales. The PSOW expressed concerns that: “...this is very widely-drawn legislation and we will come to some of the areas where that might pose particular issues for us in understanding what the intentions of the legislation are”. He also said there was potential for “ambivalence in the way in which people respond to it” (April 18).

### b) Law Commission’s recommendations

The Law Commission’s original recommendation in this area, in its Adult Social Care report (recommendation 5), had two parts. The Bill currently adopts the first part (to place a duty to promote wellbeing) and two principles of the second part (to enshrine principles in the statute to give effect to the wellbeing duty). The principles recommended are 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 wellbeing of others, if this is relevant and practicable;
- “Safeguard adults wherever practicable from abuse and neglect;

- “Use the least restrictive solution where it is necessary to interfere with the individual’s rights and freedom of action wherever that is practicable.”

**We note that the first two points of the Law Commission principles have been adopted, using different wording, in clauses 4(2) and 4(3) of the Bill. Therefore, it seems anomalous that the Bill does not include the remaining five points also advocated by the Law Commission. We believe the other points are equally important and should be included. We would particularly draw attention to the fourth point around involvement of the person, which we believe is not realised in the Bill as drafted.**

The Bill also deals with children and we believe a comparable set of principles should be discussed and developed. **We draw the committee’s attention to existing case law in health (Gillick competence) that is relevant in this area.**

The Wales Alliance for Mental Health has developed a list of principles based on the Law Commission’s but has adopted them to apply them to children and to make more specific reference to UN Conventions on Rights of People with Disabilities and on Rights of the Child. The extra principles or amendments to the Law Commission’s principles are:

- “Individuals are equal partners in assessments, planning, developing and reviewing their care and support.”
- “Adults and children are appropriately safeguarded.”
- “Carers are engaged and respected.”
- “Fully adopt the Social Model of Disability which promotes a holistic, whole person approach to wellbeing except in cases where they lack capacity to make the relevant decision.”

### **3) Wellbeing**

The concept of wellbeing and achieving outcomes is at the heart of the Bill. The advisory group thinks parts of the Bill create uncertainty about how this will work in practice.

#### **a) ‘People with needs’ or ‘persons with needs’**

The Bill’s definitions of wellbeing and outcomes imply local authorities will have to promote individuals’ wellbeing and address individual outcomes. However, the section on preventative services refers to “people with needs” rather than “a person with needs”, implying the duty will be to provide general prevention for sections of the population rather than targeted, person-level prevention.

The outcomes measures proposed by the Deputy Minister’s wellbeing statement also suggest that the intention is to use population-level statistics to



monitor the effectiveness of social care and support rather than person-level measures. There are clear practical considerations to using person-level measures, e.g. agreeing measures to monitor improvements in a person's sense of independence. One possible approach could be to measure 'value added' to a person's wellbeing and the agreed outcomes achieved as a result of care and support or prevention.

The definition of wellbeing is welcome in the sector and was described by a colleague at an advisory group event on the April 9 as "the exciting bit". We recognise the concerns the WLGA has about meeting the needs of the whole population in terms of wellbeing in clause 4(1), and believe the Deputy Minister's statement on wellbeing supports this view.<sup>1</sup> **We recommend the committee seeks reassurances that a person's individual wellbeing will be central to support and embedded within their assessment, care plan and the support they receive.**

#### **b) Safe home excluded from definition**

We recognise that the Mental Health Measure 2010 has a definition that includes eight 'areas of life' with regard to wellbeing. **We would welcome the current definition of wellbeing in the Bill being expanded to reflect the eight 'areas of life' in the Mental Health Measure 2010.<sup>2</sup> This means a 'safe home or accommodation' would be included** – and may go some way towards allaying fears about the right to aids and adaptations, which could be lost through repeals of provisions in the Chronically Sick and Disabled Persons Act 1970. It might also address the absence of housing in the Bill and contribute to a practical definition of a social model (i.e. making an accessible home environment).

#### **c) Missing link between wellbeing and needs for care and support**

We believe that the link between needs and wellbeing is missing from the Bill. The Welsh Government included a section in the Bill consultation during summer 2012 that said:

"A person is considered to be "in need" if:

"(i) they are unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or wellbeing, (and, in the case of a child, development) without the provision for them of social care services;

"(ii) their health, wellbeing (and, in the case of a child, their development) is likely to be significantly impaired, or further impaired, without the provision for them of social care services;

"(iii) they are a disabled child;

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<sup>1</sup> <http://wales.gov.uk/topics/health/publications/socialcare/strategies/statement/?lang=en>

<sup>2</sup> <http://wales.gov.uk/docs/dhss/publications/121031tmhfinalen.pdf>

“(iv) they are in need of safeguarding or protection. If they are an adult they are an adult in need who has been harmed or is at risk of harm by virtue of that need.”

We recognise criticisms of the original term ‘people in need’ as not in keeping with the ethos of the Welsh Government’s reforms. We note that it has been replaced with ‘people who need care and support and carers who need support’. **We maintain that the missing section of the Welsh Government consultation on the link between wellbeing and persons’ needs should be added to the Bill. We note it also included references to a ‘disabled child’ being a person in need** (see section 1b of this paper).

