Welsh Parliament
Legislation, Justice and Constitution Committee

Report on the Health and Social Care (Wales) Bill

October 2024

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About the Committee

The Committee was established on 26 May 2021. Its remit can be found at **www.senedd.wales/SeneddLJC**

Current Committee membership:

Committee Chair: Mike Hedges MS
Welsh Labour

Natasha Asghar MS
Welsh Conservatives

Alun Davies MS
Welsh Labour

Adam Price MS
Plaid Cymru

The following Member was also a member of the Committee during the scrutiny of the Bill:

Samuel Kurtz MS
Welsh Conservatives

Contents

1. Introduction

On 20 May 2024, Dawn Bowden MS, Minister for Social Care (the Minister)[1], introduced the Health and Social Care (Wales) Bill (the Bill)[2], and the accompanying Explanatory Memorandum (the EM).[3]

1. The Minister issued a Written Statement on 20 May 2024.[4]

2. The Minister made an oral statement to the Senedd on 21 May 2024.[5]

3. The Senedd's Business Committee referred the Bill to the Health and Social Care (HSC) Committee, and set a deadline of 11 October 2024 for reporting on its general principles.[6]

4. The Minister formally issued a Statement of Policy Intent for Subordinate Legislation to be made under the Bill on 19 June 2024.[7]

The purpose of the Bill

5. The long title of the Bill states that it is a Bill to:

> *"make provision about the regulation and provision of social care services and health care in Wales".*

6. The Minister notes in the EM that:

> *"Building on the vision set out in the 2011 White Paper on Sustainable Social Services, social care law in Wales has been reformed and consolidated through the Social Services and Well-being (Wales) Act 2014 ('the 2014 Act') and the Regulation and Inspection of Social Care (Wales) Act 2016 ('the 2016 Act').*

[1] Following the appointment of Eluned Morgan MS as First Minister in August 2024, Dawn Bowden MS became the Minister for Children and Social Care and retained responsibility for the Bill as the Member in charge
[2] Health and Social Care (Wales) Bill, as introduced
[3] Health and Social Care (Wales) Bill, Explanatory Memorandum, May 2024
[4] Welsh Government, Written Statement: Health and Social Care (Wales) Bill, 20 May 2024
[5] Plenary, 21 May 2024
[6] Business Committee, Timetable for consideration: Health and Social Care (Wales) Bill, May 2024
[7] Welsh Government, Health and Social Care (Wales) Bill, Statement of Policy Intent for Subordinate Legislation, 19 June 2024

(...)

Through the Updated Programme for Government, Welsh Ministers are seeking to further improve social care, and the health and social care interface, in Wales."[8]

7. The Minister explains that the Bill:

"contains provisions to:

(i) eliminate private profit from the care of looked after children;

(ii) enable introduction of Direct Payments for NHS Continuing Healthcare (CHC); and

(iii) make amendments to ensure that the Regulation and Inspection of Social Care (Wales) Act 2016 and Social Services and Well-being (Wales) Act 2014 are able to operate fully and effectively."[9]

8. In particular, the Minister notes in the EM that the Welsh Government's Programme for Government contains commitments which provide the framework for its vision "to radically transform Children's Services".[10]

9. The Minister also states:

"The commitment to 'put in place a framework to remove profit from the care of looked after children' is a clear part of our wider vision for whole system change. The aim is to ensure that public money invested in the care of looked after children– starting with care home services for children and fostering services – does not profit individuals or corporate entities, but instead is spent on children's services, to deliver better experiences and outcomes for young people; support service development and improvement; and further build professional development for those providing care.

Feedback from children and young people suggests they have strong feelings about being cared for by privately owned organisations that make a profit from their experience of being in care. The Children's Commissioner for Wales and Voices from

[8] EM, paragraphs 3.1 and 3.4
[9] EM, paragraph 1.1
[10] EM, paragraph 3.25

Care have also campaigned on the issue. It was a recommendation of the former Commissioner in her annual reports and Voices from Care included the issue as a commitment in its own Senedd election manifesto.

The Welsh Government does not believe there should be a market for care for children, or that profits should be made from caring for children facing particular challenges in their lives and is bringing forward this legislation to end this. This means the future residential, secure accommodation and foster care of children that are looked after in Wales will be provided by public sector, charitable or not-for-profit organisations.

We are not promoting a like-for-like replacement of for-profit providers, but rebalancing the shape and scale of provision including models of care, wrap-around support and models of ownership, as part of our wider vision for children's services to make it needs-based, integrated, local and affordable."[11]

10. As regards introducing direct payments for Continuing Health Care (CHC), the Minister notes in the EM that:

"The Programme for Government contains the commitment to 'Improve the interface between continuing health care and Direct Payments'.

Continuing Health Care (CHC) is provided when an individual has a primary health need which outweighs their needs for other care and support, and is subject to regular reassessment. The health and care needs are paid for wholly by the NHS in accordance with duties under the NHS (Wales) Act 2006 ('the 2006 Act'), without any charge for the person receiving the care as, subject to limited exceptions, health care must be provided free at the point of delivery. Direct payments are not possible under the 2006 Act at present."[12]

[11] EM, paragraphs 3.26 to 3.29
[12] EM, paragraphs 3.43 to 3.44

11. The Minister goes on to explain:

> *"The demand for a policy change in this area has been growing to address concerns of unfairness and lack of voice and control faced by disabled and seriously ill people. LHBs currently commission a significant portion of most CHC packages from private sector care home providers and domiciliary care agencies, who in turn may purchase or commission health care such as nursing. The introduction of direct payments would therefore improve voice and control for individuals by allowing them more of a choice in how, and by whom, their care is delivered. Currently individuals have limited control over how their care is delivered under CHC."*[13]

The Committee's remit

12. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

13. In our scrutiny of Bills introduced into the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter we consider relevant to the quality of legislation.

14. We took oral evidence from the Minister on 17 June 2024.[14]

[13] EM, paragraph 3.54
[14] Legislation, Justice and Constitution Committee, 17 June 2024

15. Following our evidence session, we wrote to the Minister with further questions in relation to the Bill.[15]

16. The Minister responded on 28 June 2024[16] and further on 9 July 2024.[17]

Recommendation 1. The Minister should respond to the conclusions and recommendations we make in this report at least two working days before the Stage 1 general principles debate takes place.

[15] Letter to the Minister for Social Care, 18 June 2024
[16] Letter from the Minister for Social Care, 28 June 2024
[17] Letter from the Minister for Social Care, 9 July 2024

2. Legislative Competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.

General

17. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act).

18. The Minister states in the EM:

> *"In my view the provisions of the Health and Social Care (Wales) Bill, introduced by me on the 20 May 2024, would be within the legislative competence of Senedd Cymru."*[18]

19. The Minister further states:

> *"Senedd Cymru ('the Senedd') has the legislative competence to make the provisions in the Health and Social Care (Wales) Bill ('the Bill') pursuant to Part 4 of the Government of Wales Act 2006 ('GoWA 2006') as amended by the Wales Act 2017."*[19]

20. The Llywydd, the Rt Hon. Elin Jones MS, in her statement on legislative competence, stated that:

> *"In my view:*
>
> – *Most of the provisions of the Health and Social Care (Wales) Bill, introduced on 20 May 2024, would be within the legislative competence of the Senedd.*
>
> – *Paragraph 4 of Schedule 2 to the Bill, which amends the Safeguarding Vulnerable Groups Act 2006, would not be within competence. This is because consent is required from the UK Government to bring it within the Senedd's*

[18] EM, Member's Declaration, page 1
[19] EM, page 4

> *competence and this necessary consent has not been obtained at this time."*[20]

21. When the Minister gave evidence to us on 17 June 2024, she confirmed that she was satisfied the Bill was within the Senedd's legislative competence, "subject to Minister of the Crown consent".[21]

22. We asked the Minister for an update regarding Minister of the Crown consent, and she responded:

> *"In terms of the Minister of the Crown consents, there is a consequential amendment for which Minister of the Crown consent is required, and the Government has requested this from the Secretary of State."*[22]

23. An official accompanying the Minister added:

> *"It has not been received, but we have had official-to-official confirmation that there is no argument in principle about it, because it puts our health bodies in the same position as analogous bodies in England."*[23]

Human rights

24. The Llywydd wrote to us and the HSC Committee on 10 June 2024[24] detailing human rights considerations that the scrutiny Committees may wish to consider.

25. The Llywydd noted in her letter:

> *"Whilst my overall conclusion is that the provisions in the Bill are compatible with the ECHR, my view is that the position in relation to certain provisions is finely balanced, with persuasive arguments both for and against compatibility."*

26. The Llywydd suggested in her letter that "particular consideration should be given to Article 8 and Article 1 of the First Protocol to the ECHR", noting that the "Explanatory Memorandum to the Bill makes no reference to the Welsh Government's views on the potential human rights impact of the Bill".

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[20] Presiding Officer's Statement on Legislative Competence, 20 May 2024
[21] LJC Committee, 17 June 2024, RoP [8]
[22] LJC Committee, 17 June 2024, RoP [10]
[23] LJC Committee, 17 June 2024, RoP [11]
[24] Letter from the Llywydd, 10 June 2024

27. When the Minister appeared before us on 17 June 2024, she told us that "where human rights issues are engaged, a fair balance has been struck, in proportionality terms, between the human rights impacts of the aims underlying the Bill and the relevant provisions of the Bill."[25]

28. We asked her about the impact that the Bill has on rights protected under Article 8 of the ECHR, which protects the right to private and family life, home and correspondence, and in particular, how she had concluded that the Bill is consistent with such rights for children and families.[26] The Minister responded:

> *"I think, if we look at article 8, the rights of looked-after children are protected in the Bill's transitional arrangements, which enable for-profit providers to continue to accommodate children in settled placements, and it also allows new placements to be made with for-profit providers, where that's the most appropriate place for a child to reside.*
>
> *One of the reasons we've got to this point (…) is that the current market is so highly dysfunctional and, in the view of the Welsh Government, is unsustainable in its current form, and that dysfunction in the market has adverse affect on the service provisions in Wales. Consequently, the well-being and life outcomes of looked-after children in local authorities are adversely affected. The Welsh Government has concluded that, because of all of those points that I've made previously, the status quo is not an option.*
>
> *What we do recognise is that a placement for a child who's looked after by a local authority is a child's home, and they may well be settled and they may have developed positive relationships and attachments to their carers. We also understand the importance of stability for their well-being and educational outcomes. So, where a child is settled and is having their needs met in a placement, then everything possible should be done to maintain that placement. The Bill's transitional arrangements and the provisions in the new section of the Social Services and Well-being (Wales) Act 2014 ensure*

[25] LJC Committee, 17 June 2024, RoP [8]
[26] LJC Committee, 17 June 2024, RoP [20]

that local authorities can prioritise and stabilise this for children".[27]

29. An official accompanying the Minister added:

"Just touching specifically on new section 81A, which will be inserted by the Bill into the 2014 Act, we see that as being crucial to ensuring that local authorities will prioritise stability for children. It should do this by requiring local authorities, when making placement decisions, to meet their duty to safeguard and promote the well-being of the child, which is defined in a holistic manner in section 2 of the 2014 Act, and also by ensuring that the local authority must have regard to whether the child will be disrupted by moving to another placement. We think that covers considerations of best interest and some very specific considerations around disruption and avoiding that, for reasons the Minister's articulated."[28]

30. On the subject of Article 1 of the First Protocol to the ECHR ("A1P1") which relates to the peaceful enjoyment of possessions, the Bill engages the right of for-profit service providers to make a profit (existing profit being a "possession" for the purpose of A1P1). We asked the Minister what consideration has been given to the impact that the Bill has in terms of those specific rights.[29] The Minister responded:

"What we've had to do is to carefully consider the impact of the Bill's provisions both on providers and on looked-after children. We dealt with the issue of looked-after children in the answer to your previous question. We do acknowledge absolutely that what is being proposed engages the property rights of for-profit providers of children's homes and fostering services. There are currently no registered for-profit providers of secure accommodation in Wales, so it doesn't impact on them. The convention doesn't protect future property rights, so there would be no impact on any future for-profit providers in the secure sector.

The Welsh Government considers that any interference with the rights of the provider is proportionate, again for all the reasons I set out in terms of what we believe the aims of the Bill are, and

[27] LJC Committee, 17 June 2024, RoP [21 to 23]
[28] LJC Committee, 17 June 2024, RoP [25]
[29] LJC Committee, 17 June 2024, RoP [26]

that the Bill is a vitally important one to achieve a more sustainable children's social care sector and to ensure that social services improve life outcomes for children looked after by local authorities in Wales. So, what we've sought to do is to try to strike that careful balance between the needs of looked-after children in terms of social services and the proportionate impact that that would have on for-profit providers that currently provide services in the sector. The impact on providers and the need to allow time for business adjustments will be made within the Bill, and they will be able to continue to operate in Wales within a period of time that meets the transitional arrangements.

