

National Assembly for Wales / Cynulliad Cenedlaethol Cymru
[Health and Social Care Committee / Y Pwyllgor Iechyd a Gofal Cymdeithasol](#)

[Regulation and Inspection of Social Care \(Wales\) Bill / Bil Rheoleiddio ac Arolygu Gofal Cymdeithasol \(Cymru\)](#)

Evidence from Children's Commissioner for Wales – RISC 51 / Tystiolaeth gan Gomisiynydd Plant Cymru – RISC 51



Comisiynydd Plant Cymru Children's Commissioner for Wales

Ymateb i Ymgynghoriad / Consultation Response

Date / Dyddiad: 07 May 2015

Subject / Pwnc: Regulation and Inspection of Social Care (Wales) Bill

Background information about the Children's Commissioner for Wales

The Children's Commissioner for Wales is an independent children's rights institution established in 2001. The Commissioner's principal aim, under the Care Standards Act 2000, is to safeguard and promote the rights and welfare of children. In exercising their functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC), as stipulated in regulation 22 of the Children's Commissioner for Wales Regulations 2001. The Commissioner's remit covers all areas of the devolved powers of the National Assembly for Wales insofar as they affect children's rights and welfare.

The UNCRC is an international human rights treaty that applies to all children and young people up to the age of 18. It is the most widely ratified international human rights instrument and gives children and young people a wide range of civil, political, economic, social and cultural rights which State Parties to the Convention are expected to implement. In 2004, the Welsh Assembly Government adopted the UNCRC as the basis of all policy making for children and young people and in 2011, Welsh Government passed the Rights of Children and Young Persons (Wales) Measure, which places a duty on Welsh Ministers, in exercising their functions, to have 'due regard' to the UNCRC.

This response is not confidential.

My responses to specific consultation questions are below. I have not responded to every consultation question but only to those of direct relevance to my remit.

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

1.1 Regulation and inspection are key mechanisms for ensuring that children and young people receive safe and effective statutory services and as Children’s Commissioner for Wales, I welcome the intentions of the Regulation and Inspection of Social Care (Wales) Bill (hereon referred to as the Bill). The current agenda of legislative change in relation to the provision of social care services in Wales call for the further development of regulation and inspection processes that will be fit for purpose in meeting the new social care policy and practice landscape. I welcome the intention to introduce an outcome-based approach to support a process focussed on the service user rather than on systems. I am aware that work is at an advanced stage in developing the code of practice in relation to measuring social services performance, through a framework of indicators for the measures already included in the Well-Being Statement for people who need care and support and carers who need support. I have already set out my view that the ‘securing rights and entitlements’ domain of the well-being statement as applied to children and young people should directly relate to the UNCRC in my response to the consultation on measuring performance under the Social Services and Well-being (Wales) Act (the Act). The current measures for this domain as set out in the Well-Being Statement are directed at issues related to the realisation of Article 12 of the UNCRC. Outcomes related to Article 12 are significant, however ‘securing rights and entitlements’ as applied to children and young people should consider the wider application of all the articles of the UNCRC. Work to develop an understanding of subjective well-being measures to regulate and inspect care and support services, must be informed by engagement with children and young people themselves and by the rights afforded to them through the UNCRC.

1.2 The framework to measure performance has the potential to support transparency, accountability and delivery of better outcomes for children and young people who access social services. My office has set out its views in the past on the need for standards and indicators to do more than tell us whether authorities are complying with set timeframes for completing processes. For example, the current set of statutory performance indicators for Welsh local authorities from April 2012 includes the performance indicator (PI): “The percentage of eligible, relevant and former relevant children that have pathway plans as required”. This is an important PI

and provides for an assessment of the numbers of young people, with eligibility, who are having this statutory entitlement met. However it tells us nothing about the quality of pathway plans, the degree to which young people have been given a voice in the decisions affecting them as contained in the pathway plan or the outcomes of those pathway plans in terms of young people's well-being. The proposed Results Based Accountability framework approach is intended to look at population outcomes and at service performance and promises to offer a more robust assessment of the impact of service provision on the lives of children and young people, which is to be welcomed. I concur with CSSIW's assertion in their most recent Annual Report that minimum standards are not enough, and all efforts should be focused on supporting services to achieve excellence¹.