#### **d) Independent living and the social model of disability**

Disability Wales and others have mentioned they believe the Bill lacks recognition of the concepts of independent living and the social model of disability. We think these concepts could be addressed through principles on the face of the Bill, to ensure that independent living and an enabling (or reabling) approach is taken in the course of promoting a person’s wellbeing.

#### **4) Repeals**

One of the central principles of the Bill’s reforms is to simplify the ‘patchwork’ of social care legislation. However, the Bill (and accompanying Explanatory Memorandum) must be amended to include missing definitions; to state what will be happening to existing legislation that the Bill should replace; and connections with existing Welsh legislation. We would be pleased to work with the committee to provide suggested or amended definitions to include in the Bill where we believe they are needed. We believe it is very difficult to understand what this Bill means for persons without a list of repeals.

The Deputy Minister said that repeals had been signed off at an official level but not yet at a ministerial level. On 20 May 2013 she provided a table of destinations with reference to the Children Act 1989. Therefore, there remain concerns about exactly what will be replaced or adopted in the Bill. **We would like the Deputy Minister to provide a comprehensive list of repeals before the committee reports at the end of Stage 1.** Specific concerns include but are not limited to:

- Children Act 1989.
- Chronically Sick and Disabled Person’s Act 1970.
- Carers Strategies (Wales) Measure 2010 – uncertainty about whether it will be repealed or replaced.

There are issues both with overlapping duties or ones not carried into the Bill. For example, the Chronically Sick and Disabled Persons Act 1970 contains provisions for the triggering of assessment of needs, which should be repealed and replaced by the Bill. By contrast, parts of the 1970 Act about equipment and adaptation are missing. We are anxious to ensure the

provision of equipment and adaptations should be brought into this Bill or a clear statement made that they will continue.

## **5) Access to services, including preventative services**

### **a) Necessary separation between assessment and eligibility**

We are concerned that the Welsh Government's intentions appear to differ from the evidence the committee heard about the distinction between the assessment and eligibility processes. The system must maintain a clear separation between assessment (the local authority and the individual coming to an understanding about what needs a person has) and eligibility (what will be done to address those needs).

Currently we know broadly how the current system is supposed to work:

- The person becomes aware of a need and that local services may be available to support the need.
- They have contact with their local authority, which decides what to do about their query (e.g. signposting, information or assessment).
- The person's needs are assessed.
- Needs are compared against the Fair Access to Care Services (FACS) four level model of local authority eligibility. Those above the eligibility threshold are eligible needs, which are met by the local authority. Those below the line are non-eligible but the person may receive information services or signposting. The person may also be subject to financial tests to decide whether or not they will contribute towards meeting the need.

At present we know that assessment can end up being circumvented by local authorities that believe they should not undertake an assessment because a person's needs or their finances make them appear unlikely to be eligible for services the local authority may provide. There are provisions in the Bill (in 10(3) and with similar provisions for children) to address this by specifying the local authority must disregard a person's likely level of needs and their financial circumstances when deciding to undertake an assessment. This is welcome as it is an attempt to avoid 'pre-screening' people out of services by deciding they will not have an assessment because the local authority worker believes they will not qualify for services, so thinks an assessment would be a 'waste of time'. However, we are concerned by aspects of the Deputy Minister's evidence on the future of eligibility and assessment.

Eligibility criteria serve as a 'rationing' tool to decide who receives or does not receive a service. On April 18 the Deputy Minister said: "It is time for [the four level model] to go" and that "Sometimes it served to lock people out of services rather than bring them in". However, removing the current four level Fair Access to Care Services (FACS – low, moderate, substantial and critical needs with an eligibility threshold) model will not remove the need to 'ration'

services between needs that will be met and needs that will not be met by the local authority.

## **b) Eligibility for preventative services**

We believe the threshold for intervention should be set at a level that encourages lower level intervention. We are also anxious to ensure that the new eligibility system has a requirement for local authorities to justify decisions using clear nationwide criteria. People with needs must be clear about why a local authority will not meet their needs. Therefore, we are concerned about how the new system would be designed.

The advisory group is pleased that prevention is on the face of the Bill. However, we have doubts about whether the Bill will realise the Welsh Government's aspirations. Receiving preventative services should be based on transparent and fair criteria: i.e. a person should be able to understand the system and challenge decisions they believe are not appropriate. Likewise, the local authority should be able to justify why it will not meet a need against agreed national standards. This would apply equally to people not eligible for care and support services generally and for those using care and support services. **Therefore, we recommend the Bill provides for a system of preventative services that allows for transparency and, when appropriate, challenge decisions not to give preventative services. The alternative is a system in which more assertive and informed people - 'those who shout loudest' - receive better services.**

We would suggest this section uses a duty to enable people through services, to focus prevention work on a skilled and targeted enabling approach to support a person to achieve their outcomes. We agree with ADSS (April 18), which said: "Where targeted preventative services with skilled intervention are available they make a difference. There is no evidence that general prevention has a great impact on the levels of demand."

