

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Report on the Social Services and Well-being (Wales) Bill

July 2013



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

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Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

In accordance with Standing Order 17.48, William Powell AM and Jocelyn Davies AM substituted for Eluned Parrott AM and Simon Thomas AM.



William Powell
Welsh Liberal Democrats
Mid and West Wales



Jocelyn Davies
Plaid Cymru
South Wales East

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The Committee's Recommendations

Conclusion 1. We are surprised that the issue of obtaining appropriate consents has yet to be resolved, particularly given that the Welsh Government's proposals, which have now been translated into a Bill, are likely to have been developed over a considerable period of time. It is important that the issues of concern are resolved quickly and the final outcome is made public as soon as possible. (Page 18)

Conclusion 2. Nevertheless, we note that the implementation of the Deputy Minister's policy intentions has been affected by the current constitutional settlement. While we acknowledge that the nature of the constitutional settlement is being considered by the Silk Commission, the outcome of this work will not be known for some time. In the meantime, we will monitor how the operation of the settlement impacts on the implementation of the policy intentions of the Welsh Government and it may be appropriate to undertake an inquiry in this area. (Page 19)

Recommendation 1: We believe that a Bill of such public importance should have more detail on its face. We recommend that the Deputy Minister reviews the balance of the Bill with a view to tabling amendments to ensure that the Bill's policy intent is much clearer. (Page 24)

Recommendation 2: As part of the review in recommendation 1, and while we make recommendations later in this report regarding the procedure to be applied to subordinate legislation, we recommend that the Deputy Minister reconsiders all the procedures to be applied to the making of subordinate legislation and issues a written statement on that aspect of the review, prior to tabling appropriate amendments. (Page 24)

Conclusion 3: We do not consider it good practice to introduce a framework Bill unless there are good reasons for doing so. Ultimately, it is better to delay the introduction of a Bill rather than introduce one which requires further detailed policy development and for the outcome of that development to be added by means of subordinate legislation. (Page 25)

Recommendation 3: We recommend that the Deputy Minister should consider tabling an amendment to apply the affirmative procedure to the regulation-making powers contained in sections 3(6), 7(3) and 9(3). (Page 28)

Recommendation 4: We recommend that the Minister should consider tabling an amendment to the Bill to apply a super-affirmative procedure to regulation-making powers under section 19 of the Bill. (Page 29)

Recommendation 5: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 23, 26 and 27, followed thereafter by the negative procedure. (Page 31)

Recommendation 6: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 34 to 37, followed thereafter by the negative procedure. (Page 33)

Recommendation 7: We recommend that the Deputy Minister should table an amendment to provide that in each case where Welsh Ministers issue a direction under section 62(5), the direction is accompanied by a written statement explaining the reason for its use. (Page 34)

Recommendation 8: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 92 and 93, followed thereafter by the negative procedure. (Page 35)

Recommendation 9: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under sections 105(9) and 112(4). (Page 28)

Recommendation 10: We recommend that the Deputy Minister should table an amendment to apply a superaffirmative procedure to the order-making power in section 117 of the Bill. (Page 40)

Recommendation 11: We recommend that the Deputy Minister should table an amendment to apply a superaffirmative procedure to an order made under section 119 (2), unless the order makes changes of only a minor or consequential nature, in which case the affirmative procedure should apply. (Page 40)

Recommendation 12: We recommend that the Deputy Minister should table an amendment to provide that in each case where Welsh Ministers issue a direction under sections 122, 125 and 129 to 133, the direction is accompanied by a written statement explaining the reason for its use. (Page 44)

Recommendation 13: We recommend that the Minister should table an amendment to apply the affirmative procedure to section 144 of the Bill. (Page 47)

Recommendation 14: We recommend that the Deputy Minister should consider tabling an amendment to apply a superaffirmative procedure to the regulation-making power in section 147. (Page 47)

Conclusion 4. In our view, the fact that legislation in the same policy area is being developed by the UK Government in England should not be used as a reason for excluding information on the face of a Welsh Government Bill. This is because it can have a negative impact on the effective scrutiny of legislation in Wales. We do not expect to see the Welsh Government put forward such an argument in future, unless there are exceptional reasons for doing so. (Page 50)

1. Introduction

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21¹ and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

The Bill

4. On 28 January 2013, the Deputy Minister for Social Services, Gwenda Thomas AM introduced the Social Services and Well-being (Wales) Bill (‘the Bill’) and accompanying Explanatory Memorandum.
5. The National Assembly’s Business Committee referred the Bill to the Health and Social Care Committee on 22 January 2013 for consideration of its general principles, setting a deadline to report of 21 June 2013. At a subsequent meeting of the Business Committee on 19 March 2013, this date was extended to 5 July 2013. A further extension to the 19 July 2013 was provided by the Business Committee on 18 June 2013.

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, December 2012

2. Background

Purpose of the Bill

6. The Explanatory Memorandum² explains that the purpose of the Bill:

“...is to specify the core legislative framework for social services and social care in Wales. It gives effect to the policy stated in the White Paper *Sustainable Social Services for Wales: A Framework for Action*, which set out the Welsh Government’s response to the significant challenges that face social services as a result of increased and changing societal expectations, demographic change and a difficult resource environment.”³

7. In so doing, the Bill provides for:

“... a single Act for Wales that brings together local authorities’ duties and functions in relation to improving the well-being of people who need care and support and carers who need support ... to deliver the Welsh Government’s commitment to integrate social services to support people of all ages, and support people as part of families and communities.”⁴

8. The Explanatory Memorandum also describes the primary policy objectives of the Bill as being to:

- “a. improve the well-being outcomes for people who need care and support and carers who need support; and
- b. to reform social services law.”⁵

9. It also states that:

“The Welsh Government intends to achieve these objectives through:

- a. simplifying the web of legislation that currently regulates social care in Wales;

² Welsh Government, *Social Services and Well-being (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes*, January 2013

³ Explanatory Memorandum, paragraph 13

⁴ Explanatory Memorandum, paragraph 1

⁵ Explanatory Memorandum, paragraph 101

- b. providing people with a stronger voice and greater control over services they receive;
- c. ensuring people receive the help they need to live fulfilled lives; and
- d. stronger national direction with clear local accountability for delivery.”⁶

10. The Explanatory Memorandum also sets out the Welsh Government’s view on what the Bill will achieve:

“It will transform the way social services are delivered, primarily through promoting people’s independence to give them stronger voice and control. Integration and simplification of the law for people will also provide greater consistency and clarity to people who use social services, their carers, local authority staff and their partner organisations, the courts and the judiciary. The Bill will promote equality, improve the quality of services and the provision of information people receive, as well as ensuring the right incentives for commissioners to achieve a shared focus on prevention and early intervention.”⁷

Summary of provisions in the Bill

11. The Bill contains 169 Sections, divided into eleven Parts, and three Schedules.

12. Part 1 (Introduction) provides an overview of the Bill and definitions of key terms, including a new, broader definition of ‘well-being’.

13. Part 2 (General Functions) sets out the overarching duties placed on local authorities, Local Health Boards and others around the ‘well-being’ of people who need care and support and carers who need support. This Part requires local authorities and Local Health Boards to assess the extent of need and the services required to meet needs in their areas. This Part also requires local authorities to:

- provide or arrange preventative services which would aim to benefit a much broader range of people than those who are eligible for care and support following an assessment;

⁶ Explanatory Memorandum, paragraph 102

⁷ Explanatory Memorandum, paragraph 2

- promote social enterprises, co-operatives, user led services and the third sector, to develop new models of delivery;
- provide information, advice and assistance to the public regarding care and support services and how to access them;
- establish registers of blind, deaf and disabled children.

14. Part 3 (Assessing the needs of individuals) covers the assessment of adults, children and carers and provides a single right to assessment with different emphases for each group.

15. It includes requirements that assessments should be proportionate to the circumstance and should identify the outcomes individuals and /or parents and carers etc. of children wish to achieve and the extent to which care and support will help to achieve them. In the case of carers an assessment must also identify work, training or education needs, developmental needs in the case of young carers, and willingness and ability to care. The current requirement that a carer must be providing 'substantial' and 'regular' care would no longer apply.