(…) I'm conscious that this is quite a complex legal area. (…) I am more than happy to write to the committee with a more detailed explanation, if that would be helpful, because I'm also conscious that we're going to be tied for time today as well."[30]

31. We asked if the Minister had considered the potential for challenges originating from the for-profit sector where it may be argued that a maximum profit limit should be set rather than excluding for-profit providers from providing services.[31] The Minister responded:

"It was certainly one of the considerations when we looked at what the alternatives to the current system would be, but there was no fair way that we could identify a minimum or a maximum level of profit. It's either for profit or it's not, because you then move into very grey areas. That's why we've written into the Bill the necessity of the transitional arrangements and recognition of contractual arrangements and the recognition of not disrupting children that are in for-profit placements while we go through the transition period. But we're setting out very clearly what it is we're seeking to achieve. We've set out very clearly the alternative models of delivery that will be not-for-profit and we're continuing to talk to the sector, for-profit providers that are operating in the sector, about how they can best adapt to these transitional arrangements and be part of that transitional process, because a number of these providers are very good providers. We wouldn't want to lose their

[30] LJC Committee, 17 June 2024, RoP [27 to 29]
[31] LJC Committee, 17 June 2024, RoP [31]

> *expertise, but what we don't want to see is the continuation of the for-profit provision within the sector."*[32]

32. We asked the Minister if there was anything further in the Bill that the Welsh Government had identified that may have an impact on human rights and if there were any other steps that had been taken to ensure that the Bill is consistent with the ECHR.[33] The Minister responded:

> *"...we're satisfied that we've looked at the requirements of the convention. We've undertaken integrated impact assessments and those impacts are identified in chapter 9 of the explanatory memorandum. The human rights implications of the provisions of the Bill have also been fully and carefully considered, and we will be publishing a summary of those integrated impact assessments shortly."*[34]

33. Following the Minister's appearance before us on 17 June 2024, we wrote to her on 18 June with a number of additional queries. We also referred to her commitment to provide the Welsh Government's assessment of the Bill's impact on children and their families, with particular reference to Article 8 of the ECHR, and the impact on service providers, with particular reference to A1P1.[35]

34. In her letter of 28 June 2024, the Minister provided a note on the Welsh Government's consideration of rights under the ECHR in relation to Chapter 1 of Part 1 to the Bill. The Minister stated that the Welsh Government has "carefully considered the impact of the Bill's provisions both on providers' businesses and on children looked after", which has included detailed consideration of A1P1 (the right to peaceful enjoyment of possessions), Article 8 (right to respect for family and private life, home and correspondence), and Article 14 (protection from discrimination in the enjoyment of rights under the ECHR).[36]

35. The Minister went on to state:

> *"The Welsh Government acknowledges that what is being proposed will interfere with the property rights of for-profit providers of children's home services and fostering services. It could potentially engage Article 8 if a child's placement is terminated by a provider. However, the transitional provisions in*

[32] LJC Committee, 17 June 2024, RoP [32]
[33] LJC Committee, 17 June 2024, RoP [33]
[34] LJC Committee, 17 June 2024, RoP [34]
[35] Letter to the Minister for Social Care, 18 June 2024
[36] Letter from the Minister for Social Care, 28 June 2024

the Bill enable for-profit providers already providing a service to the child to continue to operate so as to not disturb a child's existing placement. Even if there is an interference with Article 8 rights the Welsh Government is of the view that it would be justified and proportionate for the same reasons as under A1P1 (...).

As there are currently no registered for-profit providers of secure accommodation services in Wales, any impact on these services is a potential impact on future establishment and therefore is outside of the scope of Convention Rights which do not protect the right to future possessions."[37]

36. She also wrote:

"The aim of the provisions of the Bill is a vitally important one: to achieve a more sustainable children's social care sector and to ensure improved services and life outcomes for children looked after by local authorities in Wales. The aim is to ensure that public money invested in the care of children looked after does not profit individuals or corporate entities, but instead is spent on children's services to deliver better experiences and outcomes for children and young people. The aim is to eliminate private profit from the care of children looked after, in order to develop services that are locally based, locally designed and locally accountable, and that improve the care experience for young people.

The provisions are carefully designed to strike a fair balance between the need to achieve these important aims on the one hand and (a) avoiding disruption in the lives of children looked after and (b) managing the impact on providers, and the need to allow time for the business adjustments which they will have to make.

(...)

The Welsh Government has concluded that although the potential for profit has an effect of drawing private capital and private enterprise into the area, the ability of for-profit providers to extract profit from the system puts the sustainability of the

[37] Letter from the Minister for Social Care, 28 June 2024

> *children's social care sector at risk and has an adverse effect on outcomes for children."*[38]

37. The Minister also highlighted academic literature about the impact of profit extraction on children's residential and foster care.[39]

38. The Minister added:

> *"Despite the impact on the rights of for-profit providers, the Welsh Government considers that provisions of the Bill are proportionate in their overall effect. (...)*
>
> *The Bill's provisions provide for a transition period to avoid disruption for children already placed with providers who will become ineligible to provide the service(s) and to allow local authorities to use available capacity in that sector during the period while local authorities are building up sufficient numbers of placements themselves and with not-for-profit providers.*
>
> *During this transition period local authorities in Wales can apply to the Welsh Ministers for approval to place a child with a for-profit provider that does not meet the new requirements, subject to certain conditions and safeguards. This ensures that the rights of children are protected and that the impact on placement-choice is limited while the sector transitions to the new model of care. It also provides time for for-profit providers to convert to an eligible not-for-profit business model or make other business adjustments."*[40]

39. We discuss the timetable of implementation further in Chapter 3 of this report.

Impact assessments

40. Chapter 9 of the EM sets out details of a series of impact assessments or screening processes which have been completed on the Bill by the Welsh Government as part of its Integrated Impact Assessment.

[38] Letter from the Minister for Social Care, 28 June 2024
[39] Letter from the Minister for Social Care, 28 June 2024
[40] Letter from the Minister for Social Care, 28 June 2024

41. We asked if the justice screening process referred to in the EM was a justice impact assessment.[41] An official accompanying the Minister stated:

> *"So, what we've undertaken there is part of an internal process we have, which we've referred to as a justice screening tool. The official title is a justice system impact identification. So, it's a part of the justice impact assessment, probably the first stage, as you might say. It's essentially a checklist to identify further areas of assessment in order to guide officials through the various aspects of impact that need consideration. So, that's what that is.*
>
> *We've been through it. We think there is going to be a very limited impact on the justice system as a result of our provisions, and we discuss that in the explanatory memorandum per the requirement in Standing Orders. But, as we're going through scrutiny, we're obviously going to keep that assessment under review and come back to it if we think any changes suggest that there's going to be a greater impact on the justice system."*[42]

42. We asked if the Welsh Government had made any amendments to the legislation as a consequence of the process already undertaken.[43] An official accompanying the Minister responded:

> *"At the moment (...) I don't think we've identified any changes that we feel are needed at this stage."*[44]

43. In relation to data protection, the Minister states in the EM that a data protection impact assessment was being prepared. We asked the Minister if that impact assessment would be shared for scrutiny.[45] The Minister responded:

> *"Yes, absolutely. We'll publish a summary of all the impacts. We're continuing to have discussions as well with the Information Commissioner's Office because it is a complex area, as you say, but we will publish a summary of the impacts when those assessments have been completed."*[46]

[41] LJC Committee, 17 June 2024, RoP [36]
[42] LJC Committee, 17 June 2024, RoP [38 to 39]
[43] LJC Committee, 17 June 2024, RoP [40]
[44] LJC Committee, 17 June 2024, RoP [41]
[45] LJC Committee, 17 June 2024, RoP [45]
[46] LJC Committee, 17 June 2024, RoP [46]

44. When we asked why that was not done prior to introduction, an official accompanying Minister told us:

> *"So, within the explanatory memorandum, we were specifically discussing the provisions regarding restricting of profit, elimination of profit. We did undertake some consideration and identification of impacts that we were giving further consideration to. Where we are or where we were up to the point of introduction was we had to look again at the data impact assessment because we were developing some additional proposals around the approvals process for supplementary placements, and also for the sufficiency plans. So, essentially, what we have been doing in the recent weeks is just going back to our assessment of the data protection implications of the Bill in order to update it to align with those extra areas. And as the Minister said, we'll bring a summary of the codified impact assessment back to the committee and publish it as well."*[47]

45. When it was suggested to her that these matters should have been fully completed prior to the Bill's introduction to the Senedd, the Minister responded:

> *"…that would be the ideal scenario, absolutely, but I think (…) this was something that came up in the development of the policy, and it is very specific around the local authorities making supplementary placements, and that was something that came up as we were actually developing the policy. (…) we will make sure that that information is with you as quickly as possible, and that it will be in time for the completion of the Stage 1 scrutiny."*[48]

46. On 30 August 2024, the Minister notified the Committee that she had published summaries of the Integrated Impact Assessments undertaken.[49]

Our View

47. We note the evidence in relation to matters of legislative competence from the Minister.

[47] LJC Committee, 17 June 2024, RoP [49]
[48] LJC Committee, 17 June 2024, RoP [51]
[49] Letter from the Minister for Social Care, 30 August 2024

48. We also note the Llywydd's statement that, in her view, most of the provisions of the Bill would be within the legislative competence of the Senedd, but that paragraph 4 of Schedule 2 to the Bill would not be within competence because consent is required from the UK Government to bring it within the Senedd's competence. We note that this necessary consent has not yet been obtained.

Recommendation 2. The Minister should update the Senedd on the Welsh Government's discussions with the UK Government regarding the outstanding Minister of the Crown consent required for paragraph 4 of Schedule 2 to the Bill.

49. We note the Llywydd's letter of 10 June 2024, which covers in detail human rights considerations, and acknowledge her view that in relation to the Bill's compatibility with the ECHR, "the position in relation to certain provisions is finely balanced, with persuasive arguments both for and against compatibility".[50]

50. We do not consider it satisfactory that the Minister did not include details of the Welsh Government's views on the potential human rights impact of the Bill in the EM accompanying the Bill.

51. We note the evidence subsequently provided to us by the Minister in relation to the Welsh Government's consideration of rights under the ECHR in her appearance before us on 17 June 2024 and her letter of 28 June 2024.

52. We also note the evidence from the Minister regarding the impact assessments prepared by the Welsh Government on the Bill, specifically in relation to justice and data protection.

53. Regarding the potential impact of the Bill on the justice system, we note the comments from the Minister and her officials that a justice screening process was completed which is only a part of a full justice impact assessment.

54. We further note the comments that the Welsh Government will be reviewing the screening and will "come back to it" if it considers that any changes suggest that there is going to be a greater impact on the justice system.

55. We also note from the Minister's evidence that, at the time of our evidence session, a data protection impact assessment had not yet been prepared.

56. We acknowledge that an integrated impact assessment and children's rights impact assessment were published on 29 August 2024.

[50] Letter from the Llywydd, 10 June 2024

57. We do not consider it satisfactory or appropriate within the context of the Senedd's legislative process that full and robust details of the impact of the Bill on key issues including human rights, the justice system and data protection were either not prepared or published in time for the Senedd's consideration of the Bill at Stage 1. Not having this information available on the Bill's introduction naturally precludes scrutiny of it during Stage 1 when Members of the Senedd are considering the necessity and general principles of the proposed legislation. Not only does it disenfranchise Members of the Senedd, it also disenfranchises stakeholders who wish to contribute and comment on the Bill and its potential impact, and also to suggest how it could be improved.

58. In our view, it would seem appropriate that developing the legislative proposals should be informed by the outcomes of impact assessments and accordingly that their preparation should be completed prior to introduction of a Bill. This should be regarded as standard practice, rather than an "ideal scenario".

Conclusion 1. As a general matter of principle, a Bill should not be introduced into the Senedd until all relevant impact assessments have been fully completed, such that all relevant information can be included in the Explanatory Memorandum that must accompany a Bill in accordance with Standing Order 26.6.

59. One of the requirements which must be met for a Bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act. It requires all provisions of a Bill to comply with the ECHR.

60. In our consideration of other Welsh Government Bills in the Sixth Senedd, we have often concluded that as a matter of good practice, an Explanatory Memorandum should include a commentary on the consideration given to the human rights implications of a Bill.[51] We re-iterate this point again.

Conclusion 2. As a matter of good practice, an Explanatory Memorandum should provide clear information about the Welsh Government's assessment of the potential impact of a Bill on human rights and accordingly, how it is compatible with the European Convention on Human Rights.

[51] For example, Legislation, Justice and Constitution Committee, Report on the Environment (Air Quality and Soundscapes) (Wales) Bill, July 2023, Conclusion 1 and Legislation, Justice and Constitution Committee, Report on the Elections and Elected Bodies (Wales) Bill, January 2024, Conclusion 1

3. General Observations

Development of and the need for the Bill

Consultation

61. Between August and November 2022, the Welsh Government carried out a public consultation[52] on its policy proposals, some of which are now reflected in provisions in the Bill.