**We would recommend that the committee seeks draft regulations from the Deputy Minister about national eligibility criteria before the end of Stage 2, including a statement of intent about paying for care (e.g. how the system of income and capital thresholds for state support might work).** It is vital to know what framework will be used because it will set the 'rationing' criteria for care and support and preventative services. **We believe the thresholds for intervention should be low enough to incentivise and recognise preventative work.**

## **6) Proportionate assessments**

### **a) Need for a definition**

Assessment is valuable for the individual and local authority to understand needs. This is why the system should maintain separate processes for gaining

understanding of needs (assessment) and deciding what to do about them (eligibility).

The Deputy Minister said in her first evidence session that “Assessments should be proportionate.” We are anxious to ensure the concept of ‘proportionate assessment’ is defined. We are concerned that if left undefined or poorly defined ‘proportionate assessment’ could lead to restricted access to an appropriate assessment. We recognise the potential to reduce bureaucracy and improve access to lower level support with proportionate assessment.

A national eligibility framework could promote equitable treatment for people with the same assessed care and support needs. However, variation in how local authorities interpret or implement ‘proportionate assessment’ could end up determining whether a person receives a service or not. For example, ‘local authority A’ might decide that people with low incidence conditions can be assessed by a generic social worker who would not be fully aware of the unique aspects of a person’s condition while ‘local authority B’ uses a qualified professional with experience of the condition. These two assessments could result in different needs being recorded, so the person in area A may receive a less suitable service from the person in area B, despite the national eligibility criteria, because of the assessments they received.

**We would like to see the concept of ‘proportionate assessment’ set out in regulation and explained in practice by the Deputy Minister. There should be minimum assessment standards, e.g. that the person is meaningfully involved in their own assessment. There is also scope in regulations in the Bill to reserve certain kinds of assessment to qualified/experienced workers or teams for specific groups of people.**

#### **b) Supreme Court judgment on current assessment and eligibility**

There are useful lessons from a judgment by the UK Supreme Court (May 2012), which clarified existing social care law in England and Wales on whether a council can take its finances into account when assessing the needs of people for social care.

The Court confirmed it is not lawful for local authorities to have resources in mind when they assess needs of disabled people [R (on the application of KM) (by his mother and litigation friend JM) (FC) (Appellant) v Cambridgeshire County Council (Respondent), 31 May 2012]. **We would recommend the committee examines the judgment of R (KM) v Cambridgeshire, which sets out the legal importance of separating assessment from eligibility tests.**

Lord Wilson, on behalf of the court, has set out a broad pathway for provision that we think should be followed in the new system. The local authority should ask itself four questions. While we agree that the assessment approach should be proportionate to the person’s needs this process should be followed for each person and set out in assessment regulations:

- “What are the apparent needs of the [disabled] person?” The advisory group notes that these should be assessed in full without regard to cost or likely level of needs as the Bill requires. The definition of ‘proportionate assessment’ is crucial at this point.
- “To meet the person’s needs, is it necessary for the local authority to make arrangements for the provision of services?” The advisory group believes at this stage the authority is allowed to consider its own available resources, what the family may be reasonably able to provide, what other agencies can offer, how much money the person has to pay for their own services, what preventative or universal services may be available etc.
- “If it is necessary, what is the nature and extent of the services to be arranged?” The advisory group believes this is where eligibility tests and financial assessments arise and will often be the cause of discussion and argument.
- “What is the reasonable cost of securing the provision of the services identified in the previous stage?” The advisory group believes these costs should be set out in sufficient detail for the individual to understand what has been allocated to meet their needs, so that he or she can challenge if necessary.

## 7) Duties to meet needs

The advisory group believes the Bill is vague about the relationship between identified (assessed) outcomes and needs and what the local authority must do in response to these. We are clear that local authorities will have a duty to meet needs that are eligible. However, the Bill does not refer to what a local authority should do about outcomes a person wishes to achieve that are ineligible.

**We are concerned there appears to be only discretionary powers to meet needs outside of the eligibility system and that this could mean that in reality prevention and early intervention may not be achieved because they are powers rather than duties.** It is not clear what an individual’s rights to challenge would be. The current drafting of the Bill implies a person could be assessed as having needs that require preventative services but the local authority’s current provision of ‘preventative services’ might not meet the person’s needs but still fulfil the requirements of section 6 of the Bill to provide general preventative services. Therefore, the person would not receive a service to support their wellbeing but the local authority will have met its duty.

## 8) Availability and ability to deliver care and support informally

At Welsh Government stakeholder events in May 2013 the concept of a person’s informal ‘capacity’ (in the sense of availability and ability) to meet their needs was introduced as an element of the assessment process. This

was explained to mean the individual's circumstances, including whether there is family available who may be able to provide care.

We are anxious about this concept. We think assessment should be allowed to consider what care and support is being given to an adult, child or carer with needs by family or third parties, so that a local authority or other assessor can understand what needs a person has that are already being met. The local authority should be aware, for example, what care and support needs a married older couple is addressing within itself in case of stoppages or interruptions to the care and support (e.g. by illness or death of the carer) and to understand what pressures the carer may be under.