16. Part 3 also provides for the integration of assessments across service areas, for example with health services assessments.

17. Part 4 (Meeting needs) relates to meeting the needs of adults, children (who are not looked after by the local authority) and carers, including through direct payments. Ways of meeting needs however are not set out in the Bill, the aim being to allow flexibility and innovation.

18. The assessment process is followed by determination of eligibility for services which would be undertaken within a new national eligibility framework, although a need for protection from abuse or neglect can override eligibility criteria. Such a framework is not set out on the face of the Bill but left to be prescribed in regulations. Local authorities would retain discretion to provide services for people falling outside the eligibility criteria.

19. Local authorities are not required to meet the care and support needs of adults with sufficient means to pay for their own services, unless they request it. This Part also makes provision for direct payments with regulation making powers to determine their scope and

administration. In particular, this Part will make the purchase of local authority services with direct payments possible.

20. Part 4 also sets out that those with eligible needs should have a care and support plan which will, except in the case of carers and plans drawn up using discretionary powers, be 'portable' across local authorities in Wales.

21. Part 5 (Charging and financial assessment) covers the charges local authorities may make for social services and provides regulation-making powers to set out the circumstances for charging and maximum charges that may be made.

22. In particular, this Part requires local authorities that provide or arrange care and support for an individual to carry out a financial assessment of the person's resources, and regulations will set out criteria for determining liability for charges.

23. Local authorities may charge for preventative services and for information, advice and assistance, subject to regulations, but would no longer be required to charge for residential care.

24. Part 6 (Looked-after and accommodated children) mainly reflects current duties placed on local authorities by Part 3 of the *Children Act 1989* in relation to 'looked after' children (who are not the subject of a formal care order), care leavers and accommodated children.

25. Under those enactments, local authorities have a duty to provide accommodation to children who require it, to safeguard and promote the wellbeing of looked-after children, promote educational achievement and meet their care and support needs.

26. The Bill provides that 'out of area placements' will be subject to certain requirements, to be set out in regulations. Provision is also made under this Part for fostering children, including the approval of local authority foster parents and arrangements with fostering agencies.

27. This Part also provides for contact between looked after children and parents/relatives etc., and for independent visitors and Independent Reviewing Officers. It also sets out categories of care leavers and their respective entitlement to, and levels of, support.

28. The circumstances and limitations on the use of secure accommodation are set out in this Part, which may also be provided for in subsequent regulations made by Welsh Ministers.

29. Part 7 (Safeguarding) provides a new legal framework for the protection of adults at risk including a duty on local authorities to investigate suspected abuse and respond accordingly. It provides powers of entry to allow access to a person suspected of being at risk. It also abolishes an existing power under section 47 of the *National Assistance Act 1947* to remove a person in need of care from their home.

30. This Part in addition sets up a new National independent Safeguarding Board to monitor and improve safeguarding arrangements. It also provides for children's safeguarding boards and new adult safeguarding boards, including arrangements for possible future mergers of children and adult boards.

31. Part 8 (Social services functions) sets out the statutory function of social services, which are contained both in existing legislation and in this Bill. These functions are set out in Schedule 2, which may be altered by the Welsh Ministers through subsequent regulations.

32. This Part also requires the appointment of Directors of Social Services in all local authorities, although two or more may share a Director, and includes powers to issue codes of practice with which local authorities must act in accordance. It also includes powers for Welsh Ministers to intervene in local authorities that are failing to fulfil their social services functions.

33. Part 9 (Well-being outcomes, co-operation and partnership) places a new duty on Welsh Ministers to publish and lay before the Assembly 'national outcome statements' setting out the outcomes of the provision of care and support. Codes of practice will be issued to help achieve the specified outcomes and may impose requirements on local authorities, including standards, measures and targets.

34. This Part also includes provision for co-operation between local authorities and other bodies, as listed in the Bill, and requirements on local authorities to promote the integration of health and social care services. Partnership arrangements between local authorities and between them and Local Health Boards may be prescribed through regulations.

35. This Part in addition provides for joint arrangements for adoption services to facilitate a national adoption service.

36. Part 10 (Complaints and representations) provides for the procedures relating to complaints and representations about social services, including children's services. Regulation making powers included in this Part also allow Welsh Ministers to prescribe support (e.g. advocacy) to be provided to people making complaints and representations, and the groups of service users who may receive support. Arrangements are also set out regarding representations about children in need, looked after children and care leavers.

37. This Part also includes new powers for the Public Service Ombudsman for Wales to investigate complaints about privately purchased social care and palliative care.

38. Part 11 (Supplementary and general) includes supplementary matters such as the recovery of costs between local authorities and a definition of 'ordinary residence'. This Part also makes general provision for varying the effects of the Act using statutory instruments and sets out which statutory instruments will be subject to the affirmative resolution and which will be subject to the negative resolution. A list of terms and definitions used in the Bill is included in this Part.

3. Legislative Competence

Evidence from the Minister

39. According to the Explanatory Memorandum, the National Assembly for Wales has the legislative competence to make the provisions in the Bill under Part 4 of the *Government of Wales Act 2006*, as set out in section 108 and Schedule 7, specifically in relation to the following subject headings: social welfare (paragraph 15), public administration (paragraph 14), health and health services (paragraph 9) and local government (paragraph 12).

40. At the introduction of the Bill in plenary on 29 January 2013, the then Minister for Health and Social Services, Lesley Griffiths AM said:

“The Bill that we have introduced is within competence. It has been slightly modified to take account of the fact that we have not yet secured all of the necessary consents from two Whitehall departments. We will continue to pursue this and will seek to reintroduce the small number of deleted provisions at Stage 2. However, we have to express our disappointment that the UK Government did not prioritise the strengthening of safeguarding.”⁸

41. In her opening remarks to us the Deputy Minister stated:

“... The Bill is within competence and we have the necessary consents in place.”⁹

42. In a letter to the Chair of the Health and Social Care Committee on 24 April, the Deputy Minister responded to issues it¹⁰ regarding competence:

“With regards to competence, I am confident that this legislation is within the competence of the National Assembly. On the issue of consents, to enable us to include provision which imposes or modifies functions of Ministers of the Crown, we continue to liaise with the UK Government. Obtaining Ministerial consent will allow us to re-instate some of the provision about safeguarding boards and cooperation which

⁸ National Assembly for Wales, *Plenary Statement: The Introduction of the Social Services and Well-being (Wales) Bill*, RoP 29 January 2013

⁹ Constitutional and Legislative Affairs (“CLA”) Committee, *RoP [paragraph 136]*, 22 April 2013

¹⁰ Letters from the Chair of the Health and Social Care Committee, dated 24 April 2013 and 20 May 2013

was amended prior to introduction. The main sticking point is the funding model for safeguarding boards which UK Ministers will not countenance. Committee members will recall that the Bill I introduced was not dependent on these consent issues being resolved. If, as I anticipate the issues around UK Minister consent are resolved, I am pleased to say that I intend to bring forward minor changes to the Bill by Government amendments for consideration at stage 2. I plan to provide the Committee with a detailed update on this when I come before you again on 6 June.”¹¹

43. On 6 June 2013, the Deputy Minister provided the Health and Social Services Committee with an update. She said:

“There was a meeting on 10 April between our officials and Whitehall, and I believe that it was a positive meeting. However, there is a sticking point, although I must reiterate that I believe that our Bill is fully within competence. With regard to the funding of the safeguarding boards, however, there is not full agreement. The Bill provides that we could require the police to contribute to the funding of the safeguarding boards, and I had a very positive meeting earlier in the week with the offices of the commissioners of police, and there was a willingness to co-operate. However, there is that one sticking point on the actual funding”.¹²

Our view

44. We note that the Deputy Minister had to amend her Bill prior to introduction as a consequence of legislative competence and consent issues. In particular, we note that the Deputy Minister has been seeking the consent of Ministers of the UK Government to enable the Bill to be amended so that it reflects the Deputy Minister’s original legislative intentions.

