

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

**Report on the Regulation and
Inspection of Social Care (Wales)
Bill**

July 2015

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership:



David Melding (Chair)
Welsh Conservatives
South Wales Central



Alun Davies
Welsh Labour
Blaenau Gwent



Suzy Davies
Welsh Conservatives
South Wales West



William Powell
Welsh Liberal Democrats
Mid and West Wales



Dafydd Elis-Thomas
Plaid Cymru
Dwyfor Meirionnydd

The following Member was also a Member of the Committee during this inquiry



Simon Thomas
Plaid Cymru
Mid and West Wales

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The Committee's Recommendations

Recommendation 1. We recommend that the Minister provides further detailed information during the Stage 1 debate about the issues considered and the analysis undertaken to ensure the Bill is compatible with the European Convention on Human Rights. (Page 14)

Recommendation 2. We recommend that the Minister should table amendments to the Bill to ensure that a duty to consult applies to the regulation-making powers that he considers to be significant. (Page 17)

Recommendation 3. We recommend that the Minister reviews the procedure to apply to regulations made under section 6(1) of the Bill in the light of the outcome of the review of Operation Jasmine. (Page 20)

Recommendation 4. We recommend that the Minister should table an amendment to section 8 of the Bill, setting out the information that service providers will be required to submit in the annual return. (Page 21)

Recommendation 5. We recommend that the Minister should table an amendment to section 19 of the Bill identifying some of the circumstances under which the Welsh Ministers may designate a responsible individual. (Page 23)

Recommendation 6. We recommend that the Minister reviews sections 26 to 30 with a view to tabling amendments to enable the purpose of these sections to be more clearly understood from reading the face of the Bill. (Page 26)

Recommendation 7. We recommend that the Minister should table an amendment to apply a super-affirmative procedure to the making of regulations under section 35 of the Bill. (Page 28)

Recommendation 8. We recommend that the Minister should table amendments to the Bill applying a super-affirmative procedure to regulations made under sections 43, 44 and 51. (Page 30)

Recommendation 9. We recommend that the Minister should table an amendment to apply a super-affirmative procedure to the making of regulations under section 149B(4) of the Social Services and Well-being (Wales) Act 2014 (as inserted by section 56(1) of the Bill). (Page 31)

Recommendation 10. We recommend that the Minister should table an amendment to the Bill to apply a super-affirmative procedure to the making of regulations under section 60(6). (Page 32)

Recommendation 11. We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to the making of regulations under section 110(5). (Page 34)

Recommendation 12. We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to regulations made under section 124(5). (Page 37)

Recommendation 13. We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to regulations made under section 135(2). (Page 37)

Recommendation 14. We recommend that the Minister should table an amendment to the Bill applying the negative procedure to commencement orders made in accordance with section 254(3) that include transitory, transitional or saving provision. (Page 39)

1. Introduction

The Committee's remit

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

Introduction and consideration of the Bill

4. On 23 February 2015, Mark Drakeford AM, Minister for Health and Social Services (“the Minister”) introduced the Regulation and Inspection of Social Care (Wales) Bill (“the Bill”), accompanied by an Explanatory Memorandum.¹
5. The Assembly’s Business Committee referred the Bill to the Health and Social Care Committee for consideration on 27 January 2015 and, on 3 February 2015, set a deadline of 3 July 2015 for reporting on the general principles.
6. We considered the Bill at our meeting on 27 April 2015, taking evidence from the Minister.

¹ Welsh Government, *Regulation and Inspection of Social Care (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes*, February 2015

2. Background

Purpose of the Bill

7. *Sustainable Social Services: A Framework for Action*, published by the Welsh Government in February 2011, set out how the Welsh Government intended to change the system of social care in Wales.²

8. The *Social Services and Well-being (Wales) Act 2014* (“the 2014 Act”) was the first legal instrument aimed at delivering these changes. It changed the care sector as a whole and necessitated a complete overhaul of the regulatory system of social care in Wales, leading to the introduction of this Bill.³

9. The Explanatory Memorandum states that the provisions in the Bill:

“... will provide a revised and streamlined legislative framework for the regulation and inspection of care and support in Wales.”⁴