1.3 The outcomes statements and measures should be underpinned by the UNCRC, as the Minister has a duty to have due regard to the UNCRC under the Rights of Children and Young Persons (Wales) Measure 2011 (Rights Measure). I welcome the recognition within the Children's Rights Impact Assessment (CRIA) that the Bill should allow greater opportunity for children and young people to shape the services they receive to deliver outcomes that will meet their specific needs. Article 3 of the UNCRC states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. CSSIW already includes the principles of the UNCRC as it engages with children and young people to capture their views on the quality of care and support they receive, and such processes should be extended and strengthened under the new arrangements.

1.4 I am reassured by the fact that standards will continue to have a central place in the regulatory framework. Standards provide a framework against which regulators and I can scrutinise the quality of services being provided to children and young people. In relation to safety for example I would want assurance that a residential children's home had in place child protection policies and procedures and was compliant with health and safety requirements and that staff were appropriately qualified. At the same time a child may be placed in a residential children's home that has in place child protection policies and procedures and is compliant with health and safety requirements but that does not necessarily mean that the child feels safe. It does not tell us whether the child knows where they can go to raise concerns, if they have information about advocacy, complaints or if they know who they can contact to speak to about why they do not feel safe. Therefore I welcome the proposed balance between these standards and evidence of outcomes for children and young people.

¹ <http://cssiw.org.uk/docs/cssiw/report/150304annualreport3en.pdf>

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

2.1 I understand the basis of proposals to introduce a new service based regulatory system in order to respond to and accommodate emerging models of service. The Bill encompasses the inspection of Adoption services which are constituent parts of the National Adoption Service and it is obviously essential that the regulatory system is developed in pace with new service models.

2.2 I would seek assurance that proposals to introduce a new service based regulatory system will include clear guidance on transparent governance arrangements and lines of accountability. The development of new models of service and regional working arrangements must be underpinned by clear governance and accountability arrangements.

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

3.1 The Equality and Human Rights Commission (EHRC) have detailed public authorities, including Regulators, and Inspectorates, to promote and protect human rights when carrying out public functions². If a public authority fails to comply with the Human Rights Act 1998 (HRA), a person who is affected by that failure may be able to take action on this basis in the UK courts. CSSIW are already recognized by the EHRC as an Inspectorate who have been working to promote compliance with human rights obligations, which is to be commended and I hope that the Bill is utilised as a vehicle to ensure that due regard is given to the UNCRC by regulatory bodies and service providers.

3.2 The Explanatory Memorandum sets out the intention to restate the powers of the Health and Social Care (Community Health and Standards) Act 2003 within the revised legislative statute for social care in Wales, which will now include regulating duties imposed on local authorities to give due regard to the UNCRC under section

² <http://www.equalityhumanrights.com/publication/human-rights-action-case-studies-regulators-inspectorates-and-ombudsmen>

7 of the Act, though this is not explicitly stated on the face of the Bill. In keeping with the Welsh Ministers' duties to also give due regard under the Rights Measure, it would seem fitting for this duty to be ascribed to the inspectorate as they undertake the functions of regulation and inspection. Indeed, by extending the duty of due regard to the UNCRC to all persons exercising functions under the Bill, as it is in the Act, we can further embed children's rights within Welsh legislation. I believe that this could help heighten public awareness of the UNCRC and help us to further foster a culture which promotes thinking about the impact of what goes on in society on children, which challenges bad practice and promotes positive outcomes. Practical improvements leading to beneficial outcomes are essential for the duty of due regard to have real meaning.