Conclusion 1: We are surprised that the issue of obtaining appropriate consents has yet to be resolved, particularly given that the Welsh Government’s proposals, which have now been translated into a Bill, are likely to have been developed over a considerable period of time. It is important that the issues of

¹¹ Letter from the Deputy Minister for Social Services to the Chair of Health and Social Care Committee, document 2, 20 May 2013

¹² Health and Social Care Committee, *RoP [paragraph 13]*, 6 June 2013

concern are resolved quickly and the final outcome is made public as soon as possible.

Conclusion 2: Nevertheless, we note that the implementation of the Deputy Minister's policy intentions has been affected by the current constitutional settlement. While we acknowledge that the nature of the constitutional settlement is being considered by the Silk Commission, the outcome of this work will not be known for some time. In the meantime, we will monitor how the operation of the settlement impacts on the implementation of the policy intentions of the Welsh Government and it may be appropriate to undertake an inquiry in this area.

4. General observations

Evidence

45. We asked the Deputy Minister about the balance between what is contained on the face of the Bill and what is left to be dealt with by subordinate legislation. She said:

“This Bill is a major piece of primary legislation. I think that it is larger in scope than any other that the Assembly has undertaken before. It is an enabling Bill, which aims to set the framework for social care in Wales and—this is very important—is intended to last a generation. Subordinate legislation will rightly provide the detail. This approach enables flexibility in changing times. The Bill is within competence and we have the necessary consents in place. I have a short list of regulations here, but perhaps I can elaborate on that as we go through the meeting. Getting the balance right between subordinate legislation and what is on the face of the Bill has been key to our thinking and I think that we need the flexibility that subordination can provide.”¹³

46. The Deputy Minister added that there :

“...are plans in place to develop policy intent prior to regulations. I have asked that that be done by December. I want committees to have ample time to consider that. Of course, I will be more than willing to update this committee when I have those to hand.”¹⁴

47. Chapter 5 of the Explanatory Memorandum describes the powers to make subordinate legislation. In a table listing each provision, the following phrase is used on 45 occasions to describe the reason for using the negative procedure to make subordinate legislation:

“The subject matter of these regulations is relatively minor detail in the overall legislative scheme”.

48. When asked whether overall this constitutes a major amount of detail, the Deputy Minister felt that:

¹³ CLA Committee, RoP [paragraph 136], 22 April 2013

¹⁴ CLA Committee, RoP [paragraph 138], 22 April 2013

“... perhaps it is possible to view these as you suggest, Chair. It is possible to view these as a totality, which I accept would mean that the overall content of regulations is more substantial. Nevertheless, I think that it is still the case that the subject matter of regulations needs to be considered through comparison with the systematic transformation of social care in Wales that the Bill is legislating for, in relation to its general functions and its duty to individuals. So, I think that each of those relate to the individual regulation.”¹⁵

49. The Explanatory Memorandum also explains that delegated powers are justifiable in many cases because of the need to act flexibly and quickly. The Deputy Minister expanded on the reasons for this:

“There are circumstances where we need to act quickly and to be able to change regulations to meet circumstances as they arise. The references here, I believe, are to safeguarding, complaints and one other topic. So, all of those topics are issues where I can imagine we would need to move quickly, particularly safeguarding. That option is key in order to be able to react and to change circumstances where they need to be changed quickly.”¹⁶

50. In a letter to the Chair of the Health and Social Care Committee, the Deputy Minister explained in detail the reason for the approach adopted:

“It aims to create a framework and solid foundation for sustainable social services in Wales, a foundation on which we can build social services that will meet the needs of the people of Wales for years to come. In order to do that, the system that enables the provision of social services, and the legal footing that that system sits on (this Bill), needs to be flexible.

“This flexibility cannot be achieved if the fine details are set out on the face of the Bill as this would result in a potentially significant number of changes to the primary legislation in years to come, once the Bill has completed its journey through the Assembly process and has been enacted.

¹⁵ CLA Committee, RoP [paragraph 140], 22 April 2013

¹⁶ CLA Committee, RoP [paragraph 142], 22 April 2013

“Instead, allowing the more operational details of the system to be defined through subordinate legislation provides the opportunity to ‘future-proof’ the Bill, to enable it to remain relevant and appropriate as circumstances and requirements change and as policies and evidence develop and grow over time. It also allows timely reactions to any amendments that may be needed as a result of the UK Government’s legislation and policy changes, which are due to take place during the coming years.

“In these circumstances, therefore, I feel the balance between primary and secondary legislation is not only proportionate, but necessary.”¹⁷

51. The Deputy Minister also explained how parts of the Bill were a consolidation of existing law. For example, the Explanatory Memorandum explains that Part 5 of the Bill, which deals with the charging and financial assessment arrangements, contains similar powers to those contained within the *Social Care Charges (Wales) Measure 2010*. The Deputy Minister explained that what was being done was to bring together existing charging regimes, noting that:

“The charging regime set out in Part 5 covers adults, children and carers, and it will apply to residential and non-residential services ... the Social Care Charges (Wales) Measure 2010 covers only non-residential care ... we have long needed a simple set of regulations for charging that people can understand, and ... to have this clear set of arrangements.”¹⁸

52. She added:

“The Bill is based on the people model, which is fundamental to our thinking and which underlines the whole approach to the Bill. So, we need a clear set of arrangements for charging that cover all charges, so that we demolish artificial boundaries due to age, and that we have a single process to assess ability to pay, to set charges and to future-proof that ... However, there will be times when we need to look at changing charges, due to inflationary rises, or whatever. We need the flexibility to do that quickly. You cannot set a charge and expect it to remain for the

¹⁷ Letter from Deputy Minister for Social Services to the Chair of the Health and Social Care Committee, document 2, 20 May 2013

¹⁸ CLA Committee, *RoP [paragraph 200]*, 22 April 2013

next 25 years, which I anticipate would be the life of this Bill. Therefore, we would need a process to allow us to change the charge if the need arose.”¹⁹

53. When it was suggested that it is strange to say that wanting a people’s model is at the heart of this Bill, and yet the Bill drifts into guidance or a code, the Deputy Minister responded by saying:

“I think that it is better to have the code than to have one Minister issuing statutory guidance. Who is accountable for that? It is just one Minister. I think that the Assembly has a part to play in the codes, and they will have to be presented to the Assembly ... I also believe in local democracy ... Social services will still be delivered by local government, and will be the remit of local government, and I believe that the code will deliver. With regard to wellbeing, it is set out in the Bill; the wellbeing concept or policy is set out in section 2 of the Bill.”²⁰

54. An official accompanying the Minister indicated that this was in essence the definition of a people’s model:

“The people’s model will hang off that definition, because that is core to the whole approach.”²¹

55. We also considered the use of codes within the Bill. The Deputy Minister was confident that the code-making provisions of the Bill could deliver her vision for services,²² adding:

“... but we will have to learn. This is a new concept, and it is transitional, as well as groundbreaking, in many aspects.”²³

56. Codes are covered in more detail in paragraphs 130 to 143 below.

Our view

57. We note that this is in essence a framework Bill on a major and significant area of public policy.

¹⁹ CLA Committee, RoP [paragraph 202], 22 April 2013

²⁰ CLA Committee, RoP [paragraph 286], 22 April 2013

²¹ CLA Committee, RoP [paragraph 288], 22 April 2013

²² CLA Committee, RoP [paragraphs 283 - 284], 22 April 2013

²³ CLA Committee, RoP [paragraph 284], 22 April 2013

58. This is a Bill of comprehensive ambition and yet it has relatively little detail on its face. As such, in our view, the Bill lacks the level of information regarding the policy principles that we would expect to see.

59. We are cautious about this approach and are concerned about the balance that the Bill achieves between what is on the face of the Bill and what is left to subordinate legislation.

60. We also note the Deputy Minister's reference to the flexibility and future-proofing afforded to the Welsh Government by the Bill.

61. Flexibility and future-proofing are admirable concepts to include in a Bill but not at the expense of having a clear understanding of what the Bill will deliver at the time of its introduction. It is therefore surprising to see the Deputy Minister say that policy intent for regulations will be available by December. The question has to be asked: why is that policy intent not known now?

62. The concepts of flexibility and future-proofing would be more valid if they were to be used to develop an existing policy framework in light of experience, rather than being used to develop the key policy once a Bill has become an Act. In addition, such an approach does not allow for the more extensive legislative scrutiny conducted through a Bill when compared to the processes that exist in relation to subordinate legislation.