62. In the EM, the Minister notes that the consultation document "set out the context and rationale for each proposed change; explained why the Welsh Government consider it necessary to introduce or amend the law in these areas, and what this is intended to achieve; before seeking views on the proposals and their likely impacts."[53] In the EM, the Minister adds:

> *"The consultation covered the following main areas:*
>
> - *Eliminating profit from the care of looked after children;*
> - *Introducing Direct Payments for Continuing Health Care;*
> - *Extending mandatory reporting of children and adults at risk;*
> - *Amendments to regulation of service providers, responsible individuals and the social care workforce. This included extending the definition of social care worker to include childcare and play workers.*
>
> *(...)*
>
> *None of the miscellaneous amendments to the 2014 Act were consulted on..."*.[54]

63. The Welsh Government did not consult on a draft Bill. In the EM, the Minister states:

> *"There has been no formal consultation on a draft Bill. It was considered more appropriate to consult on policy proposals*

[52] Available from the Welsh Government website - Proposed changes to legislation on social care and continuing health care
[53] EM, paragraph 4.1
[54] EM, paragraph 4.2 and 4.11

> *during their development to ensure that consultation responses could be considered in developing the Bill itself. The proposals that are included in the Bill align with the policy intentions set out in the consultation but have taken into account points raised in consultation responses. There has also been focussed and proactive ongoing engagement with relevant stakeholders during the development of the Bill."*[55]

64. When the Minister gave evidence to us on 17 June 2024, we asked her to clarify why the Welsh Government did not consult on a draft Bill. The Minister confirmed:

> *"What we consulted on was the policy development, and what we considered was that, actually, having the policy development consulted on was more important than, if you like, consulting on the draft Bill, because it's the policy development that informed the drafting of the Bill. So, there's nothing in the Bill that we haven't consulted on."*[56]

65. In terms of policy development and the proposals in the Bill, we also asked the Minister what discussions she has had with the other UK administrations. With regards to the provisions in Part 1 of the Bill, the Minister told us that Welsh Government officials hold regular meetings with the UK Government's Department for Education to discuss the Welsh Government's "proposals to eliminate private profit from the care of looked after children, including around any implications of the proposed legislation on cross-border placements". The Minister added:

> *"A face-to-face meeting with the Director-General of the Department for Education was held in January 2024 and it was noted that the UK department is looking at profiteering in the sector and is concerned about rising costs and the increase in out-of-county provision."*[57]

66. In relation to Part 2 of the Bill, the Minister said that Welsh Government officials also hold regular meetings about CHC with policy counterparts from the UK Government Department for Health and Social Care and, more recently, have held meetings with officials from the Northern Ireland Executive. The Minister told us that information and evidence shared with Welsh Government officials as a

[55] EM, paragraph 4.10
[56] LJC Committee, 17 June 2024, RoP [60]
[57] Letter from the Minister for Social Care, 9 July 2024, response to question 1

result of these discussions "has contributed to the development of the Integrated Impact Assessment and Regulatory Impact Assessment for this element of the Bill."[58]

The need for new legislation

67. With regard to the provisions in Part 1 of the Bill, the Minister notes in the EM that the growth of the number of looked after children in Wales "has resulted in a long-term trend of increasing use of care, along with presentation of more complex needs, and has presented significant challenges to local authorities and impacted on children and young people themselves."[59]

68. The Minister cites in the EM a 2021 report by the Competition and Markets Authority (CMA) which looked at the children's social care market across England, Scotland and Wales.[60] The Minister highlights that the CMA report "indicates that in some areas the level of profit being taken out of these services is in excess of 20% for children's residential care and approaching this for independent fostering". The Minister adds that "This is money being taken out of children's services which could be redirected to improving services, capacity and outcomes."[61]

69. The Minister goes on to confirm that:

> *"Welsh Ministers agree with the CMA's view that the children's social care market is not functioning well. Welsh Ministers believe that the profit incentive is a key reason why the market is not functioning properly and the impact of that on the market means that it is ill-suited to securing care that meets the needs of vulnerable children and young people."*[62]

70. The Minister states in the EM:

> *"The Welsh Government does not believe there should be a market for care for children, or that profits should be made from caring for children facing particular challenges in their lives and is bringing forward this legislation to end this. This means the future residential, secure accommodation and*

[58] Letter from the Minister for Social Care, 9 July 2024, response to question 1
[59] EM, paragraph 3.14
[60] Competition and Markets Authority, Research and analysis, Children's social care market study final report, March 2022
[61] EM, paragraph 3.16
[62] EM, paragraph 3.18

foster care of children that are looked after in Wales will be provided by public sector, charitable or not-for-profit organisations.

We are not promoting a like-for-like replacement of for-profit providers, but rebalancing the shape and scale of provision including models of care, wrap-around support and models of ownership, as part of our wider vision for children's services to make it needs-based, integrated, local and affordable.

(...)

The eliminating profit provisions within the Bill will restrict the making of profit in the provision of care home services provided wholly or mainly to children, secure accommodation services, and fostering services (referred to as 'restricted children's services) by amending Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 and Part 6 of the Social Services and Well-being (Wales) Act 2014."[63]

71. With regard to the provisions in Part 2 of the Bill, the Minister notes in the EM that the Programme for Government contains the commitment to improve the interface between CHC and direct payments.[64]

72. In order to deliver the improvements and address known issues, the Minister states in the EM:

"...it is proposed to amend the [National Health Service (Wales) Act 2006] to allow the Welsh Ministers to make direct payments to individual patients; this will enable them to secure services to meet their assessed needs for health care in lieu of receiving services provided or commissioned by the NHS in Wales.

The policy intention is to use this power to enable direct payments to be made to persons who have been assessed as having a primary health need and are therefore entitled to receive CHC.

The demand for a policy change in this area has been growing to address concerns of unfairness and lack of voice and control

[63] EM, paragraph 3.28, 3.29, and 3.32
[64] EM, paragraph 3.43

> *faced by disabled and seriously ill people. LHBs currently commission a significant portion of most CHC packages from private sector care home providers and domiciliary care agencies, who in turn may purchase or commission health care such as nursing. The introduction of direct payments would therefore improve voice and control for individuals by allowing them more of a choice in how, and by whom, their care is delivered. Currently individuals have limited control over how their care is delivered under CHC."*[65]

73. When the Minister gave evidence to us on 17 June 2024, we asked her to confirm what the Bill would enable the Welsh Government to achieve that could not be achieved within the existing legislative framework. The Minister told us:

> *"So, restricting the extraction of profit from social care services provided to children—we do need primary legislation to do that. We're also placing new duties on local authorities to prepare sufficiency plans, and those duties can't be created under the existing statutory framework. And in relation to the plans to introduce direct payments for continuing healthcare, which is in Part 2 of the Bill, there are currently no powers to allow direct payments for healthcare, so the Bill needs those powers."*[66]

The drafting styles and choices adopted in the Bill

74. The Bill extensively amends both the *Social Services and Well-being (Wales) Act 2014* (the "2014 Act") and the *Regulation and Inspection of Social Care (Wales) Act 2016* ("the 2016 Act"). We asked the Minister why it was not considered appropriate to make this a free-standing Bill. An official accompanying the Minister told us:

> *"As the question indicates, the key reference points for the two bits of legislation are these two pre-existing Acts, the Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016, and even if a separate piece of legislation had been drafted to try and be self-contained, there would have been a need for people reading the law to understand how those two pre-existing Acts would have been affected in the sense that there would need to be some amendment to them to make them make sense.*

[65] EM, paragraphs 3.52 to 3.54
[66] LJC Committee, 17 June 2024, RoP [63]

> *So, given that they are the pre-existing primary reference points for those two areas of law, the most logical thing was to make amendments to those two central points."*[67]

75. Following that response we noted that, should this Bill be passed, there will have been three considerable pieces of legislation managing this area of law passed in Wales within a decade, and there may therefore be a requirement for consolidation of this law at some point.[68] We asked the Minister if consolidation is something that the Welsh Government is considering. The Minister said consolidation "isn't something that we're planning to do at the moment because our focus is on bringing this new piece of primary legislation in". She added:

> *"But, I think, as with any legislation where there is overlap (…) that's always something that Government has to keep an eye on in terms of whether that would be an effective way forward. So, we've got the two Acts—2014 and 2016—and now this one. There are some overlaps, but there are some very distinct differences as well. But I absolutely take your point that they are covering similar areas of policy, and that's something that the Government would have to keep a watch on."*[69]

76. We also asked the Minister why it has been necessary to restate existing law in some places in the Bill. An official accompanying the Minister said that the restatements had been made for reasons related to the accessibility of law. He told us:

> *"In particular, the amendments that were made to what is currently section 81 of the Social Services and Well-being Act are now divided up into three sections—81A, 81B, 81C—with the amending provisions in it, and 81C, effectively, restates some of the law. There are elements of 81A that are restatements of the law, but the division into three sections is simply because, if it had been left as a single section, it would have been extremely lengthy and cumbersome. It's easier to break it down into smaller units. So, that's more a drafting choice for accessibility of law rather than anything of any underlying policy rationale. I think that more or less answers that.*

[67] LJC Committee, 17 June 2024, RoP [79]
[68] LJC Committee, 17 June 2024, RoP [81]
[69] LJC Committee, 17 June 2024, RoP [83]

> *There's a certain amount of restatement in the direct payment provision as well, but that is, again, to improve the accessibility of the law. The same provision exists, in effect, but it's done by modification, which is a cumbersome way of creating a legal effect, and is more difficult for the reader to do. So, again, there's a sound reason for that, drawn from accessibility of law."*[70]

77. In terms of the structure of the Bill we highlighted to the Minister that we had noticed that, while Chapter 1 of Part 1 as well as Part 2 of the Bill both begin with an overview section, each section within Chapter 2 of Part 1 of the Bill has its own overview provision as its first subsection. We asked the Minister to explain the difference in drafting. An official accompanying the Minister told us that the difference "is driven by a slight difference in the nature of the parts or chapters that are in question". He added:

> *"So, Part 1, Chapter 1 of the Bill, and also Part 2, deal with distinct policies, or topics, themes, if you will. So, the one deals with eliminating profit as a whole entity, and the other one deals with direct payments for continuing healthcare as a whole entity. So, in that case, it was sensible to describe them than as an entity, whereas, with Part 1, Chapter 2, those are very much miscellaneous amendments to the two Acts, in order to address specific issues, as I say, mainly around regulation, inspection and the way that the regulators operate, and, therefore, it didn't seem to need an overview description in the same way, because, essentially, the overview would have been, 'This section makes a series of miscellaneous amendments'. So, that's the reason for that drafting choice."*[71]

78. We also asked the Minister some questions about the use of specific terms in the Bill.

79. Throughout the Bill the terms 'prescribed' and 'prescribed in regulations' are used. To obtain clarity on whether the terms had been used in a consistent and accessible manner, we asked for confirmation and more detail on the use of these terms. An official accompanying the Minister told us:

> *"...essentially, the rationale behind this is that where these words—'prescribed' and 'prescribed by regulations'—are inserted*

[70] LJC Committee, 17 June 2024, RoP [93 to 94]
[71] LJC Committee, 17 June 2024, RoP [97]

> *into other legislation by the Bill, the style used follows the style of the legislation into which those words are inserted. So, whichever is inserted into the 2014 Act follows and makes sense in the context of that Act, and vice versa for the 2016. So, essentially, we had a choice between either an inconsistent approach in relation to this Bill, or creating inconsistency within the Acts being amended, and the judgment made that it was preferable for those Acts to be internally consistent to themselves."*[72]

80. Finally, in this area of our questioning, we asked the Minister why she has decided to make reference to the elimination of private profit from the care of looked after children in the various explanatory documentation to the Bill, rather than referencing the fact that the Bill makes provision to restrict making a profit. The Minister stated:

> *"The provisions are not intended to prevent a fostering service business or a children's home business from generating a trading surplus from their operation. In that sense, the Bill does not prevent providers of these services making a profit. However, the provisions of the Bill are intended to ensure that any trading surplus or profit is retained within the business to be re-invested in either growing the business or in improving the quality of the services which the business provides. The provisions of the Bill are intended to prevent a provider from extracting profit from the business in the way shareholders of a limited company, for example, are commonly rewarded. This is the sense in which the Bill is said to eliminate private profit from services providing care for looked after children."*[73]

Delegated powers and the balance between what is on the face of the Bill and what is left to subordinate legislation

81. The Bill contains 21 powers for the Welsh Ministers to make regulations and one power to make directions. These powers are summarised in tables 5.1 and 5.2 of the EM.

82. Sixteen delegated powers will be subject to the negative procedure, three powers will be subject to the draft affirmative procedure, and three will be subject

[72] LJC Committee, 17 June 2024, RoP [87]
[73] Letter from the Minister for Social Care, 9 July 2024, response to question 2

to the draft affirmative procedure on the first use and then subsequently subject to the negative procedure.