10. The Bill proposes to introduce changes that will:

- reform the regulatory regime for care and support services;
- provide a regulatory framework that requires an approach to the regulation of care and support services focussed on outcomes for service users;
- reform the inspection regime for local authority social services functions;
- reconstitute and re-name the Care Council for Wales as Social Care Wales and broaden its remit; and
- reform regulation of the social care workforce.⁵

² Explanatory Memorandum, Annex A - Explanatory Notes, paragraph 2

³ Explanatory Memorandum, Annex A - Explanatory Notes, paragraphs 3-4

⁴ Explanatory Memorandum, paragraph 1.1

⁵ Explanatory Memorandum, paragraph 1.3

11. The Explanatory Memorandum explains that nine objectives have been set out to deliver the Bill's aims and have informed its development:

- To place the citizen at the heart of the system.
- To create a system that understands the impact of services on the lives of people.
- To ensure providers of services are appropriately accountable.
- To improve information sharing and co-operation.
- To understand better the future and avoid unexpected failures.
- To make a step change in the improvement agenda.
- To support the development of the best workforce possible.
- To deliver a robust and transparent system of regulation for service providers and for the workforce.
- To reduce complexity of the law and provide future flexibility.⁶

⁶ Explanatory Memorandum, paragraph 3.15

3. Legislative Competence

Explanatory Memorandum

12. The Explanatory Memorandum indicates that the Assembly has the legislative competence to make this legislation by virtue of heading 15 (Social Welfare), heading 12 (Local Government), heading 14 (Public administration) and heading 5 (Education and training) of Part 1 of Schedule 7 to the *Government of Wales Act 2006*.⁷

13. The Explanatory Memorandum indicates that the Bill seeks to ensure that regulatory regimes under the Bill are compliant with human rights legislation.⁸

Evidence from the Minister

14. The Minister told us that he is satisfied that the Bill is within the competence of the Assembly⁹ and noted:

“In preparing the Bill, my officials had discussions with colleagues in the Wales Office, prior to its introduction, and no issues of competence were raised within those discussions.”¹⁰

15. We also explored how the Bill was compliant with the European Convention on Human Rights. The Minister said:

“I received advice ... that led me to conclude that it was compliant ... there are some clear instances in the Bill where we have strengthened people’s rights under the European convention.”¹¹

16. By way of an example he explained that “there are new safeguards there that protect the human rights of the provider”.¹²

⁷ Explanatory Memorandum, paragraphs 2.1–2.5

⁸ Explanatory Memorandum, paragraphs 3.18, 3.67, 3.186 and 3.196

⁹ Constitutional and Legislative Affairs (“CLA”) Committee, RoP paragraph [5], 27 April 2015

¹⁰ CLA Committee, RoP paragraph [5], 27 April 2015

¹¹ CLA Committee, RoP paragraph [83], 27 April 2015

¹² CLA Committee, RoP paragraph [83], 27 April 2015

17. We also note that the Minister confirmed his satisfaction that the provisions of the Bill were compatible with the Convention in a letter to the Chair of the Health and Social Care Committee.¹³

Our view

18. We note the Minister's view regarding the Assembly's ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

19. We are satisfied that, in connection with administrative or regulatory decisions such as removal from a relevant register, the Bill incorporates the requirements of fairness, independence and impartiality required by Article 6 of the European Convention on Human Rights. We have reached this view having considered the Minister's comments and the provisions of the Bill as a whole.

20. We also consider that the general objectives of the Bill, as articulated in sections 4 and 57—the protection, promotion and maintenance of the safety and well-being of people who use regulated services and the promotion and maintenance of high standards in the provision of regulated services—are legitimate aims and justify any potential interference with the rights afforded to an individual by Article 8 of the Convention. We believe that any such interference is rendered proportionate by the provisions contained in the Bill.

21. We are also satisfied that the benefits and disbenefits of any action which could amount to interference with the enjoyment of possessions, such as the revocation of a licence to operate a care home, is justified in the pursuance of the legitimate aims.