However, **there must be safeguards on any provisions about considering capacity (availability and ability) to deliver care and support informally to ensure this avoids unintended consequences:**

- The Bill must ensure the focus of considering informal care during assessment is related to the wellbeing and good outcomes of the person. We think the inclusion of statutory principles on the face of the Bill would ensure the focus of consideration of capacity will facilitate a person's wellbeing rather than placing restrictive expectations on people who may feel unable to refuse because they are dealing with a public authority or because of moral pressure they might feel to care for or support a family member.
- The Bill must also ensure that the issue of informal care is not used to justify inappropriate generic support for specialist needs, e.g. a person with specific communication support needs that require an interpreter must have access to a suitably qualified interpreter and not have to rely on the interpreting capacity of family members if they are not qualified or feel that interpreting in a particular context would be inappropriate (e.g. at a hospital appointment or welfare benefits interview).
- The level of ongoing informal care provided by carers should be considered during assessment separately from those of the adult or child.

## **9) Prevention services**

### **a) Prevention for both eligible and ineligible needs**

The inclusion of prevention in the Bill is positive from a policy point of view. However, the Bill and regulations should define the eligibility test - the 'rationing' or 'in or out' test - for these services (see section 5b of this paper).

We recognise concerns that prevention services could result in 'sucking people into services'. However, we are pleased the Deputy Minister clearly said on April 18 that she does not agree with this view. We believe the crux of

the issue is how prevention fits into the pathway that people will take. We believe it should follow an assessment:

- For a person with non-eligible needs they may receive preventative services if their needs might escalate or become more acute.
- For a person with eligible needs they may receive preventative services if their needs could be reduced. For example, a person with recent severe sight loss might be socially isolated because they do not have the confidence or mobility skills to leave their home alone and travel safely. A preventative service could be mobility training to build the person's confidence, familiarity with a journey and training in the use of a long cane or guide dog to enable or reable the person into accessing local opportunities to socialise.

We would not wish to see a prescriptive definition on the face of the Bill of targeted preventative services. The definition should be outcome rather than service based. Local authorities should also have the flexibility to address needs in their areas. However, there may be scope for an indicative list (with the caveat of "including but not limited to") to reinforce the notion that preventative services should generally be skilled, specific and possibly time-limited and with the aim of reducing or significantly delaying care and support needs and, most importantly, promoting the independence of the person.

#### **b) Disproportionate expenditure**

Sections 6(6)(c) and 7 introduce the concept of "disproportionate expenditure". **We are not convinced that this clause is necessary, given that local authorities are generally required to avoid expenditure that is 'disproportionate' and are held to account by their electorate and local scrutiny structures in their expenditure decisions.**

#### **10) Passporting**

The Bill states that local authorities will have a duty to provide and to keep under review care and support plans for people (children and adults) who have 'eligible needs' or fall into one of the 'passporting' categories.

**We would welcome clarity from the Deputy Minister about how passporting might work from the current system to the new system brought about by the Bill and reforms in the Sustainable Social Services paper.** There were indications in the Welsh Government's consultation paper on the Bill that looked after children might be one group that would be passported.



## 11) Charging

Our priority around charging would be to ensure charges do not become a barrier to access to services that could improve a person's wellbeing and have a preventative effect.

Two areas of concern that have been highlighted are charging for information, advice and assistance (section 54) and charging for 16 and 17 year olds (clause 44(3)(b)). However, section 53 about deferred payments for 16 and 17 year olds was not discussed in committee.

We would welcome improved definitions of what information, advice and assistance are. **We are concerned about leaving the power to regulate for the charging of information, advice, assistance and preventative services in the Bill without clarity on the Deputy Minister's vision for charging.**

## 12) Voice and control

### a) Strengthening involvement

There is wide support for more voice and control for people who access social care services in Wales, including from citizens' panel members on May 16. However, we believe this vision should be realised more strongly on the face of the Bill.

For example, in clause 4(2) of the Bill, a local authority in exercising its wellbeing functions "must have regard to the individual's views, wishes and feelings, in so far as doing so is reasonably practicable". **We strongly recommend an amendment to ensure the individual should be 'enabled' and 'involved' rather than 'regarded' in clause 4(2) of the Bill** (see section 2 of this paper, on principles on the face of the Bill).

### b) Access to advocacy, information and advice

We are concerned that in 20(2)(e) and (d) the Bill lists advocacy, information and advice as ways of meeting needs following an assessment. This implies that they are services that will meet care and support needs. While there will be instances where these would be a valid care and support needs **we believe there should be clear references on the face of the Bill to ensure access to advocacy, information and advice earlier in the process where they would facilitate a person's voice and control.** For example, this would include during the assessment process or when decisions about whether to undertake an assessment are being made, particularly when the absence of advocacy, information or advice could lead to a person's needs being inappropriately assessed or not assessed at all.

### **c) Co-production**

We have concerns about use of the term 'co-production'. It has various meanings that have been used interchangeably. We favour the definition the Health Minister offered at Welsh Labour Conference Round Table (23 March 2013), when he said co-production in social care is when "participants and experts are different but equal partners".