83. As noted in Chapter 1 of this report, the Minister formally issued a Statement of Policy Intent for Subordinate Legislation to be made under the Bill on 19 June 2024.[74] Given that our scheduled evidence session with the Minister was taking place on 17 June, it was made available to the Committee in English only at the end of the week commencing 10 June 2024.[75]

84. The Minister told us that she was content that she had struck the correct balance between what detail was on the face of the Bill and what would be left to the Welsh Ministers to decide in subordinate legislation. She said:

> *"The Welsh Government's starting point is always that we should put as much as possible on the face of the Bill, and this Bill certainly does include a significant amount of detail on the face of the legislation. Where there are powers to make subordinate legislation, those powers are also aligned with the existing statutory frameworks and procedures into which they're being incorporated, and many of the new powers mirror existing powers, as is outlined in chapter 5 of the explanatory memorandum."*[76]

85. The Minister also added:

> *"...we have put an awful lot on the face of this Bill, and we've been very clear about the policy objectives, and very clear about the need for certain flexibilities in terms of why certain things are not on the face of the Bill."*[77]

Proposed commencement, transition and implementation

86. Under new section 2A(1) of the 2016 Act (to be inserted by section 2(b) of the Bill) a "restricted children's service" is:

- a care home service provided at a place at which the service is provided wholly or mainly to children;

[74] Welsh Government, Health and Social Care (Wales) Bill, Statement of Policy Intent for Subordinate Legislation, 19 June 2024
[75] See meeting papers for LJC Committee, 17 June 2024
[76] LJC Committee, 17 June 2024, RoP [102]
[77] LJC Committee, 17 June 2024, RoP [104]

- a fostering service;
- a secure accommodation service.

87. Under new section 6A of the 2016 Act (to be inserted by section 3(3) of the Bill) to be registered in respect of a restricted children's service, a person who is not a local authority must be a not-for-profit entity.

88. In the EM, the Minister states that:

> *"In order to mitigate disruption to the lives of children in existing residential and foster care placements, transitional arrangements will allow a registered for-profit provider of a restricted children's service (a legacy provider) to continue operating after the provisions have come into force, subject to conditions imposed by regulations. Welsh Ministers will have a power, exercised through regulations, to bring the registration of legacy providers to an end at an appropriate time."*[78]

89. Section 4 of the Bill inserts a new Schedule 1A into the 2016 Act to make provision about the transitional arrangements in respect of providers of restricted children's services who are already registered prior to the coming into force of new section 6A of the 2016 Act.

90. After the commencement of new section 6A, the requirement in respect of a restricted children's service imposed under that section (to be a not-for-profit entity) will apply to all new entrants to the register maintained by the Welsh Ministers under the 2016 Act and all existing service providers for so long as they remain registered.

91. However, paragraphs 1 and 2 of new Schedule 1A make provision for a transitional period during which providers of restricted children's services who were registered in respect of the service before it became a restricted children's service (by virtue of new section 6A coming into force) are not subject to the requirements in new section 6A(1) except:

- for the purposes of any applications that the service provider makes under section 6 of the 2016 Act to register in respect of a restricted children's service, or

[78] EM, paragraph 3.36

- under section 11 of the 2016 Act to vary its registration to add a restricted children's service or to provide a restricted children's service at or in relation to a new place.

92. The transitional period begins when new section 6A comes into force in respect of the service and ends on a day appointed by the Welsh Ministers in regulations (to be made under paragraph 1 of new Schedule 1A).

93. With regard to Part 1 of the Bill, the Minister states in the EM:

> *"The intention is for the relevant provisions of the Bill to be brought into effect so that:*
>
> - *New providers registering with CIW[79] will have to have not-for-profit status from 1 April 2026;*
> - *Existing "for profit" providers will be subject to transitional provisions (to be set out in regulations) from 1 April 2027. The transitional provisions will prevent such providers from registering new homes or approving new foster carers; the provisions will also mean they will be unable to accommodate new children except subject to approval, sought by the placing local authority, from Welsh Ministers. Where the placing authority is an English placing authority providers will only be able to accept placements in prescribed circumstances."*[80]

94. Also in the EM, the Minister states that the intention is for the provisions in Part 2 of the Bill to be implemented in spring 2026.[81]

95. With regard to the restriction of profit-making for restricted children's services, we suggested to the Minister that the timelines for delivering this are not clear.

96. The new Schedule 1A to the 2016 Act provides that the transitional period begins with the day on which section 6A(1) of the 2016 Act comes into force. We highlighted to the Minister that, according to paragraph 3.42 of the EM, section 6A(1) will come into force on 1 April 2026. We noted that paragraph 3.42 also states that existing 'for profit' providers will be subject to transitional provisions

[79] Care Inspectorate Wales
[80] EM, paragraph 3.42
[81] EM, paragraph 3.60

from 1 April 2027. As such, we asked the Minister to provide clarification regarding the dates. The Minister responded:

> *"The policy intention is that sections 3 and 4 of the Bill will be brought into force in April 2026 inserting new section 6A into the Regulation and Inspection of Social Care (Wales) Act 2016 along with the transitional regime set out in new Schedule 1A. New section 6A will have the effect of preventing any new bodies registering as providers of restricted children's services unless they are not-for-profit entities, which comply with the test in that section. However, under Schedule 1A existing for-profit bodies (that do not comply with the test in section 6A) will be able to continue to operate despite not meeting the not-for-profit test by virtue of the transitional regime (although they will not be able to vary their registration to provide new restricted children's services or to provide them at new places).*
>
> *Sections 10, 11 and 12 of the Bill will also be brought into force in April 2026, making amendments to section 75 of the Social Services and Well-being (Wales) Act 2014 and inserting new sections 75A to 75D. Welsh local authorities will be subject to the duty to take all reasonable steps to secure that they have sufficient placements of their own or with not-for-profit providers. They will have to prepare their first annual sufficiency plan which they will need to submit to the Welsh Ministers for approval four months prior to the start of the 2027-28 financial year.*
>
> *Section 13 of the Bill, inserting new sections 81A to 81D into the Social Services and Well-being (Wales) Act 2014, will be commenced in April 2027, requiring Welsh local authorities to seek authorisation from Welsh Ministers for all ongoing placements of children with for-profit providers. From April 2027, if a Welsh local authority is unable to identify a not-for-profit placement for a looked-after child and wishes to place a child using available placements with for-profit providers in Wales, it will need to seek approval from the Welsh Ministers.*
>
> *With effect from April 2027, Welsh Ministers will make regulations under paragraph 3 of new Schedule 1A (as inserted by section 4 of the Bill, see above), which will prevent any remaining for-profit providers in Wales (those that are still*

> *operating under the transitional provision in paragraph 2 of that Schedule) from taking placements from English local authorities other than in limited circumstances. At this point in time, regulations will also be made under the Social Services and Well-being (Wales) Act 2014 to provide that for-profit fostering service providers in Wales will not be able to approve new foster carers."*[82]

97. We also asked the Minister if she could confirm when she anticipated making regulations to bring the transitional period to an end. Further, we asked why the end date of the transitional period is not on the face of the Bill, with a power to amend, if needed. An official accompanying the Minister told us:

> *"...the reason for not specifying the end date for the transitional period is because part of the issue, which is being protected by the design of the scheme, is the article 8 rights of the children who are in placement and who are going to be potentially affected by the eventual disqualification of those providers who are for-profit providers and don't transition into the new arrangements. And setting a date on the face of the Bill would have been artificial. It wouldn't have allowed officials and Ministers to gauge the progress of the change in the sector as the provisions take effect, and would have set up instability and anxiety for those in placements who would potentially be affected because of an impending date coming up and their not knowing what might happen to them."*[83]

98. The Minister added that she "absolutely appreciate[s] the need for certainty", and that she was "fully anticipating having to account for this in the Senedd and keeping the social care sector fully apprised of where we're going and our implementation and timetable and the progress for it". The Minister said it was important that the Welsh Government "retain that flexibility in the timetabling so that we don't stray into the difficulties (...) around some of the human rights aspects of this".[84]

99. In the Statement of Policy Intent for Subordinate Legislation, the Minister states that the power to end the transitional period "recognises that it will be necessary to consider the progress of local authority disengagement from the use of for-profit placements in order to determine the appropriate point at which to

[82] Letter from the Minister for Social Care, 9 July 2024, response to question 3
[83] LJC Committee, 17 June 2024, RoP [67]
[84] LJC Committee, 17 June 2024, RoP [71]. See also RoP [72 to 73].

bring the transition period to a close".[85] We asked the Minister, if one local authority struggles to disengage from the use of for-profit placements, does this mean the transitional period across Wales will continue for all local authorities until all are ready. The Minister responded:

> *"Paragraph 1(3) of Schedule 1A makes clear that section 187 of the 2016 Act applies to the regulation-making power in paragraph 1(1). Section 187(1)(b) provides that regulation-making powers under the 2016 Act can be used to make different provision "for different purposes, for different cases and for different areas". In the scenario described it would be open to Welsh Ministers to bring the transition period to an end in a staged way, allowing local authorities whose task of removing reliance on for-profit providers is more difficult to have more time but introducing full implementation for other areas sooner."*[86]

100. Further commentary on section 4 of the Bill can be found in Chapter 4.

101. Section 24 of Part 2 of the Bill amends the *National Health Service (Wales) Act 2006* (the 2006 NHS Act) to insert new section 10B. Section 10B(5) contains a power for the Welsh Ministers to make regulations that would enable Local Health Boards (LHBs) to make direct payments in discharge of the LHBs' duty to provide after-care services under section 117 of the *Mental Health Act 1983* (the 1983 Act).

102. It is not clear to us whether the regulation-making power in new section 10B(5) could first be exercised in relation to just one LHB. An official accompanying the Minister told us:

> *"Technically, yes, it could; it could be used in that way. However, it wouldn't be appropriate to do so, because if we were to use that power in that way, then people in different parts of Wales would be treated differentially. Had we wanted to pilot this, which commencing in relation to one area only would effectively be, we would have sought appropriate piloting provisions. That wasn't the Government's intention, so, therefore, the power in 10B(5) will be used to bring the provisions into force in relation to all local health boards at the same time."*[87]

[85] Welsh Government, Health and Social Care (Wales) Bill, Statement of Policy Intent for Subordinate Legislation, 19 June 2024, page 6
[86] Letter from the Minister for Social Care, 9 July 2024, response to question 8
[87] LJC Committee, 17 June 2024, RoP [122]

Our View

103. We acknowledge the Minister's evidence regarding the development of the Bill, and note that the Welsh Government undertook a public consultation on the policy proposals which are now reflected in provisions in the Bill.

104. The Minister will be aware of our longstanding preference for government to consult on draft legislation, as opposed to singularly consulting on policy proposals. Consultation on a draft Bill would have given stakeholders and Members of the Senedd the opportunity to assess how the Welsh Government planned on translating policy proposals and changes into legislative provision. In our view, consulting on a draft Bill is equally as important as consulting on the policy intentions; they represent different but important components of developing legislation and should be built into the Welsh Government's legislative timetable. Consulting on a draft Bill should result in better, more fully thought-through legislation, which in turn should enhance the likelihood of delivering the Welsh Government's desired policy outcomes.

105. We acknowledge the Minister's explanation as regards what the Bill would enable the Welsh Government to achieve that could not be achieved within the existing legislative framework.

106. We further acknowledge the Minister's evidence on why it has been necessary to restate existing law in some places in the Bill.

107. One particular aspect of the Bill's drafting which we highlighted in our questioning of the Minister was the use of the terms 'prescribed' and 'prescribed in/by regulations'. We note the evidence we received that the Welsh Government had a choice between either an inconsistent approach in relation to the Bill, or creating inconsistency within the 2014 and 2016 Acts being amended. While we acknowledge there is an argument that it is preferable for those Acts to remain internally consistent to themselves, this demonstrates a sound reason for the need to bring everything together in a consistent and consolidated way as soon as possible.

108. We note the comments from the Minister that consolidation of this area of law "isn't something that [the Welsh Government is] planning to do at the moment because our focus is on bringing this new piece of primary legislation in".

109. We accept that reforming the law in any particular area will attract a higher degree of priority than consolidation of the existing law. Nonetheless, and as an example, the acknowledgement by the Minister and her officials that drafting

styles in this Bill are inconsistent because inconsistency exists between the 2014 and 2016 Acts indicates a need for work to be undertaken to assess and identify the need and benefits of consolidating this area of Welsh law.

Recommendation 3. The Minister should state whether she has had discussions with the Counsel General and the Welsh Government Cabinet about the priority which should be attached to the consolidation of the law on the regulation and provision of social care services and health care in Wales.

Recommendation 4. The Minister should commit to assessing and scoping the consolidation of the law on the regulation and provision of social care services and health care in Wales, and report to the Senedd on this work within 12 months of the Bill being passed.