22. We are therefore satisfied that the Bill is compliant with Article 1 of protocol 1 of the Convention.

23. Nevertheless, we believe it would have been helpful for the Minister to have included clear information in the Explanatory Memorandum about how he had taken into account human rights issues when preparing the Bill, including the issues he considered and the analysis undertaken. We believe it would have been possible to

¹³ Letter from Mark Drakeford AM, Minister for Health and Social Services to David Rees AM, Chair of the Health and Social Care Committee, *Regulation and Inspection of Social Care (Wales) Bill*, 19 May 2015

provide an appropriate narrative, without disclosing the content of any legal advice received.

Recommendation 1: we recommend that the Minister provides further detailed information during the Stage 1 debate about the issues considered and the analysis undertaken to ensure the Bill is compatible with the European Convention on Human Rights.

24. We pursued the consideration of human rights in the context of sections 124 and 135 of the Bill and report on these provisions separately in Chapter 5.

4. General observations

Evidence from the Minister

25. We asked the Minister to explain why the Bill contained so many powers to make subordinate legislation. He told us:

“I believe that this Bill puts a great deal more onto the face of the legislation than the legislation that it updates and substitutes for. The Care Standards Act 2000 is the Act that, primarily, we’ve relied on in these fields up until now ... we have sought to put a great deal more, particularly in relation to workforce regulation, on the face of the Bill than has been the case in statute up until now.”¹⁴

26. He later said when answering questions about the making of rules by Social Care Wales:

“This is primarily the part of the Bill where we have placed a great deal more on the face of the Bill than is in the Act of Parliament that it supersedes. We have elevated into primary legislation the fundamental principles and processes of workforce regulation.”¹⁵

27. He also told us that:

“There are areas where we know the Bill will need updating over time, where leaving those powers to regulations and so on, rather than having to return to the Assembly every time we have to do something of that order, is necessary. We think that the Bill sets out a clear direction of travel, proper parameters for the use of subordinate legislation ... we think we’ve got the balance broadly right.”¹⁶

28. We also sought to understand why a duty to consult did not appear regularly on the face of the Bill, particularly when the statement

¹⁴ CLA Committee, RoP paragraph [7], 27 April 2015

¹⁵ CLA Committee, RoP paragraph [75], 27 April 2015

¹⁶ CLA Committee, RoP paragraph [9], 27 April 2015

of policy intent document¹⁷ made numerous references to the intention to consult on various regulations. The Minister explained that:

“... part of the purpose of having such a statement, I think, is to give Assembly Members the confidence that the Government does intend to consult, even when we don’t put that as a duty on the face of the Bill. Once it’s there as a duty on the face of the Bill, then every time changes are necessary in that particular provision, there would be a duty to consult on those changes, and, while we give commitments to consult pretty regularly in the statement of policy intent, it’s because we think that there is likely to be a need to consult when establishing some of the new provisions of the Bill, but it would be very over-burdensome, on the sector, its stakeholders and on the Assembly itself, if we were to have a duty to consult every time we wanted a modest updating or refreshing of some of those parts.”¹⁸

Our view

29. The Minister’s arguments regarding the absence of a duty to consult appearing on the face of the Bill are not particularly persuasive.

30. A legal duty to consult is very different from a commitment in a statement of policy intent document. If a duty to consult is a principle to be followed for significant regulation-making powers, it should appear on the face of the Bill, particularly as a piece of law may last longer than the term of a Ministerial office. We also believe it is more transparent and provides greater certainty for those key stakeholders who work in the field.

31. We note the Minister’s views regarding not wanting to consult every time a “modest updating or refreshing” was required. Irrespective of the merits of this particular point, we note that already within the Bill there are existing provisions—for example section 26(6)(b)—which may accommodate such an approach.

¹⁷ Welsh Government, Regulation and Inspection of Social Care (Wales) Bill, *Policy intent for regulations to be made under this Bill*, March 2015

¹⁸ CLA Committee, RoP paragraph [11], 27 April 2015

32. We make specific recommendations on the duty to consult in Chapter 5, but believe there is scope to review this issue for the Bill as a whole given that it is heavily reliant on subordinate legislative making powers.

Recommendation 2: we recommend that the Minister should table amendments to the Bill to ensure that a duty to consult applies to the regulation-making powers that he considers to be significant.