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

4.1 The need for a regulation and inspection framework to accommodate advocacy services was a recommendation from my office's review of independent professional advocacy services, 'Missing Voices' (Recommendation 28, 2011). My predecessor therefore welcomed the proposals within the White Paper to introduce changes that will allow Welsh Government to establish appropriate registration requirements for advocacy services. I am aware that the Minister has given the directive for Advocacy services to become regulated within the first tranche of regulations emanating from the successful passage of the Bill³, however I am of the view that Advocacy Services should become specified as a regulated service on the face of the Bill, in keeping with the inclusion of Advocacy Services on the face of the Social Services and Well-being (Wales) Act, and to enshrine the emphasis of empowering children and young people with a stronger voice and control over the services they receive. The Statement of Policy Intent for the subordinate legislation proposes that advocacy services require more time to become established, however my assessment differs, especially in relation to children's Advocacy Services, as they have been established within the social care sector across Wales for the last 15 years. In prescribing the meaning of regulated services, the Bill already distinguishes specific children's services and I believe that children's Advocacy Services are ready to become regulated, and the providers themselves have confirmed that they would embrace the development, which could move towards elevating

³ <http://www.senedd.assembly.wales/documents/s38565/25%20March%202015.pdf>

the profession to an equal status alongside the agencies and professionals they interact with on a daily basis. Vitrally, a service which is in direct contact with children and young people who have care and support needs, who are often in vulnerable situations, should be a regulated one in order to safeguard the service users.

4.2 The National Standards for the provision of children’s advocacy services in Wales⁴ are currently being revised as a means to determine a clear set of good practice guidelines against which advocacy provision could be measured in Wales. The previous set of standards were welcomed and were expected to become an important part of advocacy development, monitoring and quality assurance. However, it appears that no one has been given any responsibility for measuring advocacy practice against these standards as they are voluntary and not enforceable.

4.3 It is my Office’s long standing view that a means of regulation and inspection must be established as a matter of urgency to progress advocacy to a level where we can be confident of its quality and reach⁵. Inspectors need to be given the opportunity to shine the light on both good and poor practice to inform practice development and improvement. In response to the series of reports my predecessor published following use of statutory powers to review advocacy provision, Welsh Ministers confirmed that CSSIW have already taken an integrated approach to ascertain whether the voice of the child is heard as part of the inspection methodology, which provides a strong foundation to build a regulatory framework for advocacy upon.

4.4 The work of the Care and Social Services Inspectorate Wales’s (CSSIW) recent thematic inspections into ‘safeguarding and care planning of looked after children and care leavers who exhibit vulnerable or risky behaviours’⁶ provides further evidence on the benefits of advocacy to children and young people. CSSIW found that the children and young people they interviewed as part of the review were effectively safeguarded; knew about advocacy and knew how to access it. It is reassuring to hear this, because I would expect those looked after children who display risky behaviours to be apprised of the benefits of advocacy, and to have access to an advocate to support them through challenging situations. CSSIW recognise that given the focus the case sample reviewed in each local authority encompassed, inclusive of some of the most challenging and complex case management issues, the inspection represented only a small cohort of each authority’s wider looked after

⁴ <http://www.wales.nhs.uk/sites3/Documents/441/Advocacy%20Standards-e.pdf>

⁵ <https://www.childcomwales.org.uk/uploads/publications/285.pdf>

⁶ <http://cssiw.org.uk/our-reports/national-thematic-report/2014/safeguarding-and-care-planning-of-looked-after-children-and-care-leavers/?lang=en>

children and care leaving population⁷. In contrast, the evidence base from ‘Missing Voices’ was gathered from the views of a much broader cohort of children and young people who have a statutory entitlement to independent advocacy, across a timespan starting with the Commissioner’s ‘Lost After Care’ report in 2011⁸. The challenge for duty bearers now is to ensure that there are consistent, high quality services accessed by eligible children and young people all across Wales, and a move toward a regulated service would advance the advocacy journey that Wales has been on over the last 15 years.

4.5 The central recommendation from ‘Lost in Care: the Waterhouse report’, published in 2000, was for the establishment of an independent Children’s Commissioner for Wales whose duties should include ensuring children’s rights are respected through oversight of the operation of children’s advocacy⁹. As such, the role of the Commissioner and her office is interdependent with the principles behind advocacy as a primary safeguarding service. The White Paper stated that the Bill to follow ‘may also include the duties and powers of the Children’s Commissioner for Wales, which currently derive from the Care Standards Act’. My predecessor met with Welsh Government officials to discuss this and indicated his view the time is right for a revised legislative framework for the Children’s Commissioner for Wales. I concur with this as there has been considerable constitutional and legislative change since the inception of the role in Wales over fourteen years ago and there is a need to develop a new legislative framework for the independent children’s rights institution in Wales to reflect this.