110. We acknowledge the Minister's evidence regarding the balance between the detail on the face of the Bill and what is left to subordinate legislation. We note the Minister's comments that, where there are powers to make subordinate legislation, those powers align with the existing statutory frameworks and procedures into which they're being incorporated. We also note the Minister's remarks that the Welsh Government has "put an awful lot on the face of this Bill" and has been "very clear about the need for certain flexibilities in terms of why certain things are not on the face of the Bill".

111. As the Committee that considers the delegation of powers to the Welsh Government in all Bills introduced to the Senedd, we recognise that looking at the number of powers alone is insufficient in determining whether a Bill excessively seeks to delegate power away from the legislature to the executive. Nonetheless, 21 delegated powers in a Bill of only 30 sections are stark figures that merit being drawn to the attention of the Senedd.

112. All Welsh Ministers will be aware that, where the balance of legislative power is tilted too much in favour of the executive, the Senedd and the wider Welsh public are impeded from having a rich debate about what the primary legislation is seeking to achieve. Furthermore, it impairs the ability of Members of the Senedd to scrutinise the specifics of the legislation placed before them.

113. It is regrettable that the Statement of Policy Intent for Subordinate Legislation was not made available to us and the HSC Committee at the start of Stage 1 proceedings, as per the usual practice. As we highlighted to the Minister during our evidence session, good scrutiny is informed scrutiny, and receiving such important information when there is little time to read and digest it is insufficient and should not be repeated.

Conclusion 3. We have concerns that the Bill was introduced too early and before all necessary preparatory work had been completed, including but not limited to, consulting on a draft version of the Bill and the preparation of impact assessments and the Statement of Policy Intent for Subordinate Legislation to be made under the Bill.

114. In reaching this view, we have also taken account of comments that the Minister made in respect of individual provisions in the Bill and in particular the need to give further consideration to their drafting. These matters are covered in the next chapter, together with an analysis of the delegated powers contained in the Bill.

115. As highlighted above, we asked the Minister why she has decided to make reference to the elimination of private profit from the care of looked after children in the various explanatory documentation to the Bill, rather than referencing the fact that the Bill makes provision to restrict the making of profit.

116. On this matter, we note the comments by the Minister that the provisions of the Bill are intended to prevent a provider from extracting profit from the business and "This is the sense in which the Bill is said to eliminate private profit from services providing care for looked after children".

117. Nonetheless, we are concerned that the explanatory material is arguably misleading as the Bill does not eliminate profit-making in the sector.

118. In our view, there should be consistency in phrasing between the Bill itself and the explanatory documentation, and the phrasing used should accurately reflect the provisions of the Bill.

Recommendation 5. The Minister should amend the Explanatory Memorandum (including the Explanatory Notes) by the start of Stage 3 proceedings to ensure it accurately reflects the intention of the Bill to restrict rather than eliminate the making of profit from the care of looked after children.

119. Finally, in this section of our report, we note the Minister's evidence regarding the proposed commencement and implementation of the Bill's provisions, including the provisions made for transitional arrangements.

120. We note that the intention is that providers who are applying for registration to provide a restricted children's service will be required to be not-for-profit from 1 April 2026. Existing providers will also be subject to the transitional arrangements from that date, though any restrictions that are to be placed on such providers will not come into force until 1 April 2027.

121. However, in our view, the transitional arrangements are not clear from a reading of the Bill, the EM or the Statement of Policy Intent for Subordinate Legislation. As the Minister indicated clearly in her evidence, the transitional arrangements are important because they are, in part, intended to protect the rights of looked after children.

122. While the Minister's letter of 9 July 2024 is more helpful, we are concerned that there is insufficient clarity about the transitional arrangements and how stakeholders will be affected by them. If the transitional arrangements are not clearly understood, there is a danger that this could have a negative impact on the delivery of the Minister's policy objectives and, in particular, the care of looked after children.

123. We are also concerned that there is no indication in the Bill or any of its explanatory documentation as to when the transitional arrangements are intended to end. We also heard no evidence giving us any indication on this point. Without any commitment on when the transitional arrangements will end, they could continue indefinitely, which would undermine the effectiveness of this legislation.

124. We note the Minister's comments about the reasons for not being in favour of placing an end date for the transitional arrangements on the face of the Bill. However, in our view the arguments advanced are not particularly clear or persuasive.

125. In the absence of any indication when the transitional arrangements will come to end, we believe that the Minister should place this information on the face of the Bill. We consider that this would offer more certainty to all those affected by the changes to be made by the Bill, and give a target for them to work towards in terms of preparing for those changes. However, we recognise that there would need to be some flexibility to change the end date should that be necessary. This could be achieved by the inclusion of a regulation-making power subject to the affirmative procedure. In our view, this would mitigate the concerns expressed by the Minister about having an end date on the face of the Bill.

Recommendation 6. The Minister should table amendments to the Bill to include a date on which the transitional arrangements to be introduced under Part 1 of the Bill will end, and to enable such a date to be amended by regulations subject to the draft affirmative procedure.

Recommendation 7. Should the Bill receive Royal Assent, the Minister should ensure that information is provided to all stakeholders about the transitional

arrangements that will apply under Part 1 of the Bill in such form that the arrangements can be easily understood.

Recommendation 8. The Minister should explain clearly how any phased ending of the transitional arrangements under Part 1 of the Bill would work in practice, including how the rights of children will be affected if they have to move placements.

126. Furthermore, and as regards the implementation of Parts 1 and 2 of the Bill, we note that the Welsh Government appears to have differing views as to the appropriateness of phased implementation of Parts 1 and 2 across Wales.

127. In relation to Part 1 of the Bill, in her letter to us on 9 July 2024, the Minister suggested that the Welsh Government would have no concerns with the transitional period being brought to an end in a staged way across local authorities. However, when we questioned the Minister on the implementation of Part 2 of the Bill, while acknowledging the powers in the Bill would enable the direct payments provisions to be brought into force in different LHBs at different times, we were told "it wouldn't be appropriate to do so, because if we were to use that power in that way, then people in different parts of Wales would be treated differentially."

128. If the Welsh Government is concerned that people in parts of Wales should not be treated differently when it comes to being eligible for receiving direct payments within NHS CHC, we are unclear why the same concerns do not apply to vulnerable children in Wales who may be provided with accommodation according to different standards and requirements depending on the area in which the service is provided. The Minister's position on this requires clarity and further explanation.

Recommendation 9. The Minister should explain clearly:

- why it is appropriate to potentially treat local authorities individually and therefore differently in respect of Part 1 of the Bill, but not in respect of Part 2;
- the implications for health and social care in Wales of such an approach.

4. Specific observations on particular Parts and sections of the Bill

129. The Bill comprises 30 sections (within three Parts) and two Schedules.

130. The following comments focus on specific sections of the Bill and delegated powers within those sections that we wish to highlight and, accordingly, draw to the attention of the Senedd.

Part 1 of the Bill: Social care

131. Part 1 of the Bill relates to social care and contains two Chapters.

132. Chapter 1 makes amendments to the 2014 and 2016 Acts intended to restrict the making of profit by providers of children's care home services, secure accommodation services and fostering services.

133. Chapter 2 makes a number of amendments in relation to social care services, social care workers and local authority social services, intended to ensure that the 2014 Act and 2016 Act can operate fully and effectively.

134. Part 1 of the Bill also introduces Schedule 1 which makes minor and consequential amendments to existing social care legislation.

Chapter 1: Provision of social care services to children: restrictions on profit

Section 2 - Restricted children's services

135. Section 2(b) inserts new section 2A into Part 1 of the 2016 Act. New section 2A defines a "restricted children's service" for the purposes of Part 1 of the 2016 Act. Further provision about its meaning is made in Schedule 1 of the 2016 Act, as a consequence of section 2(c) of the Bill, which inserts new paragraphs 1(3A) and 1(3B) into that Schedule.

136. New section 2A(1) defines the following regulated services as a "restricted children's service" for the purposes of Part 1 of the 2016 Act:

- a care home service at a place at which the service is provided wholly or mainly to children,
- a fostering service, and
- a secure accommodation service.

137. New section 2A(2) provides that:

> *"a care home service is provided wholly or mainly to children if—*
>
> *(a) it has provided more days of accommodation to children than to adults for any period of 12 months falling within the previous 24 months, or*
>
> *(b) it intends to provide more days of accommodation to children than to adults for any period of 12 months falling within the following 24 months."*

138. The Bill does not provide any detail about how these criteria are to be demonstrated or assessed in practice. It also does not make it clear whether the periods of time referred to must be continuous or not, i.e. if it is a 12-month period within the previous 24 months, does this mean 12 continuous months or any 12 individual months within the preceding 24 months? We asked the Minister if she had any concerns that this may lead to confusion about what constitutes a care home service in this context. The Minister responded:

> *"Providers will know whether their intention is to come within the thresholds set out in the Bill (i.e. which will make a place from which they operate a care home service a place where a care home service is provided wholly or mainly for children). There will be some instances where the provider seeks a change to its registration status because it is certain it will meet the threshold and there will be other cases where the provider seeks a change to its registration status because it recognises that it may cross the threshold.*
>
> *As far as calculating the number of days is concerned, the calculation depends on the provider having provided, at a particular place, more days of accommodation to children than to adults over a 12-month period within the last 24 months. This makes clear that the calculation of days must take place within a continuous period of 12 months. The provision would not make sense if the days making up the 12-month period could be randomly selected from within the 24 month period. However, we will give further consideration to the drafting of this provision prior to Stage 2.*
>
> *In testing compliance with the requirement, the regulator will be able to inspect a provider's admission records to determine*

> *whether the threshold has been crossed such as to require the provider to be registered as the provider of a restricted children's service."*[88]

139. The Bill defines 'looked after children' in new paragraph 1(3B) of Schedule 1 to the 2016 Act (to be inserted by section 2(c) of the Bill). This term is defined by reference to section 74 of the 2014 Act. However, section 74 does not use this term. We asked the Minister to explain why this approach has been taken and whether, on reflection, she considered that the drafting of these provisions could be clearer. The Minister responded:

> *"'Looked after children' is a term used in section 2 of the Bill inserting new section 2A and new paragraphs (3A) and (3B) into Schedule 1 to the 2016 Act. The term is defined in new paragraph (3B) by reference to section 74 of the Social Services and Well-being (Wales) Act 2014 ('the 2014 Act'). Section 74 of the 2014 Act defines the term 'child who is looked after by a local authority'. The Part heading for Part 6 of the 2014 Act (of which section 74 is the opening section) is 'Looked after and accommodated children'. We believe the definition is reasonably clear but could be clarified and propose to introduce an amendment at Stage 2 to address this point."*[89]

Our view

140. We note the evidence from the Minister regarding a care home service that is provided wholly or mainly to children, and we acknowledge her comments on the provisions which mean that, to fall within the definition, a provider will need to show that it intends to provide more days of accommodation to children than adults over a set period.

141. However, we are concerned by the Minister's response that "Providers will know whether their intention is to come within the thresholds set out in the Bill". We are also not convinced that the Minister's view on the calculation of days is as clear as the Minister suggests. As such, we welcome the Minister's commitment to give further consideration to the drafting of this provision prior to Stage 2.

142. We believe that new section 2A(2) of the 2016 Act must state clearly that the calculation of days must take place over a continuous period of 12 months.

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[88] Letter from the Minister for Social Care, 9 July 2024, response to question 4
[89] Letter from the Minister for Social Care, 9 July 2024, response to question 6

Recommendation 10. The Minister should table an amendment to the Bill so that when calculating the number of days for the purpose of new section 2A(2) of the *Regulation and Inspection of Social Care (Wales) Act 2016* (to be inserted by section 2(b) of the Bill), it is clear that the 12-month period must be continuous.

143. We are also concerned at the way in which the term 'looked after children' has been defined in the Bill. We believe there is a risk of confusion as 'looked after children' is defined by reference to section 74 of the 2014 Act. However, the 2014 Act does not actually define or use, in operative provisions, the term 'looked after children'. As such we do not believe that the approach is as clear as it could be, nor will it assist the reader of the legislation.

144. We therefore agree with the Minister's view that the wording of the Bill could be clarified in relation to this point and welcome her commitment to introduce an appropriate amendment at Stage 2.

Conclusion 4. As a general principle, we believe that legislation should clearly define terms that it uses, rather than require the reader to exercise a degree of interpretation when doing so, however simple that interpretation may be perceived to be by the relevant Welsh Minister.

Recommendation 11. The Minister should clarify why the term 'looked after children' is to be introduced to the *Social Services and Well-being (Wales) Act 2014* by the Bill when the term is not used in the operative provisions of the original Act.

Recommendation 12. If the Minister decides to continue with the use of the term 'looked after children', the Minister should table an amendment to the Bill to clarify its meaning including, if necessary, by defining the term within new paragraph 1(3B) of Schedule 1 to the Bill (to be inserted by section 2(c) of the Bill).

Section 3 - Applications for registration in respect of restricted children's services

145. Section 3(3) inserts new sections 6A (Registration in respect of a restricted children's service) and 6B (Registration in respect of a restricted children's service: definitions) into the 2016 Act.