33. We note that the statement of policy intent document contains a lot of information that would be usefully included on the face of the Bill itself, and also in the Explanatory Memorandum. On this occasion, we are not convinced that the right balance has been struck between what has been included in the Explanatory Memorandum and the statement of policy intent.

5. Powers to make subordinate legislation and issue guidance

Background

34. The Bill contains 188 sections, split into 11 parts and three Schedules. It also contains:

- 71 powers for the Welsh Ministers to make regulations;
- Two powers for the Welsh Ministers to issue guidance;
- Two powers for the Welsh Ministers to issue codes of practice
- 33 powers for Social Care Wales to make rules;
- One power for Social Care Wales to issue guidance; and
- Two powers for Social Care Wales to issue codes of practice.¹⁹

35. Given the large number of powers, we have focused on specific issues only. We recognise that there is scope to test other subordinate legislation making powers through the amending stages of the legislative process and in particular through the use of probing amendments.

Part 1 – Regulation of Social Care Services

36. Part 1 of the Bill is split into 8 chapters and covers sections 1 to 63. It sets out the regulatory processes applying to a person wishing to deliver a regulated service in Wales. It also provides detail in respect of the regulation of local authority social services functions and establishes the new processes for both local authorities and the Welsh Ministers to undertake assessment of the care and support market.²⁰

Chapter 2 – Registration etc. of service providers

37. Chapter 2 of Part 1 (sections 5 – 30) concerns the registration of service providers.

Section 6 – Application for registration as a service provider

38. Section 6 sets out the process by which a person may apply to the Welsh Ministers to become a provider of a regulated service (as defined in section 2). The information to be included in an application

¹⁹ Explanatory Memorandum, Section 5

²⁰ Explanatory Memorandum, Annex A – Explanatory Notes, paragraph 9

is set out in subsection (1), paragraphs (a)–(c), with paragraph (d) permitting regulations prescribing further information.

39. The statement of policy intent document states that an indication of what might be included in these regulations can be found in:

- the Care Quality Commission (Registration) Regulations 2009, and
- the Social Care and Social Work Improvement Scotland (Applications) Order 2011.²¹

40. It also indicated that work was being undertaken in this area in the context of a review of Operation Jasmine.²²

“These regulations could be used to make changes to the information required in an application in light of the recommendations of that review.”²³

41. The Minister noted that this provision was:

“... just a replication in this statute of the system that we have run under the Care Standards Act 2000. The requirements there were made under the negative procedure by this Assembly back in 2002. There was a further updating of them, again made under the negative procedure. They are of a relatively mundane and administrative nature, and we saw no case for altering the system that had already served ... well.”²⁴

42. Given that the independent review of Operation Jasmine could potentially inform the content of the regulations we asked whether the affirmative procedure should apply, at least for the first set of regulations. The Minister noted that the independent review will be available during the Bill’s passage through the Assembly²⁵ and indicated that he would consider this point further if the report contained views suggesting another procedure was appropriate.

²¹ Statement of policy intent, page 7

²² Operation Jasmine was a Gwent Police investigation into alleged abuse in six care homes. An independent review led by Dr Margaret Flynn into this case was announced by the Welsh Government in 2013.

²³ Statement of policy intent, page 6

²⁴ CLA Committee, RoP paragraph [14], 27 April 2015

²⁵ The independent review is expected to be published in July 2015.

Our view

43. We welcome the Minister's comments.

Recommendation 3: we recommend that the Minister reviews the procedure to apply to regulations made under section 6(1) of the Bill in the light of the outcome of the review of Operation Jasmine.

Section 8 – Annual Return

44. Section 8 requires that a service provider must submit an annual return to the Welsh Ministers following the end of each financial year during which the provider is registered.