63. In our view it is vital to ensure that the appropriate level of scrutiny is applied to what the Deputy Minister is seeking to deliver.

Recommendation 1: We believe that a Bill of such public importance should have more detail on its face. We recommend that that the Deputy Minister reviews the balance of the Bill with a view to tabling amendments to ensure that the Bill's policy intent is much clearer.

Recommendation 2: As part of the review in recommendation 1, and while we make recommendations later in this report regarding the procedure to be applied to subordinate legislation, we recommend that the Deputy Minister reconsiders all the procedures to be applied to the making of subordinate legislation and issues a written statement on that aspect of the review, prior to tabling appropriate amendments.

64. We recognise that this might be an onerous task but consider that it is essential to ensure that policy in this area is robustly scrutinised to the appropriate degree.

65. On a more general point, this Bill potentially highlights an important principle regarding framework legislation that we will be monitoring in the future.

Conclusion 3: We do not consider it good practice to introduce a framework Bill unless there are good reasons for doing so. Ultimately, it is a better to delay the introduction of a Bill rather than introduce one which requires further detailed policy development and for the outcome of that development to be added by means of subordinate legislation.

5. Powers to make subordinate legislation – observations on specific powers

66. The Bill contains 75 order and regulation making powers and 10 powers to make codes and directions by Welsh Ministers. These are explained in Chapter 5 and Annexe 1 (the explanatory notes) of the Explanatory Memorandum.

67. Given the substantial nature of the Bill we focused our scrutiny on certain aspects of the Bill and these are considered below.

Part 2 - Sections 3, 7 and 9

68. Section 3(5) of the Bill defines the term “disabled” but section 3(6) enables Welsh Ministers to prescribe further by regulations (subject to the negative procedure), what categories of people can or cannot be included under the definition of ‘disabled’ for the purposes of the Act.

69. Section 7(2) defines the terms “social enterprise” and “third sector organisation”. Section 7(3) enables Welsh Ministers to prescribe further in regulations (subject to the negative procedure) what categories of organisations and activities may or may not be included as social enterprises, cooperative organisations or third sector organisations.

70. Section 9(3) enables Welsh Ministers to prescribe by regulations (subject to the negative procedure) what categories of people may or may not be treated as being deaf, blind or both blind and deaf, for the purposes of section 9(1), which requires local authorities to establish and maintain a register of people ordinarily resident in their area who are deaf, blind or both blind and deaf.

71. In each case the Explanatory Memorandum explains that the negative procedure was chosen because:

“The subject matter of these regulations is relatively minor detail in the overall legislative scheme.”²⁴

²⁴ Explanatory Memorandum, Chapter 5, pages 27-28

72. When questioned the Deputy Minister explained the rationale for each regulation-making power:

“In relation to section 3(6) and the definition of ‘disability’, the definition that we use is the one used by the Equality Act 2010 ... We need to be very clear that the social model of disability is a concept and has no basis in law. Therefore, we needed to rely on an Act in order to be sure that we had a legislative base for it. The powers in section 3(6) enables Ministers to prescribe further what categories of people can or cannot be included under the definition of disabled. I gave a commitment to the Health and Social Care Committee that we would consider this further.”²⁵

73. As regards section 7(3), the Deputy Minister said it is:

“... a regulating power that we believe that we need in order to futureproof this Bill—if nothing else—with regard to being able to develop our thinking here. I am wondering whether the committee would support a change in the procedure on this occasion.”²⁶

74. An official accompanying the Deputy Minister indicated that, in respect of section 9(3):

“The Minister has given a commitment that we would look again at the content and perhaps give a commitment quite early on, with more detail about how we might use those regulation-making powers.”²⁷

75. When asked whether the affirmative procedure was appropriate for these regulation-making powers, the Deputy Minister indicated she would consider the committee’s views.²⁸

76. In a letter to the Chair of the Health and Social Care Committee, the Deputy Minister said:

“In response to my appearance at the Constitutional and Legislative Affairs Committee on 22 April I indicated a

²⁵ CLA Committee, *RoP [paragraph 145]*, 22 April 2013

²⁶ CLA Committee, *RoP [paragraph 158]*, 22 April 2013

²⁷ CLA Committee, *RoP [paragraph 151]*, 22 April 2013

²⁸ CLA Committee, *RoP [paragraphs 153 and 158]*, 22 April 2013

willingness to change the procedure from Negative to Affirmative for the following Regulations:

“Section 3(6) relating to Regulations may provide that a person falling within a specified category is or is not to be treated as disabled for the purposes of this Act.”²⁹

Our view

77. We welcome the Deputy Minister’s intention to review the procedures for the regulation-making powers in sections 3, 7 and 9. While we note that she only refers to the power contained in section 3(6) of the Bill in her letter to the Chair of the Health and Social Care, we believe that the affirmative procedure should be applied to all 3 sections.

Recommendation 3: We recommend that the Deputy Minister should consider tabling an amendment to apply the affirmative procedure to the regulation-making powers contained in sections 3(6), 7(3) and 9(3).

Part 4: Section 19

78. Section 19 provides that, if, after carrying out a needs assessment a local authority concludes that the person has a need for care and support, it must then conduct an eligibility assessment to determine whether it meets an ‘eligible need’ and therefore whether there is a duty to meet that need.

79. According to the Explanatory Memorandum, regulations will provide for the detail of the eligibility criteria in terms of the specification of the levels of eligibility.³⁰ It also says that a national eligibility framework will be developed to provide clarity through regulations on what constitutes an ‘eligible need’.³¹

80. Regulation-making powers are provided in subsections (3), (4) and (5) and are subject to the affirmative procedure because:

²⁹ Letter from the Deputy Minister to the Chair of the Health and Social Care Committee, document 2, 20 May 2013

³⁰ Explanatory Memorandum, Annex 1 – Explanatory Notes, paragraph 56

³¹ Explanatory Memorandum, Annex 1 – Explanatory Notes, paragraph 57

“The duties on local authorities in relation to the determination of eligibility and consideration of what to do to meet needs are set out on the face of the Bill but the regulations will affect the way in which a local authority determines a person’s eligibility to have their needs met. This involves considerations of special importance, as the purpose is fixed by the Act but principal substance will be set out in subordinate legislation. Therefore affirmative procedure is appropriate.”³²

81. When asked why more information was not placed on the face of the Bill regarding the circumstances in which a particular need might be met, rather than identifying the needs through regulations, the Deputy Minister said this was for reasons of flexibility.³³ An official accompanying the Minister said that “there is a lot more work to do to develop the regulations”.³⁴

Our view

82. In the absence of more detail on the face of the Bill and the need for more work to be undertaken on developing regulations of such importance, we believe that a more robust scrutiny procedure is necessary.

Recommendation 4: We recommend that the Minister should consider tabling an amendment to the Bill to apply a super-affirmative procedure to regulation-making powers under section 19 of the Bill.

Part 4 - Sections 23, 26 and 27

83. Section 23 sets out the conditions that must be met for a local authority to be under a duty to meet the care and support needs of a child in its area. Section 23(1) enables Welsh Ministers to set additional conditions to take account of future needs and considerations in respect of triggering the duty to meet the care and support needs of the child.

84. Section 26 sets out the conditions that must be met for a local authority to be under a duty to meet the support needs of an adult carer of an adult or disabled child in its area. Section 26(1) allows

³² Explanatory Memorandum, Chapter 5, page 29

³³ CLA Committee, RoP [paragraphs 165-166], 22 April 2013

³⁴ CLA Committee, RoP [paragraphs 169], 22 April 2013

Welsh Ministers to set additional conditions to take account of future needs and considerations of adult carers.

85. Section 27 sets out the conditions that must be met for a local authority to be under a duty to meet the support needs of a child carer of an adult or a disabled child in its area. Section 27(1) allows Welsh Ministers to set additional conditions to take account of future needs and considerations of child carers.