4.6 I welcome the opportunity to engage further with Ministers and relevant officials over the coming months to consider this issue in further detail. The fact that the majority of the Care Standards Act 2000 will be subsumed by legislation proposed here (and that enacted for England) means that action to put in place a firm legislative framework for the role of Children’s Commissioner for Wales cannot be delayed for too long a period. The Independent Review into the role and functions of the Children’s Commissioner for Wales recommended that the legal framework governing the Children’s Commissioner for Wales should be consolidated and simplified into one piece of Welsh legislation¹⁰. My office agrees that legislation should be consolidated and

⁷ <http://cssiw.org.uk/docs/cssiw/report/140828lacbridgenden.pdf>

⁸ <http://www.childcom.org.uk/uploads/publications/250.pdf>

⁹ Lost in Care, 2000

http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/DH_4003097

¹⁰ <http://gov.wales/docs/dsilg/publications/cyp/141210-childrens-commissioner-reportv3-en.pdf>

simplified into a new Children and Young People's Bill that will ensure that the Children's Commissioner for Wales has the power to act on all matters which relate to or affect children in Wales.

4.7 There is an anomaly in relation to the regulation of residential special schools, which have National Minimum Standards that are used by CSSIW when it undertakes welfare inspections¹¹. There is a separation of National Minimum Standards for all other schools which provide accommodation for children. Boarding schools which accommodate or arrange accommodation for any child for more than 295 days a year, or intend to do so, are required to register as children's homes with the CSSIW and are then subject to the Children's Homes Regulations 2002 and the National Minimum Standards for Children's Homes rather than standards in relation to residential special schools. Further work is required to address this anomaly through the Bill and its subordinate legislation, as I would advocate for all children in residential special school settings who have care and support needs to receive regulated services, not just a service that is inspected against Minimum Standards but without any powers of enforcement. My counterpart in England has ascertained the views and experiences of children and young people in residential special schools, and consequently called for the formulation of comprehensive, ambitious and outcome focused quality standards to replace the current National Minimum Standards¹², and I echo the same call for Wales as a starting point to further safeguard children attending these schools.

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

5.1 By relating the definition of "care" within the Bill to physical tasks and the mental processes related to those tasks seems to disproportionately focus on physical needs rather than emotional well-being as it does within the Act. I would expect there to be greater connectivity with the meanings of well-being, care and support from the Act as the Bill moves through the scrutiny process.

6. What are your views on the provisions in Part 1 of the Bill for the regulation of social care services?

6.1 While I welcome the intention to strengthen openness and transparency by service providers careful consideration of how the publication of annual reports will be understood and perceived by children and young

¹¹ <http://cssiw.org.uk/docs/cssiw/general/130910nmsspecialschoolsen.pdf>

¹² http://www.childrenscommissioner.gov.uk/content/publications/content_909

people will be needed. In terms of the presentation of annual reports and their contents great care would be needed to ensure that the material produced on issues such as, for example, corporate governance arrangements can be set out in a way that children and young people can comprehend. Children and young people may need support to assist them in understanding the role and contents of a service provider's annual report. I recommend that consultation with national, regional and local forums, including peer led looked after children forums and youth forums, be undertaken to explore how best to address the need for support in understanding an annual report for children and young people in different circumstances. It may also be necessary to put in place measures to ensure that children and young people have access to an independent person or advocate to help them understand the contents and implications of an annual report.