45. The information to be contained in the annual return is to be prescribed in regulations under section 8(2). The statement of policy intent sets out what the Welsh Government intends to include and says the regulations will be used to ensure that this information is “proportionate, factually-based, current and consistent across services”.²⁶

46. The Bill does not include a duty on the Welsh Ministers to consult before making regulations under this section. However, the policy intent document states that there will be “full engagement with the regulators, the sector and citizens in the development of these regulations”.²⁷

47. The regulations are subject to the negative procedure because they are “an administrative issue and will not be controversial or impose burdens on the provider”.²⁸

48. We asked why no information about the annual return was placed on the face of the Bill. The Minister acknowledged that this was a new provision and a “more significant requirement” for service providers,²⁹ adding:

“.. the way that we've set it out in the statement of policy intent is sufficient to explain to Assembly Members how we will go about it, and that the negative procedure is sufficient.”³⁰

²⁶ Statement of policy intent, page 8

²⁷ Statement of policy intent, page 9

²⁸ Explanatory Memorandum, Section 5, page 87

²⁹ CLA Committee, RoP paragraph [15], 27 April 2015

³⁰ CLA Committee, RoP paragraph [15], 27 April 2015

49. He indicated he would be content to consider an alternative procedure.³¹

50. While failure to submit a return in a timely fashion would be an offence, the Minister did not believe however that there would be merit in including a time limit on the face of the Bill:

“I think we have to work very carefully with the sector to make sure that we establish timelines for the production of annual reports that don’t inadvertently lead to people committing offences of this sort ... This is something better left to regulations where proper discussions with the sector can be carried out, and where some extra flexibility in implementation will be possible.”³²

51. Such regulations would be subject to the negative procedure because the power is “minor”.³³

Our view

52. We believe that it is important for service providers to have a clear idea of what is expected of them in completing an annual return. Such information should be available as soon as possible to them, given the possibility of committing an offence for not submitting a return on time. We note that the statement of policy intent states what is to be required of a service provider and we see no reason why this information should not appear on the face of the Bill.

Recommendation 4: we recommend that the Minister should table an amendment to section 8 of the Bill, setting out the information that service providers will be required to submit in the annual return.

53. On the basis of recommendation 4, we are content for the Bill to permit additional information to be prescribed in regulations subject to the negative procedure.

54. We are content for the time-limit for submitting an annual return to be prescribed in regulations subject to the negative procedure.

³¹ CLA Committee, RoP paragraph [15], 27 April 2015

³² CLA Committee, RoP paragraph [17], 27 April 2015

³³ Explanatory Memorandum, Section 5, page 87

Section 19 – Responsible individuals

55. The Bill introduces, through section 19, the concept of a “responsible individual”, to ensure that accountability for service quality and compliance is held by a nominated responsible individual at an appropriately senior level within the organisation. The regulator can then take action against the responsible individual.

56. Section 19(6) provides the Welsh Ministers with a power to specify circumstances in which they may designate a responsible individual despite the individual not satisfying the requirements under sections 19(2) and 19(4); and to make provisions for the whole of Part 1 of the Act to apply with prescribed modifications to such an individual. The statement of policy intent document recognises that there may be situations where there is no one within the service provider’s organisation who is capable of being designated as the responsible individual.³⁴

57. The Explanatory Memorandum explains that the regulations are subject to the negative procedure because “this is an administrative detail which is relatively minor in the overall legislative scheme.”³⁵

58. We asked the Minister whether regulations under section 19(6) should be subject to the affirmative procedure as they could potentially dilute one of the central provisions in the Bill. He replied:

“I would probably want to take issue with the contention that these are powers that are capable of being used to dilute a central purpose of the Bill, because I think there are other safeguards within the Bill—the general requirements that are in it—that would prevent that from happening.”³⁶

59. He explained the purpose of the new power:

“The Bill sets up a new statutory role of the responsible individual ... it places new obligations on people at board level for the oversight and the quality of the services that they provide. What section 19(6) is is essentially a fallback position ... We would not want a competent, well-run and quality service to be put in danger because there was a temporary period

³⁴ Statement of policy intent, page 12

³⁵ Explanatory Memorandum, Section 5, page 88

³⁶ CLA Committee, RoP paragraph [19], 27 April 2015

when a responsible individual was not in place ... It is a contingency provision. We would not be making long-term arrangements to allow a company not to have a responsible individual, but we don't want the temporary inability to provide such an individual to have consequences that we wouldn't expect it to have. For that reason I think that, as we conceive of it in the Bill, it's proportionate with the purpose that we expect that power to discharge."³⁷

Our view

60. We consider that section 19(6) is effectively a power of intervention for the Welsh Ministers. We consider that the most appropriate approach would be to specify on the face of Bill some of the circumstances in which they may designate a responsible individual but to retain a power to add further circumstances by regulations subject to the negative procedure.

