

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

[The Care and Support \(Eligibility\) \(Wales\) Regulations 2015 / Rheoliadau Gofal a Chymorth \(Cymhwysra\) \(Cymru\) 2015](#)

Evidence from Age Cymru - CSR 01 /  
Tystiolaeth gan Age Cymru - CSR 01



## **Consultation Response**

### **National Assembly for Wales Health and Social Care Committee Scrutiny of the Care and Support (Eligibility) (Wales) Regulations 2015**

**May 2015**

#### **Introduction**

Age Cymru is the leading national charity working to improve the lives of all older people in Wales. We believe older people should be able to lead healthy and fulfilled lives, have adequate income, access to high quality services and the opportunity to shape their own future. We seek to provide a strong voice for all older people in Wales and to raise awareness of the issues of importance to them.

We welcome the opportunity to respond to the Health and Social Care Committee's consultation on regulations and codes of practice in relation to eligibility. The effective operation of the eligibility framework will be fundamental to the operation of the social care system under the new Act.

#### **Introduction**

1. Age Cymru were pleased to participate in the work of the Technical Group established by the Welsh Government that considered Eligibility. We welcome this opportunity to comment on the Code of Practice on Meeting Needs and associated regulations as they have been laid before the Health and Social Care Committee.
2. We welcome the steps that have been taken to introduce greater consistency in the eligibility framework across Wales. However, we remain deeply concerned that if the threshold for eligibility is set too high, older people will not receive the support that they need until a crisis point is reached. It is crucial to ensure that no-one is worse off as a consequence of the transition to the new system.
3. Whilst we appreciate that the intention of the Act is to see more people's needs being met by preventative services in the community, we must recognise that this will require a significant shift in resources in order to be achieved. It also needs to be recognised that, despite assertions to the contrary in the Codes, there may not be an immediate reduction in the number of people in Wales who need access to

formal social care services as many people are living for longer and the incidence of chronic conditions and forms of cognitive impairment continues to rise.

### **The 'Can and Can Only' principle**

4. According to 2.20, the National Eligibility Framework is expressed through the following principle:  
"The person has needs which meet the eligibility criteria if an assessment establishes that they can, and can only, overcome barriers to achieving their well-being outcomes by the local authority preparing a care and support plan (or a support plan for a carer) to meet their assessed needs, and ensuring that the plan is delivered."
5. With regard to the 'Can and Can Only' principle for determining eligibility, we are concerned that the restrictive nature of the definition creates potential for the application of the principle to become a barrier to accessing personalised services, if it is interpreted in such a way that a person has to demonstrate that their needs are not being met by the preventative services available in the community. Steps must be taken to ensure that this does not delay people from accessing personalised services to support the achievement of their well-being outcomes.

### **Co-production and right to appeal**

6. In terms of enabling co-production, we are not convinced that the eligibility framework will strengthen the role of individuals as the local authority will retain control of commissioning the services to deliver care and support plans. It is therefore a concern that individuals receiving a care and support package who choose not to have a direct payment will not be full partners in designing and delivering care due to the role of procurement processes in shaping the services commissioned.
7. We welcome the commitment in 3.34 of the code that visits commissioned under a care and support plan should be of sufficient length to ensure appropriate delivery and that the length of visits must be identified in the care and support plan. We must now ensure that this leads to the delivery of quality care. It is important to ensure that commissioning processes work to facilitate this delivery, rather than acting as a barrier or restricting the capacity for co-production to operate.
8. We are also concerned that the language in the Codes and the Regulations leaves decisions to the local authority in a way that works against the principle of co-production. For example, references including the phrase 'if it appears' seem to give the local authority a large degree of discretion in deciding whether a person requires a re-assessment of whether their needs are being met. Under 3.58, for example, the implication would appear to be that if the local authority is satisfied that needs have not changed/needs are being met, then no re-assessment would take place. It is not clear what recourse, if any, exists for an individual or a carer in these circumstances.

9. The above issue reflects the fact that, unlike the Care Act in England, the Social Services and Wellbeing (Wales) Act does not provide a right of appeal to decisions made by local authorities. Currently the only mechanism open to carers and those they care for to object to the outcome of eligibility decisions is to make a formal complaint. We believe that this oversight weakens the overall intentions of the Act and would like to see a formal appeals process introduced by legislation at the earliest opportunity.