86. The regulation-making power in each case is subject to the negative procedure and the Explanatory Memorandum explains that this is because:

“The subject matter of these regulations is relatively minor detail in the overall legislative scheme.”³⁵

87. When asked why the negative procedure had been considered for these regulations the Minister said that:

“I am certainly open to considering the affirmative procedure for these regulations, although in my view, the subject matter is relatively minor in terms of detail in the overall legislative scheme. I would be interested to know what committee thinks, and will consider it.”³⁶

88. She also indicated that she was willing to consider the regulations to be affirmative in the first instance, and negative thereafter,³⁷ adding:

“... officials have been very careful in considering Welsh Government guidelines on the criteria for negative and affirmative procedures, and have done their very best to fit in with those guidelines.”³⁸

89. In a letter to the Chair of the Health and Social Care Committee, the Deputy Minister said:

“In response to my appearance at the Constitutional and Legislative Affairs Committee on 22 April I indicated a willingness to change the procedure from Negative to Affirmative for the following Regulations:

³⁵ Explanatory Memorandum, Chapter 5, page 30

³⁶ CLA Committee, RoP [paragraph 173], 22 April 2013

³⁷ CLA Committee, RoP [paragraph 176], 22 April 2013

³⁸ CLA Committee, RoP [paragraph 176], 22 April 2013

Section 23, 26, 27 relating to the duty to meet the care and support needs of a child, the duty to meet the support needs of an adult carer and the duty to meet the support needs of a child carer (Affirmative for the initial set and negative thereafter).³⁹

Our view

90. We note and welcome the Deputy Minister's confirmation that she is happy to change the procedure in respect of regulations to be made under sections 23, 26 and 27.

Recommendation 5: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 23, 26 and 27, followed thereafter by the negative procedure.

Part 4 - Sections 34 to 37

91. Section 34 provides a power for Welsh Ministers to make regulations that may require or allow a local authority to make payments to a person towards the cost of meeting an adult's needs for care and support. Section 35 includes a similar provision in respect of a child's needs for care and support, while section 36 includes a similar provision in respect of a carer's need for support. Section 37 provides that regulations under sections 34, 35 and 36 may make provision about a wide range of matters.

92. The Explanatory Memorandum states in respect of section 34 that

"The section replicates the approach taken in the Health and Social Care Act 2001. By allowing regulations to determine whether local authorities are obliged or merely permitted to offer direct payments it allows greater flexibility in future policy development. The purpose is for the primary legislation to create a clear framework but allow flexibility in how this is adapted from time to time. This is an appropriate way of ensuring that the legislation does not become out-dated or require repeated amendment through subsequent bills."⁴⁰

³⁹ Letter from the Deputy Minister to the Chair of the Health and Social Care Committee, document 2, 20 May 2013

⁴⁰ Explanatory Memorandum, Chapter 5, page 33

93. The regulation-making power in each case is subject to the negative procedure and the Explanatory Memorandum explains that this is because:

“The subject matter of these regulations is relatively minor detail in the overall legislative scheme.”⁴¹

94. The Deputy Minister explained that the provisions replicated the *Children Act 1989*, as well as the 2001 Act, noting that “however the drafting has been changed, it has been changed to make the section easier to understand, I hope.”⁴²

95. An official accompanying the Minister explained that:

“...there are some elements of the current scheme in the regulation-making powers have been lifted up and elevated into what is on the face of the Bill. So, in this instance, there is a greater level of detail in the Bill than exists currently in comparable provision, which is in the Health and Social Care Act 2001 and the Children Act ...”⁴³

96. When asked why the current scheme had been replicated with some streamlining, the official added:

“The reason for having a scheme with a regulation-making power to set out the detail is to cater for a range of different situations without occupying a huge number of sections of the Bill, and creating a level of detail that might be excessive. The rationale for maintaining the regulation-making power for Welsh Ministers either to require or allow local authorities to make direct payments is to cater for the range of different situations ...”⁴⁴

97. The Deputy Minister indicated that the Bill did have the right architecture to ensure delivery of the government’s policy intentions in relation to payments.⁴⁵

⁴¹ Explanatory Memorandum, Chapter 5, pages 33-34

⁴² CLA Committee, RoP [paragraphs 181], 22 April 2013

⁴³ CLA Committee, RoP [paragraph 182], 22 April 2013

⁴⁴ CLA Committee, RoP [paragraph 184], 22 April 2013

⁴⁵ CLA Committee, RoP [paragraphs 190 - 193], 22 April 2013

Our view

98. We consider that given the potential significance of this issue, there should be some strengthening of the procedure to make these regulations.

Recommendation 6: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 34 to 37, followed thereafter by the negative procedure.

Part 6 - Section 62

99. Part 6 of the Bill mainly reflects current duties placed on local authorities by Part 3 of the *Children Act 1989* in relation to ‘looked after’ children (who are not the subject of a formal care order), care leavers and accommodated children.

100. Section 62(5) enables Welsh Ministers to issue a direction, where they think it is necessary for protecting members of the public from serious injury, to a local authority with respect to the exercise of the local authority’s powers in the case of a child it is looking after. There is no procedure for this.

101. Given that Part 6 of the Bill is consolidating existing legislation we sought advice from the Minister about whether this power had been used before, to test whether out-dated legislation was being carried through into the new Bill.⁴⁶ By letter dated 12 June 2013, the Minister stated:

“I have not had cause to use this power and I am informed by my officials that my predecessors have also not used it. I have not made enquiries of the UK Government to establish if there was any use of the power in the period from 1991 to 1999.”⁴⁷

102. When questioned about whether there was a procedure for reporting back to the Assembly to say the power had been used and to

⁴⁶ CLA Committee, *RoP [paragraph 218]*, 22 April 2013

⁴⁷ Letter from Deputy Minister for Social Services to the Chair of the Constitutional and Legislative Affairs Committee, 12 June 2013

explain the next steps, the Deputy Minister said:

“I believe that we would want to do that and that it would be important that we do so.”⁴⁸

Our view

103. We are content with the power to issue a direction but consider that where Welsh Ministers do so, it should be accompanied by a written statement explaining the reason for its use.

Recommendation 7: We recommend that the Deputy Minister should table an amendment to provide that in each case where Welsh Ministers issue a direction under section 62(5), the direction is accompanied by a written statement explaining the reason for its use.

Part 6 - Sections 92 and 93

104. Sections 92 and 93, deal with support for category 2 and 3 young people.⁴⁹ Section 92(3) provides a regulation-making power to enable Welsh Ministers to prescribe the definition of “suitable accommodation” and the suitability of landlords or other providers or accommodation in relation to safeguarding and promoting the well-being of category 2 young people. Section 93(3) provides a regulation-making power enabling Welsh Ministers to prescribe the details of the support to be given to a category 3 young person who pursues higher education. Section 93(6) allows for the meaning of certain terms under section 93 to be specified in regulations.

105. The Explanatory Memorandum indicates that these regulations will permit a flexible and timely response by Welsh Ministers where an evidence-based need for change is demonstrated. It also states that:

“The subject matter of these regulations is relatively minor detail in the overall legislative scheme. Negative procedure replicates the procedure currently set out within the Children Act 1989.”⁵⁰

⁴⁸ CLA Committee, *RoP [paragraph 221]*, 22 April 2013

⁴⁹ Section 88 sets out the different categories by which young people who are designated as “care leavers” are defined for the purposes of the Bill.

⁵⁰ Explanatory Memorandum, Chapter 5, pages 44 and 45

106. The Minister explained that:

“These issues are very important in the life of a child. We may wish to change the regulations on these issues from time to time. So, placing this in regulation will be of assistance and will allow us to look back and to learn from past experiences as we develop this legislation, to ensure that we are able to respond. We have seen that over the past decade. We have seen regulations needing to be changed to catch up with events. I believe that we have the correct process in place.”⁵¹

107. When it was suggested that the Deputy Minister consider placing more detail on the face of the Bill, the Deputy Minister said:

“I have used the regulation-making powers in section 23(b) and 23(c) of the Children Act 1989 and we have transposed those into sections 92 and 93 of this Bill.”⁵²

Our view

108. We note that the Deputy Minister has indicated that she is not in favour of including more information on the face of the Bill with respect to these provisions. We also note her comments that the negative procedure for regulations to be made under sections 92 and 93, follows the current procedure set out in the *Children Act 1989*.