146. Under new section 6A(1), to be registered in respect of a restricted children's service a person who is not a local authority must be a not-for-profit entity.

147. New sections 6A(2), (3) and (4) provide that a 'not-for-profit entity' is a person that meets the following two conditions:

- Condition 1: the person's objects or purposes primarily relate to the welfare of children, or to such other public good as the Welsh Ministers may prescribe (new section 6A(3));

- Condition 2: the person is one of the following four types of undertaking (that are defined in section 6B, and in relation to which the law restricts the extraction of profit): a charitable company limited by guarantee without a share capital; a charitable incorporated organisation; a charitable registered society; a community interest company limited by guarantee without a share capital (new section 6A(4)).

148. As a consequence of the insertion of new sections 6A and 6B into the 2016 Act, section 3(2) inserts a new subsection (1A) into section 6 of the 2016 Act. This new subsection requires a person applying to be registered in respect of a restricted children's service to supply the Welsh Ministers with prescribed information showing that the person is a not-for-profit entity. The power to prescribe the information is to be exercised by regulations subject to the negative procedure made under section 187 of the 2016 Act.

149. We questioned the Minister about the use of the term 'public good' and its lack of definition in the Bill. The Minister told us that, in the Bill, the term 'public good' is "about the welfare of children, and it's the collective rather than the individual responsibility".[90] An official accompanying the Minister added:

> *"...just to build on what the Minister said, the intention of including some ability through regulations to widen the range of purposes and objects that a qualifying not-for-profit entity might have is simply to allow a little more scope. If it proves, through time, that it's a disadvantage or an advantage [correction: If it proves, through time, that it's an advantage] to have a slightly wider range of not-for-profit entities engaged in this area whose objects might go beyond something that is simply captured by the words 'welfare of children', then that will give us scope to enable us to do that, if that's what time proves to be required."*[91]

150. While Condition 1 in new section 6A(3) refers to a person's objects or purposes primarily relating to the welfare of children or other public good, no information is provided as to how objects or purposes are to be determined. We

[90] LJC Committee, 17 June 2024, RoP [106]
[91] LJC Committee, 17 June 2024, RoP [107]

asked the Minister to clarify the reason for the omission of this detail. She responded:

> *"The task of determining whether a provider's objects or purposes comply with the requirement in section 6A will fall to the Welsh Ministers as regulator for regulated social care services under Part 1 of the 2016 Act. Welsh Ministers' functions as regulator are carried out by Care Inspectorate Wales. There is no detail about this on the face of the Bill.*
>
> *All of the aspects of determining applications for registration, including elements which require the exercise of judgement about whether statutory tests are met are functions of the regulator. Examples of these are determinations of whether an applicant is a 'fit and proper person' and whether a 'responsible individual' is both 'eligible' and 'fit and proper'.*
>
> *We do not think it necessary to include provision to set out how the regulator will apply the new 'not-for-profit' test for restricted children's services. We think it is clear from the context that judgements about the compatibility of a provider's objects or purposes with the test will simply be an additional aspect of the regulator's function of determining applications for registration.*
>
> *This will be a judgement made on the basis of the regulator's reading and analysis of the provider's objects clauses and testing them for compatibility with the not-for-profit condition in section 6A(3).*
>
> *However, we see from the question posed that the drafting was not understood in this way and we will look again at this prior to Stage 2."*[92]

151. The Bill defines 'company having share capital' in new section 6B(6) of the 2016 Act (to be inserted by section 3(3) of the Bill) by reference to existing legislation. This term is given specific meaning in the Bill, but the phrase is not used in such form in the Bill. We again asked the Minister to explain why this approach has been taken and whether, on reflection, she considered that the drafting could be clearer. The Minister responded:

[92] Letter from the Minister for Social Care, 9 July 2024, response to question 5

> *"We believe the drafting of 'company having a share capital' is clear. The reason this phrase is defined by reference to a Companies Act definition (in new section 6B(6)(b), inserted by section 3(3) of the Bill) but is not used word-for-word elsewhere in the Bill is in the interests of brevity and ease of comprehension, the words 'without a share capital' are used in the labels in new section 6A(4)(a) and (d); new section 6B(2)(b) and (5)(b) then set out that 'without a share capital' means not having a share capital, and section 6B(6)(b) makes it clear that the concept of having or not having a share capital is to be understood as per section 545 of the Companies Act 2006."*[93]

Our view

152. As regards section 3 of the Bill, we note the Minister's views about the use of the term 'public good' in new section 6A(3)(b) and its lack of definition in the Bill. However, we are concerned that the Minister has not sufficiently acknowledged that 'public good' is a fundamental concept to the nature of the service providers that wish to be registered to provide restricted children's services.

153. The regulation-making power in new section 6A(3)(b) of the 2016 Act is exceptionally broad and could be used to widen a key element of the Bill. Moreover, this power will be available to the Welsh Ministers of all future governments. Given its importance, we believe that there should be greater oversight of the exercise of this power by the Senedd, and that there must be a duty to consult stakeholders on proposed regulations.

Recommendation 13. The Minister should table an amendment to the Bill to include a definition of 'public good' in new section 6A of the *Regulation and Inspection of Social Care (Wales) Act 2016* (to be inserted by section 3(3) of the Bill).

Recommendation 14. The Minister should table an amendment to the Bill to apply a super-affirmative procedure to the making of regulations under new section 6A(3)(b) of the *Regulation and Inspection of Social Care (Wales) Act 2016* (to be inserted by section 3(3) of the Bill).

154. We welcome the Minister's comments that how objects or purposes are to be determined will be reviewed ahead of Stage 2. For the avoidance of doubt, we

[93] Letter from the Minister for Social Care, 9 July 2024, response to question 6

believe there would be a benefit to including, on the face of the Bill, provision about how objects or purposes are to be determined, and by whom.

Recommendation 15. The Minister should consider tabling an amendment to the Bill to clarify how objects or purposes are to be determined, and by whom under new section 6A(3) of the *Regulation and Inspection of Social Care (Wales) Act 2016* (to be inserted by section 3(3) of the Bill).

155. The Bill defines 'company having a share capital' which is given a specific meaning in the Bill, but the phrase is not used in such form in the Bill. We note the Minister's comments that the phrase is being used for "brevity and ease of comprehension". However, in line with conclusion 4 of this report, we maintain that for clarity and accessibility of legislation, terms should only be defined in legislation where such terms are used in that form. We note the Minister's evidence on this point was that the phrase 'without a share capital' was used in the Bill and this was to be understood with reference to the term 'company having a share capital'. However, we do not consider that this approach provides clarity to the reader. We believe that it is more accessible to define terms in legislation that are actually based on certainty and precision, rather than brevity.

Recommendation 16. The Minister should table amendments to section 3 of the Bill to remove the definition of a 'company having a share capital' to be inserted into new section 6B(6)(b) of the *Regulation and Inspection of Social Care (Wales) Act 2016* and replace it with an appropriate definition in respect of the phrase 'without a share capital'.

Section 4 - Registration in respect of a restricted children's service: transitional arrangements

156. As noted above in Chapter 3 of the report, section 4 inserts a new Schedule 1A into the 2016 Act to make provision about transitional arrangements in respect of providers of restricted children's services who are already registered prior to the coming into force of the new 'not for profit' requirements contained in new section 6A of the 2016 Act (to be inserted by section 3(3) of the Bill).

157. Paragraph 2(1)(a) of the new Schedule 1A to the 2016 Act refers to a service being 'provided wholly or mainly to children'. This phrase is given a specific meaning in the new section 2A of the 2016 Act, to be inserted by section 2(b) of the Bill. However, this meaning is stated to only apply in new section 2A(1). We asked the Minister whether it is intended that the phrase should have the same meaning in paragraph 2(1)(a) of Schedule 1A as it does in section 2A(1) and, if so, whether the Minister considered that the drafting reflects this. We also noted that

the same issue applies in relation to section 75(4) of the 2014 Act, as amended by section 10(6) of the Bill, which uses the phrase 'wholly or mainly to children' but offers no explanation as to how this is to be determined. The Minister responded:

> *"The test for determining whether a service is provided wholly or mainly for children is set out in the new section 2A(2) and establishes the meaning of 'children's home' as a form of 'restricted children's service' in section 2A(1). The definition of 'restricted children's service' is stated in section 2A(1) to be for the purposes of Part 1 (of the 2016 Act). Although this extends to Schedule 1A which is introduced by section 6C the ph[r]ase 'wholly or mainly to children' does not relate to a use of the term "restricted children's service" in paragraph 2(1)(a). We propose to introduce an amendment at Stage 2 to address this point.*
>
> *As far as the reference to 'wholly or mainly for children' in section 75(4) of the 2014 Act is concerned, the definition directs the reader to interpret the phrase 'children's home' as a place in respect of which a person is registered under Part 1 of the 2016 Act. However, we believe greater clarity would be provided for the reader if this was signposted in a more explicit way and we will introduce an amendment at Stage 2 to address the point."*[94]

158. Paragraph 2(4)(b) of new Schedule 1A inserts a regulation-making power which enables the Welsh Ministers to specify enactments for the purposes of which the new paragraph 2(3) of Schedule 1A does not apply. We asked the Minister why these enactments are not listed in the Bill. We also noted that the Statement of Policy Intent for Subordinate Legislation states that the new powers in paragraph 2(4)(a) of Schedule 1A allow the Welsh Ministers to specify other instances where a provider should be treated as not meeting the not-for-profit requirement, and so we asked what instances are envisaged here. The Minister told us:

> *"We believe the only circumstances when the effects of paragraph 2(3) need to be disapplied are in relation to aspects of the regulatory regime in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016. One additional circumstance where paragraph 2(3) needs to be disapplied is*

[94] Letter from the Minister for Social Care, 9 July 2024, response to question 7

for the purposes of an application by a service provider under section 11(1)(a)(ii). We will review the need for the regulation-making power in paragraph 2(4)(b) of Schedule 1A prior to stage 2."[95]

Our view

159. In relation to new Schedule 1A to the 2016 Act to be inserted by section 4 of the Bill, we agree with the Minister that more clarity is needed as regards the references to 'wholly or mainly to children', and we welcome the intention to provide more clarity via an amendment at Stage 2. Similarly, we welcome the Minister's comments in respect of similar wording that appears in section 10(6) of the Bill.

Recommendation 17. The Minister should consider tabling an amendment or amendments to ensure that it is clear what 'wholly or mainly to children' means in each place that it is used in the Bill.

160. Furthermore, while we also note and welcome the Minister's intention to review the need for the regulation-making power in paragraph 2(4)(b) of new Schedule 1A prior to Stage 2, the Welsh Government should be clear on the need for delegated powers before the introduction of a Bill to the Senedd. Given the Minister's comments, it would appear that the regulation-making power is unnecessary, and in our view it should be removed from the Bill.

Recommendation 18. The Minister should table an amendment to the Bill to remove the regulation-making power from paragraph 2(4)(b) of new Schedule 1A (to be inserted by section 4 of the Bill).

Section 6 - Fit and proper person: relevant considerations

161. Section 6 of the Bill amends the 2016 Act, including by the insertions of new sections 9A and 9B into the 2016 Act (as a consequence of section 6(3)). These sections provide that unreasonable or disproportionate financial arrangements entered into by a service provider registered in respect of a restricted children's service are evidence to which the Welsh Ministers must have regard when deciding if the provider is a fit and proper person. The term 'substantial interest in a body corporate' is given specific meaning in new section 9B(3)(d) of the 2016 Act, but the phrase is not used in the Bill. The Minister told us:

[95] Letter from the Minister for Social Care, 9 July 2024, response to question 9. See also LJC Committee, 17 June 2024, RoP [115].

> *"'Substantial interest in a body corporate' is defined in new section 9B(3)(d) of the 2016 Act (inserted by section 6(3) of the Bill). New section 9B(2)(e)(i) refers to 'a body corporate in which …[a person]…has a substantial interest' and section 9B(2)(e)(ii) refers to 'a body corporate in which …[persons]…have a substantial interest'. We believe in the context the relationship between the term and the phrasing used in new sections 9B(2)(e)(i) and (ii) is clear."*[96]

Our view

162. The Bill defines 'substantial interest in a body corporate' which is given a specific meaning in the Bill, but again the phrase is not used in such form in the Bill. In line with conclusion 4 of the report, we make the following recommendation as we believe that the Bill should define the terms it actually uses, rather than require a degree of interpretation.

Recommendation 19. The Minister should table amendments to section 6 of the Bill to ensure that the drafting of new sections 9B(2)(e) and 9B(3)(d) is in line with conclusion 4 of our report.

Section 11 - Duty to prepare and publish an annual sufficiency plan

163. Section 11 of the Bill amends the 2014 Act to insert new sections 75A, 75B and 75C relating to the general duty of a local authority to secure sufficient accommodation for looked after children under section 75 of that Act.