We have used this specifically to mean that there should be assurances that people are enabled to be involved in their assessment and care planning. We also note there is the use of the term 'co-production' to describe a wider involvement in shaping services – such as that described in 7(1)(c). **We would welcome a definition of co-production on the face of the Bill, potentially contained within principles, to enshrine the idea of equal partnership and difference between participants and experts.**

### **d) Direct payments**

We would like to see provisions that require local authorities to actively involve the person in the whole assessment and care planning process; to work together to produce the care plans and outcomes, and to promote the options that are available for people to exercise voice and control, including (but not limited to) direct payments.

We know that there is a limited take up of direct payments in Wales. People can already access direct payments as the law stands but there is a proportion of the population that does not know about them or understand what they are. 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.

Some organisations would like to see a duty to promote direct payments on the face of the Bill – as a group we would not be opposed to this but note that would need to be clarified in regulations to ensure that no pressure was put onto individuals and that refusing direct payments is a valid option if a person has the information necessary to reach a decision. We note that direct payments are not suitable for everyone and so do not think it would be appropriate to have direct payments as the default option.

We believe individuals should be informed of all the options available to them; the outcome we would wish to see is people being able to take informed decisions about their care and support. **Therefore, we would like to see a duty to promote access to information about options for voice and control (like direct payments) rather than a presumption in favour of direct payments.**

### **e) Accessible information**

Colleagues in the sector shared with the advisory group their concerns about the lack of accessible information, which can provide a barrier to accessing information, support and other services in social care. As a group we are

concerned that the provision of information within the Bill does not refer to 'accessible' information. We note that 20(6) of the Equality Act 2010 contains duties to make adjustments, including information. **We would, however, welcome amendments in the Bill to add 'accessible' ahead of "information" in the Bill and recognise 'accessible information' would need to be defined in the Bill.**

People also need accessible information about the options available to them. We would like the Bill to explicitly require processes, such as assessment, and information, advice and assistance to be accessible. This requirement would not only include alternative formats, languages etc but also, for example, access to interpretation services for people with learning difficulties, sensory impairments and others with specific communication requirements.

### **13) Carers**

**We are concerned that some of the provisions in the Bill may impact negatively on carers:**

#### **a) Portability for carers**

The portability provisions do not apply to carers, meaning carers who move with the person for whom they provide care and support do not have the same portability 'entitlement' for support for themselves as a person with support needs. This seems inconsistent with the aim of the Bill to put carers' rights on an equal footing with those for whom they provide care and support.

#### **b) Carers Strategies Measure 2010**

There is lack of clarity on the Carers Strategies Measure 2010. We understand informally that the intention is to repeal it. However, not all of the provisions in the Measure appear in the Bill, meaning they will be lost (see section 4 of this paper).

#### **c) Ability and availability to give care and support**

The consideration of a person's 'capacity' (availability and ability) to meet their own needs could lead to increased pressures on unpaid carers if clarity is not provided (see section 8 of this paper).

### **14) Barriers to implementation**

We would identify two key barriers to achieving the stated aims of the Bill:

#### **a) Finances**

We would share the WLGA's concerns about the Bill in terms of resources. The WLGA said "we fundamentally challenge the assumption that it is cost-neutral". The Regulatory Impact Assessment states that the only cost will be

training for social workers and sets this against the reduced costs of legal challenge.

We note that the Children Act 1989 had significant implementation resources and would expect that this Bill will need similar Welsh Government support to implement it. **We would like to see more detailed financial modelling as soon as possible and certainly at Stage 2. Additionally, we recommend the committee seeks clarity on the Welsh Government's intentions around the implementation of the Dilnot review on paying for care.**

## **b) Culture change**

The other barrier we would highlight is cultural change needed alongside the Bill. Training should be considered more widely as a cost implication of the Bill. People who work in social care (and some in the NHS) will need to be retrained to realise the aims of the Bill. WLGA and ADSS have raised the point that implementation of the Sustainable Social Services paper is already underway.

## **15) Collaboration and integration**

### **a) Importance of culture**

WLGA has mentioned that the joint working and integration vision needs further clarity from the Welsh Government. We would tend to agree with this.

Witnesses have raised practical issues with collaboration and integration, such as implementing pooled budgets or difficulty placing duties on independently contracted healthcare staff (Anna Buchanan from Older Person's Commissioner's Office, 2 May). We note that the NHS Confederation, speaking on May 16, welcomed overarching joint outcomes between health and social care, but thought prescribing models of joint working were unhelpful.

Health sector attendees at an advisory group event on April 9 suggested that the key sticking points are that organisations are "set in their ways culturally" and that the Bill could have a role in:

- Ensuring information and advice hubs provide information on both social care and health.
- Agreeing standard language and concepts used across organisations.
- Setting lines of accountability for outcomes delivery: financially, managerially and professionally.
- Agreeing measures of success and periodic review.

**We believe social services and health services should come to a common understanding about what integrated care is and a common understanding and vision for terms like 'prevention', 'care' and 'support', which can vary not only between adult and child social**

**services but also between health and social services.** We note that witnesses from the NHS said (May 16) that the concept of ‘prevention’ had a very different meaning to health services, e.g. public health, immunisation etc, which is quite different from the broad definition used by social services.