109. In our view the Deputy Minister should have provided a more robust case for replicating the negative procedure used in the 1989 Act, particularly when she has indicated a willingness to change the procedure for other provisions in the Bill that have also been transposed from the 1989 Act (see paragraphs 110 – 113 below),

Recommendation 8: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 92 and 93, followed thereafter by the negative procedure.

Part 6 - Section 97

110. Section 97 provides that a child, looked after by a local authority, cannot be placed in secure accommodation unless the child has a

⁵¹ CLA Committee, RoP [paragraph 235], 22 April 2013

⁵² CLA Committee, RoP [paragraph 237], 22 April 2013

history of absconding and is likely to suffer significant harm including injury or if the child is likely to injure himself or others if kept in any other form of accommodation. The regulation-making power in section 97(2) enables the Welsh Ministers to prescribe, for the purposes of section 97, the maximum periods that a child may be kept in secure accommodation. The Explanatory Memorandum states that this is subject to the affirmative procedure because:

“Given the Welsh Minister’s adherence to the UNCRC obligations in respect of the Rights of the Child it is considered that notwithstanding that the analogous provision within the Children Act 1989 specifies the negative procedure that these regulations should be subject to the affirmative procedure.”⁵³

111. The regulation-making power in section 97(7) enables Welsh Ministers to prescribe a description of a child that may or may not be placed in secure accommodation under section 97; and to assist in the determination of such circumstances. The power is subject to the affirmative procedure for the same reason as above.

112. We noted that the use of the affirmative procedure was different from the (negative) procedure used in the equivalent provision in the *Children Act 1989*. In explaining the reasons for this the Deputy Minister stated:

“...we must have the affirmative procedure in place, so that we take account of everybody’s views and reach the best possible solution to ensure that we do our best for these children and we treat them fairly throughout the process, having taken account of the convention.”⁵⁴

Our view

113. We note the views of the Deputy Minister and are content with the use of the affirmative procedure for making regulations under sections 97(2) and 97(7).

⁵³ Explanatory Memorandum, Chapter 5, page 46

⁵⁴ CLA Committee, *RoP [paragraph 231]*, 22 April 2013

Part 7 - Sections 105 and 112

114. Part 7 (Safeguarding) provides a new legal framework for the protection of adults at risk including a duty on local authorities to investigate suspected abuse and respond accordingly.

115. Section 105 of the Bill enables applications to be made to the court for Adult Protection and Support Orders. Section 105(9) provides a regulation-making power enabling Welsh Ministers to place restrictions on the persons who may be an ‘authorised officer’ for the purposes of applying to a justice of the peace for an adult protection and support order. The Explanatory Memorandum explains that “this is suitable for regulations as these restrictions (such as qualifications or experience) may need to be adjusted according to evidence.”⁵⁵

116. Section 112 sets out the functions and procedures of safeguarding boards. Section 112(4) enables Welsh Ministers to prescribe by regulations further functions of a Safeguarding Board if this would assist the objectives of the Safeguarding Board. The regulations can prescribe procedures to be followed by Safeguarding Boards and can specify when and how relevant children or adults must be given the opportunity to participate in the Safeguarding Board’s work. The Explanatory Memorandum states that these regulations:

“...will provide sufficient flexibility for Welsh Ministers to respond quickly where it is apparent that safeguarding of adults and children will be improved by the extension of the Safeguarding Board’s functions.”⁵⁶

117. The regulation-making powers in sections 105 and 112 are subject to the negative procedure because, according to the Explanatory Memorandum:

“The subject matter of these regulations is relatively minor detail in the overall legislative scheme.”⁵⁷

118. The Deputy Minister agreed to consider the affirmative procedure for the regulation-making powers under sections 105 and 112.⁵⁸ Subsequently, in a letter to the Chair of the Health and Social Care

⁵⁵ Explanatory Memorandum, Chapter 5, page 47

⁵⁶ Explanatory Memorandum, Chapter 5, page 47

⁵⁷ Explanatory Memorandum, Chapter 5, page 49

⁵⁸ CLA Committee, *RoP [paragraphs 244 and 249]*, 22 April 2013

Committee, she stated:

“In response to my appearance at the Constitutional and Legislative Affairs Committee on 22 April I indicated a willingness to change the procedure from Negative to Affirmative for the following Regulations:

...

Section 105(9) relating to Adult Protection and Support Orders

Section 112(4) relating to the functions and procedures of Adult Safeguarding Boards.”⁵⁹

Our view

119. We note and welcome the Deputy Minister’s confirmation that she is happy to change the procedure in respect of regulations to be made under sections 105(9) and 112(4).

Recommendation 9: We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under sections 105(9) and 112(4).

Part 7 - Section 117

120. Section 117 enables Welsh Ministers by order to provide that in each Safeguarding Board area, the children and adult Safeguarding Boards are to combine to form a single board per area. The Explanatory Memorandum indicates that this provision is suitable for an order as it:

“...enables Welsh Ministers to provide that in each Safeguarding Board area, the children and adult Safeguarding Boards are to combine to form a single Board per area. It will provide flexibility to combine Boards where evidence suggests that it is appropriate and suitable to do so.”⁶⁰

121. It also states that the affirmative procedure is being used

⁵⁹ Letter from the Deputy Minister for Social Services to the Chair of the Health and Social Care Committee, document 2, 20 May 2013

⁶⁰ Explanatory Memorandum, Chapter 5, page 51

because:

“An order under this section could substantially affect the provisions of this part of the Act. The exercise of this power involves considerations of special importance. An order under this provision will result in structural changes to Safeguarding Boards, combining functions of Safeguarding Adults and Safeguarding Children Boards.”⁶¹

122. When asked whether a superaffirmative procedure would be more appropriate for this power given its “special importance”, the Deputy Minister indicated that the affirmative procedure “would be sufficient”,⁶² noting that:

“The superaffirmative procedure would be quite lengthy ... The merging of the boards ... could only happen when it was felt that the time was right. This will not happen on a cliff edge. We will develop the adult and children boards separately on the footprints of six, which I have made absolutely clear. However, given that the principle of the Bill is to be a people’s Bill, there would come a time when merger might be in the interests of the people whom we want to protect, but, certainly, that would not happen until there was consultation and due consideration as to whether that truly was the best way forward.”⁶³

Our view

123. We note the Deputy Minister’s view that a superaffirmative procedure would be lengthy and that the merging of the boards could only happen when the time was right. However, in our view, the procedure to be used in making an order under section 117 should, broadly speaking, reflect the nature of the change or development in policy that the government is seeking to deliver.

124. We consider that the merger of children and adult safeguarding boards to form a single board per area would represent a significant change and would need to be approached with a degree of caution. Accordingly, we believe that a superaffirmative procedure would ensure an appropriate level of scrutiny for the order.

⁶¹ Explanatory Memorandum, Chapter 5, page 51

⁶² CLA Committee, *RoP [paragraph 254]*, 22 April 2013

⁶³ CLA Committee, *RoP [paragraph 251]*, 22 April 2013

Recommendation 10: We recommend that the Deputy Minister should table an amendment to apply a superaffirmative procedure to the order-making power in section 117 of the Bill.

Part 8 – Section 119

125. Part 8 concerns social services functions.

126. Section 119 provides for the social services functions as set out in Schedule 2 and for the Welsh Ministers, to by order, add, remove or amend entries. The Explanatory Memorandum states:

“...an order under this section could substantially affect the provisions of Schedule 2 of this Act. An Order under this section will determine which functions of a local authority are social services functions. The exercise of this power will therefore involve considerations of special importance.”⁶⁴

127. When asked whether a superaffirmative procedure would be more appropriate, given that the powers enable social services to be changed substantially, the Minister replied:

“I think that the affirmative procedure is adequate here. It is important, but I believe, from my experience, that there is a need to look at what social services departments are doing and to have this power to intervene should the need arise. I do not think that we need the superaffirmative procedure...”⁶⁵

Our view

128. We note that this power can be used to substantially change the provisions of Schedule 2 of the Bill once enacted and, as a consequence, the functions of a local authority.

129. While in principle we favour a superaffirmative procedure for this provision, we recognise that in some cases, for example in relation to an order that makes solely minor and consequential changes, it would be unnecessarily onerous.