164. New section 75A requires local authorities to prepare and publish an annual sufficiency plan before the beginning of each financial year. The plan must detail the steps the local authority will take in that year to fulfil its duty under the newly amended section 75(1) of the 2014 Act to secure accommodation within or near the local authority's area that is not-for-profit and meets the needs of children referred to in section 75(2).

165. Section 75A(2) sets out information that must be included in the plan. In particular, under section 75A(2)(d), the plan must also include prescribed information about for-profit providers (sub-paragraph (iii)) and private providers (sub-paragraph (iv)) who are likely to be named in applications for approval of supplementary placements.

[96] Letter from the Minister for Social Care, 9 July 2024, response to question 6

166. It appears to us that the new section 75A(2)(d)(iii) and (iv) are two separate regulation-making powers. We noted, however, that the EM and Statement of Policy Intent for Subordinate Legislation refer to them as a singular power. We asked the Minister to confirm our understanding that there are two powers in new section 75A(2)(d)(iii) and (iv). The Minister confirmed to us that the drafting of the Bill creates two separate regulation-making powers in new section 75A(2)(d)(iii) and (iv), adding:

> *"...though they are similar in nature: one relating to information about for-profit accommodation providers in Wales and the other to information about private providers in England. They present as a pair and for that reason have been referred to in the Explanatory Memorandum in the singular. This is inaccurate and we will amend the Explanatory Memorandum at the next opportunity."*[97]

Our view

167. As regards section 11 of the Bill, we note the Minister's confirmation that there are two separate regulation-making powers in new section 75A(2)(d)(iii) and (iv), and we welcome the commitment to make the necessary corrections to the EM.

Section 13 - Ways in which looked after children are to be accommodated

168. Section 13 of the Bill amends section 81 of the 2014 Act and also inserts into the 2014 Act new sections 81A, 81B, 81C and 81D (after section 81).

169. Section 81 (Ways in which looked after children are to be accommodated and maintained) imposes a duty on a local authority to arrange for a looked after child to live with a parent, a person with parental responsibility or a person in whose favour a child arrangements order has been made. However, where this is not consistent with the looked after child's well-being, or is not reasonably practicable, under new section 81A, the local authority must accommodate the child in the 'most appropriate placement available'. (However, this is subject in both cases to any decision made by the authority that it would be appropriate for the child to be placed with a prospective adopter (see new section 81C)).

170. The changes to be made by section 13 reflect changes to be made to the 2016 Act that will restrict the making of profit in the provision of fostering services and children's care home services as 'restricted children's services'.

[97] Letter from the Minister for Social Care, 9 July 2024, response to question 10

171. New section 81A(2) concerns the decision taken by a local authority as to the most appropriate placement available for a looked after child. The existing section 81(7) of the 2014 Act requires a local authority to take a number of matters into account when making this decision. These are expressed as requirements under the existing section 81 at subsections (8) and (9). (Section 81(7), (8) and (9) of the 2014 Act are to be omitted by section 13(2)(c) of the Bill).

172. These matters must still be taken into account under new section 81A(5), but section 13 now amends the decision-making process to provide that if the local authority considers that the most appropriate placement (in accordance with new section 81A(2)) is with a foster parent or in a children's home (giving preference – subject to the principal duty under section 78[98] – to a kinship placement), as a preliminary consideration, the authority must seek to place the child with a not-for-profit foster parent or in a not-for-profit children's home (depending on which is most appropriate in the child's case).

173. If a placement with a not-for-profit foster parent or children's home provider is not available, or if placing a child in such a placement where one is available would not be consistent with the local authority's principal duty under section 78, the local authority must once again consider what is the most appropriate placement available in accordance with new section 81A(2).

174. At this point the local authority must necessarily consider placements that may be available with other providers, again having regard to the factors referred to in section 81A(5)(a), and also giving preference to a kinship placement (subject again to the principal duty under section 78 of the 2014 Act).

175. However, a placement of a looked-after child with a provider who does not meet the requirements of the new section 81A(4) (a) or (b) in this way is subject to the need to make an application to the Welsh Ministers for approval of what is referred to as a "supplementary placement", under section 81B.

176. New section 81B(5)(c) of the 2014 Act, gives the Welsh Ministers the power to direct a local authority to reconsider its application to place a child in a supplementary placement, taking into account reasons and information specified by the Welsh Ministers. No procedure is applicable to such a direction. Given that this power allows the Welsh Ministers to interfere with a subjective decision-

[98] Under section 78(1) of the 2014 Act, a local authority looking after any child must— (a) safeguard and promote the child's well-being, and (b) make such use of services available for children cared for by their own parents as appears to the authority reasonable in the child's case.

making process of the local authority, we asked the Minister why it is not subjected to a Senedd scrutiny procedure. The Minister told us:

> *"...this relates directly to a local authority's decision on a supplementary placement, and, because it's about an individual looked-after child, we didn't feel that that would be appropriate to be the subject of a Senedd scrutiny procedure.*
>
> *(...)*
>
> *So, the individual—. As I say, because it's about an individual child, that would not normally—. As Ministers, we quite often have to make decisions, based on current legislation, around placement of individual children and reasons for doing that, and none of that is subject to Senedd scrutiny, so we would not see that as being appropriate in this particular case, because it is about the placements of individual children. The general principles of what we're seeking to do is what would be the subject of scrutiny, but not the specifics of placements of individual children."*[99]

Our view

177. We acknowledge the Minister's comments that directions under new section 81B(5)(c) of the 2014 Act will relate to the placements of individual children. Such directions could therefore include information that is confidential. For that reason we are content that such directions should not be subject to any Senedd scrutiny procedure.

Chapter 2: Miscellaneous amendments in relation to social care services, social care workers and local authority social care functions

Section 14 - Duty to submit and publish annual return

178. Section 14 amends section 10 of the 2016 Act, which currently requires a service provider to submit an annual return to the Welsh Ministers, who must then publish that return. Section 14 amends section 10 so that the provider (and not the Welsh Ministers) is required to publish its own annual return on its website, and also to make a copy of that return available upon request. The amendments also provide that a service provider must publish its return within a time limit prescribed by the Welsh Ministers in regulations (which would be subject to the

[99] LJC Committee, 17 June 2024, RoP [117] and [119]

negative procedure) and that failure to do so is a summary offence punishable by a fine (see section 14(3) which amends section 48 of the 2016 Act).

179. In the Statement of Policy Intent for Subordinate Legislation, the Minister sets out the reasons why a regulation-making power is needed in section 14 to set a time limit for the publication of an annual return, stating:

> *"The intention is to use the regulations to prescribe a reasonable timescale for the publication of annual returns by service providers. This will ensure that timely and consistent information is available to the public.*
>
> *Using regulations rather than specifying a timescale on the face of the Act provides flexibility to adjust the timescale should it prove necessary in practice."*[100]

180. We asked the Minister what time frame she anticipated setting and why such a time frame would ever need to be changed. We also asked for views on whether a flexible time frame is appropriate for the publication of an annual return. The Minister responded:

> *"It is proposed the service provider should be required to publish the annual return within 30 days of submitting the report to the Welsh Ministers. We do not anticipate at this stage that this timescale will change, and we are not intending to provide a flexible timeframe for the publication of an annual return.*
>
> *However, prescribing the timeframe within regulations, rather than on the face of the Act, will give Welsh Ministers the flexibility to extend or reduce the timescale should CIW encounter any unforeseen issues in practice."*[101]

Our view

181. We note the Minister's evidence. In our view, the comments of the Minister in the Statement of Policy Intent for Subordinate Legislation contradict her comments in the evidence she gave to us in her letter of 9 July 2024. Moreover, if the Minister knows now what the timeframe for publishing the annual return will be, we see no logical reason why that information cannot be placed on the face of the Bill. Should the Minister want the flexibility for the Welsh Ministers to be able

[100] Welsh Government, Health and Social Care (Wales) Bill, Statement of Policy Intent for Subordinate Legislation, 19 June 2024, page 17
[101] Letter from the Minister for Social Care, 9 July 2024, response to question 11

to change this timeframe in the future, it would seem reasonable to retain the regulation-making power but subject it to an affirmative procedure as it would be for the purpose of amending primary legislation.

182. In our view, this approach would also provide early certainty to service providers about what is required of them, rather than having to wait for regulations should the Bill receive Royal Assent.

183. In reaching this view, we note that it is commonplace for public bodies such as the Auditor General for Wales to be required to publish reports within timeframes that are set out on the face of the applicable legislation.

Recommendation 20. The Minister should table an amendment to section 14 of the Bill to include the timeframe for the publishing of an annual return by a service provider in new section 10(4A) of the *Regulation and Inspection of Social Care (Wales) Act 2016*.

Recommendation 21. The Minister should consider tabling an amendment to section 14 of the Bill to enable regulations subject to the draft affirmative procedure to change the timeframe for the publication of an annual return by a service provider (to be set out in new section 10(4A) of the *Regulation and Inspection of Social Care (Wales) Act 2016* Act as a consequence of recommendation 20).

Section 19 - Fitness to practise cases: powers to extend interim orders

184. Section 19 of the Bill amends section 147 (Reviews of interim order: possible decisions) of the 2016 Act. Section 147 makes provision in respect of interim orders and reviews of interim orders in fitness to practise proceedings. Interim orders imposed by the regulator are a means to enable temporary restrictions to be applied to a registered person while investigations are undertaken into fitness to practise allegations made against the person.

185. The amendment to section 147 provides a panel (interim orders panel or fitness to practise panel before which the interim order proceedings are brought) with the power to extend an interim order for up to 18 months in total, removing the need for applications to be made to the First-tier Tribunal for extensions which do not push the total length of the order beyond that limit. An application to the First-tier Tribunal will continue to be required where an interim order is to be extended beyond 18 months (see section 148 of the 2016 Act).

186. Section 19(1) (an overview provision) states that the power is to extend the order for up to 18 months, but section 19(2)(b), which amends section 147 of the

2016 Act, requires that the extension does not result in the interim order having effect for a period of more than 18 months. We were concerned that the wording in section 19(2)(b) implies that the interim order as a whole, not just the extension, cannot endure for more than 18 months, which we consider is different to what is stated in section 19(1). As such, we asked the Minister to clarify the intention. The Minister responded:

> *"Section 144(6)(b) of the Regulation and Inspection of Social Care (Wales) Act 2016 provides a fitness to practise panel with the power to set an interim order for up to a maximum of 18 months. However, if that panel initially makes an order for a shorter period and then finds that their investigations take longer and that there is a need to extend it, the panel does not have the power to do so. Section 148(1) requires the panel to apply to the First Tier Tribunal (the Tribunal) for an extension or a further extension to an interim order.*
>
> *This creates an incentive for panels to routinely set the maximum deadline on interim orders, to minimise the administrative and cost burden of repeated applications to the tribunal. The amendment will provide a panel with the power to set an interim order for a period less than 18 months and then, if necessary, extend that interim order up to a maximum of 18 months without the need to apply to the tribunal. Any request for an interim order to go beyond 18 months would require the panel to apply to the tribunal as is the case currently.*
>
> *We accept that there is a degree of ambiguity in the wording of the overview in section 19(1) and will review this ahead of Stage 2."*[102]

Our view

187. In relation to section 19 of the Bill, we acknowledge the Minister's acceptance that there is ambiguity in the wording of the overview in section 19(1). As such, we welcome the Minister's intention to review this provision ahead of Stage 2 proceedings.

[102] Letter from the Minister for Social Care, 9 July 2024, response to question 12

Recommendation 22. The Minister should table an amendment to section 19(1) of the Bill to ensure its wording is consistent with the policy intention set out in section 19(2).

Section 20 - Direct payments in social care

188. Section 20 of the Bill amends Part 4 of the 2014 Act so as to allow a local authority to make direct payments to a person (an individual or a body) nominated by an adult entitled to receive a direct payment under section 50 (Direct payments to meet an adult's needs) of the 2014 Act regardless of whether that adult lacks capacity (within the meaning of the *Mental Capacity Act 2005* (the 2005 Act)) to receive and manage the direct payments themselves.

189. The amendments made by section 20 are intended to ensure that all persons who are entitled to receive a direct payment under Part 4 of the 2014 Act (including payments made in respect of after-care services under section 117 of the *Mental Health Act 1983* (the 1983 Act)) have the same entitlement to nominate a person to receive and manage the direct payments on their behalf whether or not they have mental capacity (or in the case of a child under the age of 16, the local authority is satisfied that the child has sufficient understanding to make an informed decision about consenting to receive a direct payment).

190. The amendments insert new sections 49A and 53A into the 2014 Act; substitute sections 50, 51 and 52 with new sections 50, 51 and 52, and substitute Schedule A1 with a new Schedule A1.