#### **b) ‘Cost shifting’**

On April 18 the Deputy Minister said:

“I am not aware that there is a problem [with combining budgets]. The Bill does not change the fact that the health service is free of charge and that social services are not the same. I do not see a problem.”

**We believe there is a particular gap in the Bill around preventative services and potential to result in ‘cost shifting’.** A person who is already in receipt of care and support from social services and then develops a need for prevention may have charges applied. However, a person unknown to social services who develops a need for prevention services after a stay at hospital may have their services covered by the NHS (i.e. without charges) through intermediate care.

We are also anxious to ensure that the division of responsibilities and duties between health and social care is defined fairly to ensure on one hand that people are not asked to pay for care they may have previously received free from the NHS or on the other hand that the NHS itself is not subject to disproportionate expenditure.

#### **c) Integration in separate legislation**

The advisory group has noted that in Scotland integration is dealt with in a separate piece of legislation. While we acknowledge the Welsh Government may not wish to separate this from the Bill, there is still a large amount left to regulations.

**The advisory group recommends the committee seeks assurances that development of regulations will engage all partners across health, social care and the third sector in developing and drawing up regulations and resulting structures and processes. We would also recommend the committee confirms the Deputy Minister is confident that section 147 will give the Welsh Government the necessary powers to fulfil its aspirations.**

#### **16) Commissioning**

We would like to note that there has been little discussion about the standards of commissioning within the Bill despite the majority of social services being externally commissioned. Section 7 outlines different models that should be promoted by local authorities, which has been welcomed. We would, however, highlight there are likely to be a range of providers commissioned to

deliver social care services from the third and independent sector, as well as those noted in that section. **We would like to see standards set out for commissioning take into account values as well as cost, which would should be required by the Bill and set out in regulation.**

## **17) Advocacy**

### **a) Access to advocacy**

There has been discussion about advocacy and particularly the need for access to independent advocacy in the Bill. It is currently largely missing from the Bill. Where it is mentioned, for example, it is a social care service that could be provided once a person becomes eligible (in clause 20(2)(e)). We believe that in order to deliver a "stronger voice and greater control" the Bill must make provisions to improve access to independent advocacy support services, building on and enhancing existing provision for children and people experiencing mental ill health.

The Welsh Government's Framework for Action on Independent Living (endorsed by the Deputy Minister for Social Services), the first priority identified as an enabler to independent living is information, advice, advocacy and peer support.

We have some concerns that current work is focusing on advocacy for children and older people specifically and note that 'working age' adults must not be overlooked.

**We believe that advocacy is a significant omission in the Bill and that it is important to rectify as a matter of urgency. We welcome the Deputy Minister's statement that she would be open to an amendment on independent advocacy to extend the reach of services.**

We welcome informal assurances that the Welsh Government intends to bring forward an amendment on advocacy. It is essential that this amendment makes a strong commitment to independent advocacy and enables better access to services for people across Wales. It must improve existing provision and extend access to people of all ages. It is important that services are not charged for, and do not automatically exclude individuals on the assumption that they have someone who can speak up for them (such as family) because this will not always be appropriate.

### **b) Critical points for advocacy**

We acknowledge that there are always costs associated with widening the provision of services. However, there are instances in which the absence of an advocate means a person will not have a voice. The benefits of advocacy are numerous in terms of outcomes for individuals and long term cost savings, particularly in terms of safeguarding and preventing potential abuse situations from escalating.

Access to independent advocacy is particularly crucial in terms of assessment and developing care and support plans, and safeguarding from abuse or neglect. **We would like to see advocacy available at the earliest opportunity – enabling people to access the assessment process and help to ensure their needs are being met in an appropriate way.**

### **c) Advocacy standards**

We support Disability Wales' comments that Action for Advocacy has developed quality standards and professional training programmes on advocacy from which we can learn. **We support the definition and promotion of core principles for advocacy services, which the Advocacy Charter uses.**<sup>3</sup>

### **d) Safeguarding and advocacy**

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

The advisory group believes access to independent advocacy for adults and children is a crucial issue in safeguarding, and thinks the Bill provides a timely opportunity for the Welsh Government to strengthen its commitment and improve access to independent advocacy services across Wales.

The Welsh Institute for Health and Social Care's Review of 'In Safe Hands' recommended that "Legislation should include a duty to consider advocacy support."<sup>4</sup> The Scottish legislation includes a similar duty. The Children's Commissioner stated that he would like an amendment that specifically refers to widening access to independent, professional advocacy services. The advisory group supports this. WLGA acknowledged that independent advocacy is not sufficiently provided in Wales.

**We would agree with the view of the Older People's Commission that not everyone will need to use an independent advocate. Nevertheless, it is important that access is available to those who need it.**

Anna Buchanan, from the commissioner's office, said: "There are occasions where nothing but an independent advocate will do." Such occasions can include when the family is not working in the best interests of the person; where there is no one available to help; or when individuals are in an isolated situation where they do not feel they can trust anyone around them. Without access to an independent advocate the individual could lose their voice

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<sup>3</sup> <http://www.aqv59.dsl.pipex.com/Advocacy%20Charter2004.pdf>

<sup>4</sup> A review of the Welsh Assembly Government's guidance on the Protection on Vulnerable Adults in Wales, Welsh Institute for Health and Social Care, 2010

entirely, which is a human rights issue. We would agree with the Older People's Commission, which said the cost of providing these services should be weighed against the severe costs of violating a person's human right, when their voice is denied.