6.2 More fundamental than this though is my concern about the impact an annual report could have on children and young people in specific circumstances. For example should a child placed in a residential children's home be provided with an annual report containing information about complaints against staff and what impact might this have on their emotional well-being? Should they feel that they do not wish to remain in that residential placement as a result of the information contained in that annual report what actions will be open to them in the context of limited placement availability within each authority? I would expect children and young people to be provided with information about support from an independent advocacy service at the same time they receive any annual report so that they get support to express and resolve any concerns they may have as a result of information contained in an annual report. Careful consideration is needed of how this process is managed as the proposals go forward. It will not be sufficient for children and young people to be simply provided with an annual report (even if produced in an accessible way) without the safeguards of measures that will ensure that they understand why the annual report is important, what it says and what it means for them.

6.3 A Quality Judgement Framework supported by a transparent and consistent approach to assessing the quality of services would provide a useful tool for those tasked with scrutinising the quality and consistency of services provided to children and young people across Wales. The evaluation of the Pilot Quality Judgement Framework for early years found that there was overall support from inspectors towards moving to a new system approach¹³, but there was little consideration of the impact on children in receipt of such services, and this would have to be factored in as the framework is extended wider. In considering how useful such an approach could be for children and young people, the provision of clear information about the safety and quality

¹³ <http://cssiw.org.uk/docs/cssiw/general/150204qjfevalen.pdf>

of the services they use would have to be provided within a supported system in the same way as that I have set out for annual reports above.

6.4 My predecessor often highlighted the crucial importance he placed on systems that support the child to have a voice as a central part of good safeguarding practice. Access to independent professional advocacy is a key part of this and I am engaged with Welsh Government in relation to the strengthening of current arrangements in response to my office's review of advocacy services 'Missing Voices'. Robust implementation of this entitlement is essential. In addition evidence from serious case reviews tells us that where children and young people are not afforded the opportunity to speak to an independent person without a parent or carer present they can be denied the right to share any concerns they have. Children and young people continue to have the option to speak to those responsible for inspecting the service provider without a member of service staff being present. However children and young people may need to be introduced to the inspector by a trusted adult who can explain their role in advance of any meeting. Additionally some children and young people may wish to have an advocate or other independent representative present to assist them in expressing their views or concerns when meeting with an inspector. As inspections are unannounced, the capacity to return to meet with children and young people should be inbuilt into the whole process.

7. What are your views on the provisions in Part 1 of the Bill for the regulation of local authority social services?

7.1 I welcome the intention to strengthen the role of the service regulator in terms of their relationship with local authorities, and have made specific reference to the scrutiny of services against their duties of due regard to the UNCRC above. Responsible and informed commissioning is also key to securing good quality services that can meet the needs and demands of children and young people.

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

9.1 I wish to acknowledge the important work and leadership that has been provided by the Care Council for Wales. The proposals to reconstitute the Care Council for Wales into Social Care Wales to provide strong leadership on the improvement agenda in addition to existing functions is to be welcomed. I would like full

consideration to be given to the relationship between the functions exercised by this new institute and opportunities to promote the UNCRC and a child rights based approach to social care practice in line with Welsh civic society's commitment to the Convention.

10. What are your views on the provisions in Parts 4 – 8 of the Bill for workforce regulation?

10.1 Children and young people in Wales have the right to expect that the practitioners and professionals with whom they come into contact as a result of care and support needs have been subject to a thorough consideration of their suitability to fulfill positions of trust. Workforce registration is key to safeguarding measures and potentially gives greater affect to article 19 of the UNCRC (take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has care of the child). I would wish to see training on the UNCRC and children's rights included as a requirement of induction and continuous professional development in order to retain registration.

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

11.1 I welcome the proposals to introduce measures to strengthen information and intelligence sharing between regulators. We know that robust information sharing is at the heart of measures to keep children and young people safe.

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

12.1 The 'Policy intent for regulations to be made under this Bill' document provides a useful oversight of the subordinate legislation we will expect, and there is significant detail on the face of Bill, which I believe would be strengthened through stronger legislative linkages made with the Act, especially in relation to advocacy, meanings of care and support, and duties of due regard to the UNCRC.

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

13.1 I am acutely aware that the CSSIW and other inspection budgets are being stretched and that any new regulatory responsibilities need to be fit for purpose and either have funding linked to it or be integrated systematically into a current framework.

Submitted by:



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Children's Commissioner for Wales