Recommendation 5: we recommend that the Minister should table an amendment to section 19 of the Bill identifying some of the circumstances under which the Welsh Ministers may designate a responsible individual.

Section 26 – Regulations about regulated services

Section 27 – Regulations about responsible individuals

Section 28 – Guidance about regulations under sections 26 and 27

Section 29 – Regulations about service providers who are liquidated etc

Section 30 – Regulations about service providers who have died

61. Section 26 provides a regulating-making power for the Welsh Ministers to impose requirements on service providers in relation to a regulated service. The Explanatory Notes indicate that section 26 could be used to make regulations along the same lines as an equivalent provision in the *Care Standards Act 2000*.³⁸ However, they also state:

“... it will also be possible to take a different approach. The current intention is that there will be only two sets of regulations that will be made pursuant to section 26. Firstly, there will be a set of “quality standards” that will apply to

³⁷ CLA Committee, RoP paragraph [19], 27 April 2015

³⁸ Explanatory Memorandum, Annex A - Explanatory Notes, paragraphs 69-70

providers of regulated services... Secondly, there will be another set of regulations that will establish similar duties to those currently listed in section 22(2) of the 2000 Act.”³⁹

62. More information about the intention behind the regulations is included in the statement of policy intent.⁴⁰ They are subject to the affirmative procedure because they will:

“... be the basis upon which the regulated services set out in the Bill are to be regulated. The detail of such regulations and the burdens being placed upon providers should be subject to the full scrutiny of the Assembly.”⁴¹

63. Regulations under section 27 will set out the duties that are to be specifically placed on the responsible individual. The statement of policy content does not include any information on section 27. They are subject to the affirmative procedure “given that some of those duties will attract offences if they are not complied with” under section 44.⁴²

64. Section 28 requires Welsh Ministers to produce guidance about how, in relation to each different type of regulated service, service providers and responsible individuals may comply with the regulatory requirements in sections 26 and 27 respectively.

65. Section 29(1) allows the Welsh Ministers to make regulations:

- (a) requiring service providers who are liquidated / in administration / bankrupt etc. to notify the Welsh Ministers of that fact, and
- (b) modifying the application of the whole of Part 1 to receivers / liquidators / trustees in bankruptcy etc.

66. Section 30(1) provides the Welsh Ministers with powers to make regulations:

- (a) modifying the application of the whole of Part 1 where a service provider who is an individual has died, and
- (b) requiring the personal representative of that individual to notify the Welsh Ministers of the death.

³⁹ Explanatory Memorandum, Annex A - Explanatory Notes, paragraph 70,

⁴⁰ Statement of policy intent, pages 14-15

⁴¹ Explanatory Memorandum, Section 5, page 88

⁴² Explanatory Memorandum, Section 5, page 88

67. Both regulation-making powers are subject to the negative procedure because they are concerned with “minor, administrative detail”.⁴³

68. The Minister explained why so little information about these powers was placed on the face of the Bill:

“... we set out a good deal of the detail about what we intend to do using these powers within the statement of policy intent. It is true, I concede, that we could go down the route that was adopted in the Care Standards Act 2000, where, in section 22 of that Act, it does set out quite a lengthy list of the things that we are talking about ... the danger is that if you put an illustrative list—and that’s all it could be at this point—on the face of the Bill, people would begin to think that it’s actually the definitive list, and, as that list is augmented and amended through regulations, as we imagine it would be, it becomes confusing to have two lists in operation, where the real list is not actually the one on the face of the Bill, because it’s been overtaken by the development of requirements that we would be developing through the regulations. So, we’ve decided not to do that for the purposes of this Bill, and that partly explains why you don’t have what appears to be the detail that was there in the Care Standards Act.”⁴⁴

69. As regards the power to make regulations under section 26(1) the Minister said:

“... these are regulations that will be at the heart of the new system that is being established. It is why, in this instance, we have placed a duty to consult on the face of the Bill. I’m not certain myself whether there would be sufficient additional gain in moving to a superaffirmative procedure, which in my experience ... essentially, rests on the duty to consult.”⁴⁵