## **18) Safeguarding**

### **a) Funding formula needed for regional boards**

A funding formula for Regional Boards that sets out an expected and proportionate contribution from each agency is required to ensure that the business of the Regional Boards is not disrupted or threatened by funding negotiations. There was agreement during committee evidence sessions, including from police representatives, that a funding formula is needed.

Evidence from a variety of expert groups suggests that the "creation of a funding formula is the best way to ensure that all partnership agencies make an equitable contribution to the work of the LSCB" (Health, Wellbeing and Local Government Committee Inquiry into Local Safeguarding Children Boards in Wales, November 2010).

The Bill says regulations *may* require payments to be made by partners (section 115) but does not make provision of a partner funding formula or central funding. This creates the danger that the new boards will be established with no firm or consistent funding base. The advisory group believes regulations *must* require partners to make requirements and provisions within the legislative competence of the National Assembly.

The Children Act 2004 did not provide for a funding formula, which has led to inconsistency across Wales. The WLGA budget survey (2010) indicated a significant shortfall for a majority of Local Safeguarding Children Board's through withdrawal of funding from partner agencies. We are concerned that without an established national funding formula, local authorities will continue to make up the deficit which will divert funding from front line services to maintain infrastructure.

**The advisory group believes that an established funding formula, with relevant and enforceable powers of sanction if not adhered to, would firmly establish each agency's strategic commitment to safeguarding.**

### **b) Strengthening Adult Support and Protection Orders**

Most organisations giving evidence agreed the orders should be strengthened and go further than is currently stated in the Bill. We agree that removal powers should only be used in exceptional circumstances but it is important that the powers are included in the Bill. Evidence from Scotland shows similar powers contained within the Adult Support and Protection (Scotland) Act 2007 are invoked only in extreme situations but act as a significant deterrent.



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

We are not fully satisfied with the Deputy Minister's response in her first evidence session. She said that she assumed that if abuse was identified it would be a criminal matter and picked up by other agencies. We accept that some instances of abuse, such as physical or sexual, can (in theory) be picked up by criminal justice agencies. However, in other instances it may not be a straightforward case and **we are concerned that in the worst case scenario an adult known to be at risk will be left in a dangerous environment with their abuser.**

We believe that powers of intervention should include injunction orders and removal powers: the aim of which would be to reduce the risk posed to the adult at risk in the most supportive and least restrictive means possible. The 'General principle on intervention in an adult's affairs' in the Adult Support and Protection (Scotland) Act 2007 enshrines this principle in legislation, and we consider this principle valuable for the the Social Services & Well-being Bill. These principles can provide checks and balances for professional judgement.

The police representatives at the Health Committee said removal powers are not necessary because police can use mental health legislation to remove an individual when necessary. We would question this belief and think mental health legislation should not be used inappropriately in this way. The person will not always have a mental health condition or lack capacity but they may still need authorities to intervene to protect them from abuse.

### **c) Safeguarding Board membership**

#### Service user representation

We think the Board needs to ensure it is a robust body, informed by both policy and practice leading to improvements in safeguarding. Its membership should reflect this through stakeholders working together with specialist experts. **It is important that both National and Regional Safeguarding Boards have representation from individuals with direct experience of service provision and safeguarding (such as previous users of social care services).**

A public appointments process may be most appropriate to ensuring individuals with direct experience of service provision and safeguarding are represented on the board. Service user representatives should be valued members of the board with an equal voice in decision making processes, and therefore must be able to play a full role in the board's business.

### Independent chairs

There was no consensus on whether there should be a requirement for the Boards should have independent chairs. **The advisory group maintains that it is in favour of independent chairs. They are able to enforce, critique, question and uphold the statutory duties of chair without conflict, as may be the case if the person is from one of the key agencies involved in adult protection.**

Section 112 states that a Safeguarding Board must achieve its objective by co-ordinating and ensuring the effectiveness of what is done by each person or body on the board. Duties to co-ordinate and scrutinise present a potential conflict unless there is strong independent leadership to enable accountability. Independent Chairs are seen as a valued asset to the business of encouraging high standards in Scotland. We also note that in England every LSCB has an independent chair and the chairs are supported by an Independent Chairs Association.

ADSS said it agreed with the principle of independent chairs but was concerned about the costs. A funding formula would need to be in place and the role and remit of the chair must be clear. We agree with the point that an important issue is how the boards will be evaluated to assess effectiveness and held to account.

### **d) Regional Safeguarding Boards**

There is some concern around the democratic accountability of proposals for six Regional Safeguarding Boards that cross local authority boundaries. Lessons must be learned from issues with current Local Safeguarding Children's Boards (LSCBs). It is widely accepted that LSCBs, as they currently stand, need greater checks and balances in place to ensure that they are delivering robust outcomes for the children that they protect.