191. Paragraph 7 of the new Schedule A1 to the 2014 Act, requires regulations made under that Schedule to specifically provide that direct payments under section 117 of the 1983 Act have to reflect the amount that the local authority estimates would be required to pay for the service in question. The power to make these regulations is a discretionary power. We asked the Minister what will happen if this power is not exercised and how paragraph 7 will be given effect. We also asked the Minister to clarify why it would not be more appropriate to include these requirements about the direct payments on the face of the Bill. The Minister told us:

> *"The ability of health boards to offer direct payments for mental health after care services is entirely contingent on the making of the Regulations – health boards will not be able to offer direct payments without the Regulations being in place and the statutory framework must therefore include the restriction discussed.*

Paragraph 1 of the substituted Schedule A1 gives the Welsh Ministers the power to make regulations that require or allow a local authority to make direct payments in lieu of providing services to meet an individual's need for after-care services following detention under the Mental Health Act 1983.

Paragraph 7 of that Schedule contains a limitation on the use of the regulation-making power in paragraph 1.

The effect of this limitation is that should the Welsh Ministers exercise the power in paragraph 1 to make regulations to enable the making of direct payments for local authority-funded after care services they must include a provision which specifies that a direct payment for after care services must be at the rate the local authority estimates to be equivalent to the reasonable cost of securing or providing services to meet the assessed needs.

The inclusion of the requirement in paragraph 7 will have the effect of ensuring that an individual who chooses to receive a direct payment to secure their own services to meet their needs for local authority after care services will not be required to contribute to the costs of their direct payment by way of contribution or reimbursement because after care services must be provided free of charge.

The requirement of paragraph 7 could have been included on the face of the Bill but we do not see that this would be any more appropriate, or give any greater advantage, than the drafting approach which has been taken."[103]

Our view

192. We note the Minister's evidence which stated that the requirement of paragraph 7 of the new Schedule A1 (which imposes a limitation on the use of the regulation-making power in paragraph 1 of that Schedule) could have been included on the face of the Bill.

193. We are not persuaded by the Minister's contention that placing the requirement solely on the face of the Bill "would be any more appropriate, or give any greater advantage, than the drafting approach which has been taken". In our

[103] Letter from the Minister for Social Care, 9 July 2024, response to question 13

view, repeating the limitation set out in paragraph 7 of the new Schedule A1 in regulations made under paragraph 1 of that Schedule could give rise to confusion and inconsistencies.

Conclusion 5. As a matter of principle, if information can be set out on the face of the Bill, that is where it should be placed, for reasons of transparency, certainty and good legislative practice.

Recommendation 23. The Minister should table an amendment to the Bill to require that paragraph 7 of new Schedule A1 to the *Social Services and Well-being (Wales) Act 2014* (to be inserted by section 20 of the Bill) is free-standing and its policy intent does not require repeating in regulations to be made under paragraph 1 of new Schedule A1.

Part 2 of the Bill: Health care

194. Part 2 of the Bill relates to health care and makes amendments to the 2006 NHS Act in order to enable the introduction of direct payments within NHS CHC.

195. Part 2 of the Bill also introduces Schedule 2 which makes minor and consequential amendments in relation to this change.

Section 24 - Direct payments for health care

196. Section 24 inserts new sections 10B, 10C and 10D into Part 1 of the 2006 NHS Act in order to allow the Welsh Ministers to make direct payments to individuals in lieu of the provision of services to meet their assessed needs under the 2006 NHS Act.

197. According to the Explanatory Notes accompanying the Bill:

> *"The Welsh Ministers have exercised power under section 12 of the 2006 NHS Act to make regulations which direct Local Health Boards (LHBs) to exercise specified functions of the Welsh Ministers under the 2006 NHS Act on their behalf. These powers may be exercised further to direct the LHBs to exercise the Welsh Ministers' power to make direct payments in lieu of the provision of services."*[104]

[104] EM, Annex 1 – Explanatory Notes, paragraph 92

198. New section 10B(5) contains a power for the Welsh Ministers to make regulations that would enable LHBs to make direct payments in discharge of the LHBs' duty to provide after-care services under section 117 of the 1983 Act.

199. New section 10C provides that the Welsh Ministers may make regulations which specify when and how direct payments may be made. Regulations made under new section 10C may provide that direct payments are to be offered only in specified circumstances, or may prevent such payments being made to specified persons.

200. New section 10D provides that the Welsh Ministers and LHBs may make arrangements with other organisations to provide assistance with direct payments.

201. Section 24 also amends section 203 of the 2006 NHS Act to provide that the first set of regulations to be made under section 10B(5) of the 2006 NHS Act will be subject to the draft affirmative procedure in the Senedd.

202. We asked the Minister to confirm whether the provisions in section 24 of the Bill could be used to allow payments to people who have not been assessed as having a primary health need and, therefore, entitled to receive continuing healthcare. The Minister told us:

> *"So, continuing healthcare is a package of NHS-funded support that is provided to adults aged 18 and over, and the policy intent behind the Bill has focused on these adults because this is where the demand for direct payment in lieu of the provision of NHS services has been greatest, and that's what's led to the programme for government commitment. Only adults assessed as having a primary health need are entitled to receive continuing healthcare, and our policy intention is that those adults who will receive CHC will be able to seek the direct payments to secure the services that they need to meet their eligible needs, and there is no intention in this Bill to extend it beyond that at this stage."*[105]

203. As noted above, the first set of regulations to be made under new section 10B(5) of the 2006 NHS Act will be subject to the draft affirmative procedure in the Senedd but the negative procedure thereafter. As we highlight in Chapter 3, it is not clear to us whether on this first occasion the power can be exercised in

[105] LJC Committee, 17 June 2024, RoP [75]

relation to just one LHB, and so we asked the Minister for clarification. An official accompanying the Minister said:

> *"Technically, yes, it could; it could be used in that way. However, it wouldn't be appropriate to do so, because if we were to use that power in that way, then people in different parts of Wales would be treated differentially. Had we wanted to pilot this, which commencing in relation to one area only would effectively be, we would have sought appropriate piloting provisions. That wasn't the Government's intention, so, therefore, the power in 10B(5) will be used to bring the provisions into force in relation to all local health boards at the same time."*[106]

204. The Minister added that direct payments have been in place for around 10 years in England and "this is a tried and tested procedure that we didn't feel we needed to pilot".[107]

205. New section 10B makes reference to a 'person lacking capacity'. This term is given a meaning by the new section 10B(8)(b) of the 2006 NHS Act, but it is defined with reference to the 2005 Act as a whole. The phrase is given meaning by section 2 of that Act, and so we asked the Minister to clarify why the reader is not directed to that provision. The Minister responded:

> *"Defining 'mental capacity' by reference to the Mental Capacity Act 2005 generally as opposed to a more specific reference to section 2 is the more common practice in the statute book. It is the same formulation used in section 197(5) of the 2014 Act."*[108]

206. . Some of the matters that regulations to be made under new section 10C(1) may cover, as indicated in the new section 10C(2), are detailed and potentially complex. We asked the Minister why she considered that the negative procedure is appropriate for such regulations. The Minister responded:

> *"The regulations will set out technical matters relating to the administration and operation of the direct payments and so the negative procedure would be appropriate. The procedure set out in the Bill mirrors the use of the negative procedure for the existing powers to make regulations in relation to direct payments in social care. Although there is a level of complexity*

[106] LJC Committee, 17 June 2024, RoP [122]
[107] LJC Committee, 17 June 2024, RoP [125]
[108] Letter from the Minister for Social Care, 9 July 2024, response to question 15

> *in the detail, the important points of principle are set out in the enabling powers."*[109]

Our view

207. In respect of the new provision relating to direct payments for healthcare, we note the Minister's comment that:

> *"...our policy intention is that those adults who will receive CHC will be able to seek the direct payments to secure the services that they need to meet their eligible needs, and there is no intention in this Bill to extend it beyond that at this stage."*

208. However, our reading of the Bill is that new sections 10B and 10C of the 2006 NHS Wales Act are very wide in scope. For example, under 10B(3)(a) payment could be made for anything that the Welsh Ministers have to provide under section 2(1) of the 2006 NHS Wales Act, which covers the provision of such services as the Welsh Ministers "consider appropriate for the purpose of discharging any duty imposed on them by this Act, and do anything else which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty."

209. It is therefore unclear to us whether the provisions have been drafted more widely than the Minister's current policy intention and therefore whether direct payments could be made more widely at some point in the future.

210. It has long been our view that it is important to consider not only the reason for the Minister seeking a regulation-making power, but also to consider how such a delegated power could be used in the future and in particular by a different Minister, potentially in a different government and in a later Senedd.

211. The potential breadth of the powers in new section 10B makes this consideration valid in respect of the regulation-making power under new section 10C(1).

212. This consideration applies equally to the regulation-making power in new section 10B(5). The Minister has acknowledged that the power could be used in relation to one LHB, although that is not the stated intention; the intention is to use for all LHBs at the same time. The Bill therefore provides the Minister with a wider power than she needs and accordingly, we believe it should be restricted to the desired policy intention.

[109] Letter from the Minister for Social Care, 9 July 2024, response to question 16

Recommendation 24. The Minister should provide detail on all the services that could be subject to direct payments using the provisions to be inserted into the *National Health Service (Wales) Act 2006* by section 24. This information should be provided no later than the commencement of Stage 3 proceedings.

Recommendation 25. The Minister should review the breadth of the provisions in section 24 including whether the Bill may allow the Welsh Ministers, at some point in the future, to make payments to people who have not been assessed as having a primary health need. Having done so, the Minister should make a statement to the Senedd about the outcome of this review no later than the commencement of Stage 3 proceedings.

Recommendation 26. If the Minister's intention remains to exercise the regulation-making power under section 10B(5) of the *National Health Service (Wales) Act 2006* (to be inserted by section 24 of the Bill) solely for all Local Health Boards at the same time, the Minister should table an amendment to the Bill to reflect that intention (and remove the ability for it to be exercised in respect of one Local Health Board only).

213. We note the Minister's comments regarding the meaning of a person lacking mental capacity, which is set out in new section 10B(8)(b). While the approach adopted may be consistent with section 197(5) of the 2014 Act, as our remarks earlier in this report demonstrate, we believe there are benefits to being as precise as possible when drafting legislation including making legislation more accessible. In our view, while there are benefits to consistency, that should not be at the expense of accessibility or accuracy. For that reason, we believe that new section 10B(8)(b) should be amended to make specific reference to section 2 (and other relevant provisions) of the 2005 Act.

Recommendation 27. The Minister should table an amendment to the Bill such that the meaning of 'a person lacking capacity' as set out in new section 10B(8)(b) of the *Social Services and Well-being (Wales) Act 2014* (to be inserted by section 24(2) of the Bill) is described by all relevant provisions of the *Mental Capacity Act 2005* that specify its meaning.

214. As regards regulations to be made under section 10C(1), we note the Minister's comments that the subject of the regulations covers "technical matters relating to the administration and operation of the direct payments". However, in our view, they cover more than just "technical matters" and the matters listed in section 10C(2) could have significant policy implications. For that reason, we believe the regulations should be subject to the affirmative procedure, rather than the negative procedure.

Recommendation 28. The Minister should table an amendment to the Bill such that regulations to be made under section 10C(1) of the *National Health Service (Wales) Act 2006* (to be inserted by section 24(2) of the Bill) are subject to the draft affirmative procedure.

Part 3 of the Bill: General provisions

215. Part 3 of the Bill contains a number of general provisions, including in relation to regulations made under the Bill, interpretation, powers to make consequential and transitional provisions, and coming into force arrangements.

Section 28 – Consequential and transitional provision etc

216. Section 28 of the Bill contains consequential and transitional provisions.

217. Section 28(2)(a) of the Bill contains a Henry VIII power and it allows regulations to amend, modify, repeal or revoke any enactment. Section 28(3) sets the requirements for which delegated powers in the Bill, when exercised, will be subject to the draft affirmative procedure. This provision only refers to 'amend, modify or repeal'. The EM further describes the draft affirmative scrutiny procedure applying when regulations amend, repeal or otherwise modify, while the Statement of Policy Intent for Subordinate Legislation uses the phrasing 'amend or repeal'. We asked the Minister to clarify whether she intended any difference in meaning or application of the provision in section 28(3). The Minister responded:

> *"The reason that section 28(2)(a) refers to 'amend, modify, repeal or revoke' and section 28(3) refers to 'amend, modify or repeal' only is that 'revoke' is the term which applies to the removal of provisions in secondary legislation and section 28(3) is only concerned with effects on primary legislation.*
>
> *The omission of a reference to regulations which 'modify' primary legislation is an inaccuracy in the Statement of Policy Intent but has no practical impact or implication.*
>
> *The reference in the Explanatory Memorandum to regulations which 'otherwise modify' is wording which acknowledges that, in non-legal parlance, amendment and repeal are ways in which legislation can be modified."*[110]

[110] Letter from the Minister for Social Care, 9 July 2024, response to question 17

Our view

218. We note the evidence in relation to section 28(2)(a) of the Bill and also note that it will delegate a Henry VIII power to the Welsh Ministers, enabling the amendment of primary legislation by statutory instrument, subject to the draft affirmative procedure.