### **Monitoring of signposting to ensure effectiveness**

10. Whilst we welcome the revision to the Code of Practice under 2.24 to provide support to access appropriate community-based services, even where a determination of eligibility has been made, we are concerned that the signposting highlighted under 3.9 does not allow for monitoring to ensure that this signposting has worked effectively, that services have been accessed, and that these services have been able to help the person achieve the desired well-being outcome.

### **Clarity**

11. We are unclear as to why the 'specified outcomes' listed in Regulation 5 (b) (i) of the Care and Support (Eligibility) (Wales) Regulations 2015 do not correlate exactly with the 'personal well-being outcomes' that are set out in Part 2 of the Act. This appears to introduce an unnecessary lack of clarity for both practitioners and those seeking assistance.

### **Direct payments**

12. Age Cymru were pleased to be invited to participate in the work of the Overview Group established by the Welsh Government that considered Direct payments. We welcome many of the revisions that have been made to the Code of Practice in line with the recommendations of the Overview Group's consultation response. We welcome the commitment to expanding and facilitating the use of direct payments, and it is important that direct payments are not refused, or fail to be offered, based upon assumptions made about an individual's chronological age.
13. One remaining area of concern relates to the fact that direct payments cannot be used to pay for healthcare as is made clear by 4.7. This gives rise to a concern that without clear processes for joint working between local authorities and healthcare professionals, there is a potential for tensions to emerge between health boards and local authorities over the definition of certain needs.

### **Advocacy**

14. As a long-term proponent of independent advocacy, Age Cymru welcomes the inclusion of advocacy in the redrafted Part 4 Code of Practice, in light of its absence from the original. In particular, we welcome the recognition under 3.51 and 3.52 that a review of a care and support plan can involve an advocate.
15. We are also pleased to see a new paragraph addressing advocacy under 3.32. However, we are concerned that some of the language and phrasing used under this paragraph does not reflect the intention of the work of the Advocacy Technical Group which participated in the development of the draft Code of

Practice on advocacy. In particular, it fails to recognise that support by family and friends may be inappropriate, as opposed to unavailable. Where there are conflicts of interest between an individual and members of their family, or potential safeguarding concerns, advocacy by those family members is entirely inappropriate. The paragraph also fails to reflect those situations where independent advocacy is appropriate.

16. In line with the comments above, we are concerned about the phrasing that has been added around inclusion of an advocate “where one has been identified” (e.g. 2.3) as this does not reflect the importance of providing advocacy where an individual can, and can only, participate effectively in assessment, eligibility and other processes with the assistance of an independent advocate.

### **Carers**

17. We understand the overarching aims of the Act to refocus on people’s strengths, capacity and capabilities but we are concerned that this change of emphasis could easily result in additional demand and expectation being placed on unpaid carers to meet the care and support needs of the people they care for. It is vital then that primary and secondary legislation provides a clear legal framework for the decisions which need to be made by local authorities in these matters.
18. We welcome the high profile given to carers in the Act and both the primary and secondary legislation relating to assessments make it clear that an assessment of needs must be carried out in a manner which disregards the willingness or availability of a carer to provide care and support. The “Can and Can Only” test and eligibility regulations however reintroduce the availability of *“others who are willing to provide that care”* directly into decisions about whether a person is legally entitled to have their needs met by a local authority. We believe that there is an inherent risk for carers in this approach, especially as the stated aim of the legislation is to “reduce the number of people who will require a care and support plan” and thereby have an enforceable right to support from their local authority.
19. Age Cymru, together with other members of the Wales Carers Alliance, was therefore particularly disconcerted to see the removal of Regulation 7 from the original consultation draft. Regulation 7 specifically addressed the importance of a local authority disregarding the care given by a carer (to an adult or a child) when making decisions in regards to need and eligibility. The removal of this clause increases the likelihood of local authorities deciding that the care and support needs of an adult or disabled child can be readily met by their carer, potentially placing undue pressure on carers to take on or maintain increasing levels of care.
20. Clauses 3(c)(ii), 4(c)(ii), 5(c)(ii) of the revised regulations refer to “others who are willing to provide that care” but there is a concern that this does not provide sufficiently clear direction on the relationship between eligibility and the willingness and availability of a carer to provide care and support. The original Regulation 7 may have been confusing but at least attempted to address this issue.