### **e) Definitions of neglect**

**The advisory group agrees with the Older People's Commission, which would like to see a broad definition of neglect included in the Bill.** As stated in its evidence submission Operation Jasmine (on care home abuse) charges could not be brought on the basis of wilful neglect as it was difficult to prove an omission. It is important to learn from such cases and prevent similar situations from happening again. We agree that such a definition should allow for self-neglect but that this must be handled carefully and balance human rights with assessing risk of harm to the individual.

Definitions to consider in relation to neglect:

#### i) Adult Support and Protection (Scotland) Act 2007

##### Section 3

(2) An adult is at risk of harm for the purposes of subsection (1) if—

- (a) another person's conduct is causing (or is likely to cause) the adult to be harmed,
- or
- (b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.

ii) Review of 'In Safe Hands' (2010)

The review states: "Safe Hands (paragraph 7.4) defines neglect: as "including failure to access medical care or services, negligence in the face of risk-taking, failure to give prescribed medication, poor nutrition or lack of heating."<sup>5</sup>

iii) Office of the Public Guardian Safeguarding Vulnerable Adults policy (2008)

"Neglect and acts of omission:

Includes ignoring medical or physical care needs, failure to provide access to appropriate health, social care or educational services, the withholding of the necessities of life, such as medication, adequate nutrition and heating."<sup>6</sup>

We note that there is the option to explicitly mention self neglect or 'harm' (as in the Scottish Act) or for the definition to be worded in a way that would not exclude self neglect (some minor changes to the latter two definitions could provide for this).

#### **f) Safeguarding principles**

**We believe that 'principles' of safeguarding would be beneficial, particularly to emphasise the importance of the local authority balancing the protection of a person at risk with the individual's human rights.** This should incorporate relevant United Nations Conventions and Principles, including Article 19 of the UN Convention on the Rights of Persons with Disabilities: the right to live independently and be included in the community.

The Adult Support and Protection (Scotland) Act 2007 has positive, person centred general principles on the face of the Act. While we acknowledge that the Act covers adults only we think it would be beneficial to include similar principles in the safeguarding section of the Bill.

#### **g) Corporate accountability for abuse and neglect**

Some organisations have noted that they would also support measures to increase corporate accountability of abuse and neglect in the care sector. Social care providers have a serious responsibility for the health and well-being of many people. **We would encourage the committee to seek views**

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<sup>5</sup> Review of In Safe Hands, A review of the Welsh Assembly Government's guidance on the Protection of Vulnerable Adults in Wales, Welsh Institute for Health and Social Care, 2010

<sup>6</sup> <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/sva-policy1-12081.pdf>

**on whether the Bill should also cover institutional abuse or neglect.**

#### **h) Adults at risk definition**

**There are significant concerns with the current definition of adults at risk:** to qualify as an adult at risk, a person must have care and support needs and be *unable to protect themselves as a result of those needs*. However, it can often be the case that a person may not have identified care and support needs, until they are being abused and are consequently vulnerable and in need of support as *a result of the abuse*. Such cases could be excluded from support in the current drafting.

Therefore, having *eligible* care and support needs should not be a pre-requisite in the definition for an adult at risk and clarity is needed on how it will be determined if a person is “unable to protect themselves”. Additional issues such as coercive control and breach of trust are often important factors in elder abuse but they are not taken into account in this definition nor within the safeguarding section as a whole.

Alternative definition to consider:

Professor John Williams (Aberystwyth University), the Older People’s Commissioner for Wales, Mick Collins (Chair, PAVA Wales), and Age Cymru proposed the following definition (as discussed in the evidence session with the commission):

A person is an adult at risk if they are a person:

- i) who is aged 18 years or over;
- ii) who, because of their circumstances, is suffering or is at risk of suffering harm; and
- iii) whose ability to protect themselves from such harm is significantly impaired through disability, illness, mental incapacity, age, coercive control or otherwise.

#### **i) Missing duties for children**

Section 106(1) on a duty to report adults at risk requires relevant partners to inform the local authority if it suspects an adult is at risk. **Section 108 on a duty to report a child at risk omits this duty and refers to provisions in section 47 of the Children Act 1989, which do not contain a similar duty to the duty to report adults at risk.** This appears to be anomalous and we would recommend the committee confirms whether there will be a parallel duty on relevant partners to report a child at risk to a local authority.

## **About the advisory group**

### **Aim**

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.

### **Members**

The group is made up of a series of third sector and professional organisations that work with people who use social care and support services:

Age Cymru (co-secretariat)  
Leonard Cheshire Disability Cymru (co-secretariat)  
Sense Cymru (co-secretariat)  
Barnardo's Cymru  
British Association of Social Workers (BASW) Cymru  
Carers Wales  
Chartered Society of Physiotherapy  
College of Occupational Therapists  
Contact a Family Cymru  
Mencap Cymru  
MS Society Cymru  
NAS Cymru  
NSPCC Cymru Wales  
RCN Cymru  
Royal Voluntary Service (formally WRVS)  
Scope Cymru  
Wales Alliance for Mental Health