Recommendation 11: We recommend that the Deputy Minister should table an amendment to apply a superaffirmative procedure to an order made under section 119 (2), unless the order makes

⁶⁴ Explanatory Memorandum, Chapter 5, page 51

⁶⁵ CLA Committee, *RoP* [paragraph 263], 22 April 2013

changes of only a minor or consequential nature, in which case the affirmative procedure should apply.

Part 8 – Sections 120 to 133

130. Section 120 requires every local authority to appoint a Director of Social Services and if appropriate for two or more local authorities to appoint a Director for both or all of those authorities. Directors may only be appointed by a local authority if the authority is satisfied that they have met competencies specified by Welsh Ministers (by virtue of subsection (3)) in either regulations (subject to the negative procedure) or a code issued under section 121.

131. Section 121 enables the Welsh Ministers to issue and to revise from time to time one or more codes on the exercise of social services functions. The Explanatory Memorandum states that:

“...setting out the requirements in a Code rather than on the face of the Bill or in regulations will enable the use of language more readily understood by the interested parties. Provisions will be based on best practice and will be developed over a period of time. A statutory code will enable developments in best practice to be more easily incorporated.”⁶⁶

132. Section 122 sets out a statutory procedure for making and approving codes. In addition, codes may be revoked either in a further code or by direction. There is no statutory procedure applicable to directions although, under subsection (8), directions must be laid before the National Assembly.

133. Section 123 enables a local authority to exercise its social services functions in a way that does not adhere to the requirements set out in a code. In such circumstances, the local authority must follow the procedure set out in section 123 and notify the Welsh Ministers of its reasons. Part of the procedure includes setting out a policy statement in accordance with the requirements of section 124. Section 125 provides that Welsh Ministers may direct a local authority to comply with the code if it considers that its alternative policy statement will not adequately deliver its social services functions. The direction is subject to no procedure because according to the Explanatory Memorandum:

⁶⁶ Explanatory Memorandum, Chapter 5, page 53

“These direction powers will apply to individual authorities and be made in specific circumstances which will require Welsh Ministers to respond quickly where required to do so.”⁶⁷

134. Sections 126 to 136 provide Welsh Ministers with powers of intervention in the exercise by a local authority of its social services function, including powers to issue directions to local authorities under sections 129 to 133. The Explanatory Memorandum states that the reason for no statutory procedure applying to the directions under sections 129 to 133 is because:

“These direction powers will apply to individual authorities and be made in specific circumstances which may change from time to time.

There [is] no statutory procedure for such action to permit the Welsh Ministers to react with urgency where required to intervene in a failing local authority.”⁶⁸

135. The Deputy Minister thought it was necessary for Directors’ competencies to be specified in two different ways under section 120(3) because:

“... we need a choice regarding which approach is going to provide the greatest clarity in dealing with this.”⁶⁹

136. We questioned the Deputy Minister about the statutory process for codes subject to section 122. In particular, we asked about the use of a direction to revoke the code and the absence of a duty to consult on it. The Deputy Minister said:

“I believe that section 122 strikes that balance between what we would need to discuss and consult upon and perhaps responding to a situation where the code, or part of the code, would need to be changed to bring something better in. The only reason for doing so that I can think of would be to improve the code.”⁷⁰

⁶⁷ Explanatory Memorandum, Chapter 5, page 53

⁶⁸ Explanatory Memorandum, Chapter 5, page 55

⁶⁹ CLA Committee, *RoP* [paragraph 269], 22 April 2013

⁷⁰ CLA Committee, *RoP* [paragraph 274], 22 April 2013

137. We also asked why it appeared to be so simple for local authority to depart from a requirement in a statutory code using the provisions of section 123. The Deputy Minister replied by saying:

“It does not stop there, because they would still have to find an alternative way of providing the service, and they would have to issue a policy statement in accordance with section 124. It is not as simple as being able to move away from the code and not deliver. They can move away from the code so long as they produce an alternative method of provision and that fits into the requirements of section 123. There is the issue of local democracy, and we have safeguards that we would have an acceptable alternative way of delivering: that is what that section delivers.”⁷¹

138. She added:

“We need the provision and they would be answerable to their electorate and would also be subject to the annual report. Therefore, there would have to be a public and published annual report with regard to the delivery of the requirements of this section.”⁷²

139. The Minister explained why directions were being used to require adherence to codes of practice (section 125) and to intervene (sections 129 to 133) rather than using regulation-making powers:

“I can see that a situation could arise where we would intervene in local government. We have seen examples of that recently and historically. However, I do not think that making regulations would always allow us to intervene swiftly enough. I can see a situation where intervention would be required immediately. I think this power would enable us to do that, or ensure that we have enforcement powers in terms things that local government should respond to ... we must be able to move quickly.”⁷³

⁷¹ CLA Committee, RoP [paragraph 280], 22 April 2013

⁷² CLA Committee, RoP [paragraph 282], 22 April 2013

⁷³ CLA Committee, RoP [paragraph 276], 22 April 2013

Our view

140. We consider the approach set out in section 120(3) to be reasonable and are content with the application of the negative procedure to the regulation-making power in this section.

141. We note the Deputy Minister's reference to local authorities being able to justify departing from the requirement in a statutory code (by virtue of section 123) and being subject to further public scrutiny under their obligation to provide an annual report (under the *Children Act 1989*). Notwithstanding the requirement for local authorities to publish their annual report, we are satisfied that if a local authority decides to deviate from a code of practice under section 122 and the Welsh Ministers consider the alternative policy to be substandard, the Welsh Ministers have a power to direct local authorities under section 125(2) to "take any action which the Welsh Ministers consider appropriate for the purpose of securing the exercise of functions by the authority in accordance with the requirement in the relevant code." In our view this would adequately deal with potential problems arising from any local authority deviating from a code of practice.

142. We note that in respect of the power to issue a direction under section 122(7), it is laid before the Assembly after it has been issued and there is no timeframe within which this is to be achieved.

143. We also note and are content with the use of powers of direction in sections 125 and 129 to 133. However, we do believe that Welsh Ministers should be more transparent about the reasons for the exercise of these powers in each case.

Recommendation 12: We recommend that the Deputy Minister should table an amendment to provide that in each case where Welsh Ministers issue a direction under sections 122, 125 and 129 to 133, the direction is accompanied by a written statement explaining the reason for its use.

Part 9 – Section 138

144. Part 9 of the Bill (Well-being outcomes, co-operation and partnership) places a new duty on Welsh Ministers to publish and lay before the Assembly 'national outcome statements' setting out the outcomes of the provision of care and support. Codes of practice will

be issued to help achieve the specified outcomes and may impose requirements on local authorities, including standards, measures and targets.

145. Section 137 specifically requires the Welsh Ministers to issue and from time-to time revise, a statement on the well-being of people in Wales who need care and support and carers in Wales who need support. The statement must specify the outcomes that are to be achieved in terms of the well-being of those people. Section 138 provides that the Welsh Ministers must issue, and from time to time revise, a code to help achieve the outcomes specified in the statement under section 137. The code will be subject to the statutory procedure set out in section 122.

146. The Deputy Minister explained why a code is being used for the purposes of section 138 rather than regulations:

“Wellbeing as an outcome underpins the whole of the Bill, and I am very interested in what the code provides for us to be able to do. This code will bring clarity to the providers of services of whatever sector and will allow us to make clear to them what is expected in the delivery of the wellbeing statement that I published last week ... The use of the code here, with what you said about the provision of section 122, is, in my opinion, a good way of introducing this and of ensuring that link with providers, users and carers, who need care and support, of course.”⁷⁴

147. The Deputy Minister was confident that the code-making provisions of the Bill could deliver her vision for services,⁷⁵ adding:

“... but we will have to learn. This is a new concept, and it is transitional, as well as groundbreaking, in many aspects. However, there is the national outcomes framework, which will be based in law, within which all these things must happen. Therefore, it is not as if there is no legislative base to it all—there will be, as well as clear, accountable procedures with regard to the provision of service. Therefore, I see these as building blocks within the national outcomes framework. I have issued a statement on this issue, explaining my thinking

⁷⁴ CLA Committee, *RoP [paragraph 278]*, 22 April 2013

⁷⁵ CLA Committee, *RoP [paragraphs 283 - 284]*, 22 April 2013

behind the development of it. So, the over-arching legislative requirement will be the outcomes framework. It is no good our having any policies—on wellbeing or anything else—unless we can measure those outcomes effectively, and unless I can meet a person in the street who can tell me, ‘This is the difference that this Bill has made to me’. That simplicity that exists within the wellbeing statement is its strength. I believe that the simple language that is used in that will help us to develop the best possible legislation that we can.”⁷⁶

Our view

148. We are content with the use of a code as set out in section 138.

149. In reaching this view, we note that recommendation 12 of our report applies to any section 138 code that is subsequently revoked as a consequence of section 140 (and accordingly section 122 of the Bill).

Part 9 – Sections 143 to 149

150. Sections 143 to 146 set out a series of provisions dealing with arrangements to promote co-operation between local authorities and a range of organisations. Sections 147 to 149 set out provisions relating to partnership arrangements between two or more local authorities, or, one or more Local Health Boards.

151. The regulation-making power under section 144 is subject to the negative procedure. The regulation-making powers under sections 143, 145, 146 and 148 – 149 are subject to the affirmative procedure because of their “significant policy implications”.⁷⁷ Similarly, the regulation-making powers in section 147 are subject to the affirmative procedure but because entering into specific partnership arrangements:

“... will involve considerations of special importance as the principal substance of the legislative scheme will be set out in regulations”.⁷⁸

152. We asked whether consideration had been given to applying a superaffirmative procedure to any of these provisions but the Deputy

⁷⁶ CLA Committee, *RoP [paragraph 284]*, 22 April 2013

⁷⁷ Explanatory Memorandum, Chapter 5, pages 56-58

⁷⁸ Explanatory Memorandum, Chapter 5, pages 56-58

Minister thought that the affirmative procedure should apply.⁷⁹ On the specific issue of partnership working and the provision of regulations, the Deputy Minister said:

“My view is that being able to legislate for partnership working and having this power to do it will help local authorities and local health boards ... I believe that integration is at the heart of providing better services, particularly to frail and older people and to vulnerable children. To me, this is a very important power and I think that the affirmative procedure will deal with this.”⁸⁰

Our view

153. We are content with the affirmative procedure applying to regulation-making powers made under sections 143, 145, 146, 148 and 149.

Recommendation 13: We recommend that the Minister should table an amendment to apply the affirmative procedure to section 144 of the Bill.

154. Section 147, on partnership arrangements, would allow a Welsh Minister to require a specific partnership to be made by two or more local authorities, or by one or more local authorities and one or more local health boards.

155. In our view this would allow the Welsh Ministers to essentially re-designate functions and those responsible for them. In effect, it would be possible to re-design services and agglomerate social services and local health board functions by using this particular regulation-making power. From a procedural point of view, making that scale of change is of considerable significance and we believe that a superaffirmative procedure should apply.

Recommendation 14: We recommend that the Deputy Minister should consider tabling an amendment to apply a superaffirmative procedure to the regulation-making power in section 147.

⁷⁹ CLA Committee, *RoP [paragraph 290]*, 22 April 2013

⁸⁰ CLA Committee, *RoP [paragraph 291]*, 22 April 2013

Part 11 – Section 167

156. Section 167 provides that the Welsh Ministers can, if they consider it expedient, make regulations which provide for provisions of this Bill to come in to force at different times to other provisions.

157. The Explanatory Memorandum says in relation to section 167 that:

“It is not possible to set all these provisions out on the face of the Bill as it may be that provision can be made in the UK Care and Support Bill, depending on the timing of commencement of the two Bills.”⁸¹

158. The Deputy Minister noted that section 167 is “a broad power” and that two Bills on social care are currently being considered: one in the UK Parliament and the other in the National Assembly. She went on to say that:

“We need this power in regard to the consequential from one Bill to the other. The overlap between the Assembly and parliamentary processes means that it is not possible to be certain which will come into force first. We will have consequential amendments that reflect this, of course, and it is exciting that we are here presenting our own Bill with the draft care and support Bill in England. There will be some issues that are non-devolved, of course, which will require consent one way and the other. The purpose of this section 167 is really on the timing in relation to the draft care and support Bill.”⁸²

159. She also noted that the Welsh Government is “in front at the moment, by far.”⁸³

160. A lawyer accompanying the Deputy Minister developed these points further:

“Normally ... one would expect there to be a raft of consequential provisions showing how the new scheme set out in our Bill connects to the existing, old system, which would stay in force in England. In this case, because England is also in the process of having a whole-system change, and we do not

⁸¹ Explanatory Memorandum, Chapter 5, page 62

⁸² CLA Committee, *RoP [paragraph 319]*, 22 April 2013

⁸³ CLA Committee, *RoP [paragraph 321]*, 22 April 2013

know which of the two Bills will come into force first, we do not know whether to draft a set of consequential amendments that connect to the old law, or whether to try to anticipate or find out what the English Bill will look like on introduction, or what it may eventually look like after it has been amended as it goes through Parliament ... both Bills will need to have extensive consequential powers to provide for this kind of thing. In order for there to be some transparency, the intention would be that a draft of the consequential Order would be made available within the scrutiny process so that at least Members can see the kind of provision that will be made, even though it is almost inevitable that the Order that is eventually made will have to evolve somewhat from that.”⁸⁴

161. Another Welsh Government official indicated the Deputy Minister is proposing to bring forward an amendment with a Schedule containing the consequentials and repeals relating to the key Acts in respect of children and that this would be made available before the end of Stage 1. The Deputy Minister subsequently provided a table of repeals in a letter to the Chair of the Health and Social Care Committee on 20 May⁸⁵ and updated this information in a further letter dated 3 June.⁸⁶

162. In a letter of 12 June 2013, the Deputy Minister explained why she did not think section 167 could be used to unpick the social model provided through the provisions in the Bill. She said:

“Section 167 does not give an entirely free rein to amend the Act because the power can only be used where it is "necessary or expedient for the purposes of, or in consequence of, giving full effect to any provision of this Act". The power could therefore not be used to take the policy as represented in the Act in a contrary direction. However, we acknowledge the issue you raise about the breadth of the power and the issue raised during the Committee session about ensuring that it is subject to suitable Assembly control. We are giving further consideration to this issue and look forward in particular to

⁸⁴ CLA Committee, *RoP [paragraph 323]*, 22 April 2013

⁸⁵ Letter from the Deputy Minister for Social Services to the Chair of the Health and Social Care Committee, document 2, 20 May 2013

⁸⁶ Letter from the Deputy Minister for Social Services to the Chair of the Health and Social Care Committee, 3 June 2013

seeing what recommendation the Committee includes in its report which I look forward to receiving in due course.”⁸⁷

Our view

163. While we note that some of this information has subsequently been provided by the Deputy Minister, the fact that consequential amendments and revocations were not included on the face of the Bill has led to considerable difficulty in scrutinising it.

164. It was not possible initially to assess with any certainty what existing provisions are to be revoked, amended or replaced and how this Bill works alongside existing legislation. In particular, key stakeholders directly affected by the new Bill have been left in the dark on this issue and have not therefore been in a position to give a fully considered appraisal of the Bill.

165. We note the explanation provided in paragraphs 158 and 160 above to explain the reasons for this but would contrast the points made here with the Deputy Minister’s assertion that, in terms of progress on the legislation, the Welsh Government is “in front at the moment, by far” (when compared to the UK Government). As such, we see no reason why the Welsh Government could not have included this information in the Bill as introduced, and then amended it, if necessary, at stages 2 and 3 to take account of policy developments in England.

166. In some respect, the approach adopted by the Welsh Government emphasises the points we make in conclusion 3 of our report.

Conclusion 4. In our view, the fact that legislation in the same policy area is being developed by the UK Government in England should not be used as a reason for excluding information on the face of a Welsh Government Bill. This is because it can have a negative impact on the effective scrutiny of legislation in Wales. We do not expect to see the Welsh Government put forward such an argument in future, unless there are exceptional reasons for doing so.

⁸⁷ Letter from the Deputy Minister for Social Services to the Chair of the Constitutional and Legislative Affairs Committee, 12 June 2013