70. We also asked the Minister for the rationale for including the powers in sections 29(1) and 30(1) and how he envisaged them being used. He said:

⁴³ Explanatory Memorandum, Section 5, pages 88-89

⁴⁴ CLA Committee, RoP paragraph [21], 27 April 2015

⁴⁵ CLA Committee, RoP paragraph [26], 27 April 2015

“The powers that we take in these sections are all existing powers drawn from the Care Standards Act 2000. This is the exact formula that’s on the statute book now. These powers have had to be used already, and there are recent examples where they’ve been relevant. Our belief is that they have stood the test of that experience, and that they provide a reasonable way in which, where a service can be sustained temporarily, it allows that to happen without the disruption of automatic closure of a service because of a failure in one particular aspect of it.”⁴⁶

71. He noted that these powers had been transposed from existing law and indicated that the use of the negative procedure for them had not been thought “to create detriment”.⁴⁷

Our view

72. We note the Minister’s view that placing a list of requirements on the face of the Bill (under section 26) and supplementing that list through regulations would be confusing. We are not persuaded by that view, particularly when a list of requirements could potentially be provided through more than one set of regulations.

73. Overall we believe that, in the interests of good law-making, sections 26 to 30 should include more information that clearly sets out, on the face of the Bill, the intentions of these provisions, rather than leaving so much to subordinate legislation.

Recommendation 6: we recommend that the Minister reviews sections 26 to 30 with a view to tabling amendments to enable the purpose of these sections to be more clearly understood from reading the face of the Bill.

74. Subject to the tabling of such amendments we are content with the procedures to be applied to the regulation-making powers under sections 26, 27, 29 and 30.

⁴⁶ CLA Committee, RoP paragraph [35], 27 April 2015

⁴⁷ CLA Committee, RoP paragraph [37], 27 April 2015

Section 35 - Inspection ratings

75. Section 35 provides a regulation-making power to the Welsh Ministers to establish a ratings system in respect of the quality of care provided by regulated services.

76. The Explanatory Memorandum states that a ratings system would have a significant impact on social care providers and that such provisions should be subject to the full scrutiny of the Assembly, hence the affirmative procedure.⁴⁸

77. The statement of policy intent notes that:

“There was support for the introduction of some form of quality judgement rating in the responses to the White Paper. However, it was noted that the framework would require careful development in order to ensure a reliable and consistent judgement of service delivery and quality. There is no intention to introduce regulations in the short term, and any such regulations will only be brought forward after thorough consultation with the regulator and the sector. It is essential that any such system is right for this sector.”⁴⁹

78. We asked the Minister whether the power in section 35(1) (and a similar power in section 149B(4) of the 2014 Act, as inserted by section 56(1) of the Bill) should be subject to a duty to consult and a super-affirmative procedure. The Minister replied:

“This is a major potential part of a new regulatory regime ... We commit to that sort of consultation in the statement of policy intent. I’m happy to consider ... whether, because it is new and significant, that duty to consult ought to appear on the face of the Bill, although the commitment to it is absolutely clear.”⁵⁰

Our view

79. We note the Minister’s comments. We believe that it would be appropriate to apply a super-affirmative procedure to the making of

⁴⁸ Explanatory Memorandum, Section 5, page 89

⁴⁹ Statement of policy intent, page 18

⁵⁰ CLA Committee, RoP paragraph [42], 27 April 2015

regulations under section 35 given their importance as part of a new regulatory regime.

Recommendation 7: we recommend that the Minister should table an amendment to apply a super-affirmative procedure to the making of regulations under section 35 of the Bill.

Chapter 5 – Offences and Penalties

80. Chapter 5 of Part 1 (sections 41 to 54) deals with offences and penalties

Section 43 – Failure by service provider to comply with requirements in regulations

Section 44 – Failure by responsible individual to comply with requirements in regulations

Section 51 – Penalty notices

81. Sections 43 and 44 give regulation-making powers to the Welsh Ministers to establish offences in relation to any of the regulatory requirements created in the regulations made in respect of providers and responsible individuals in sections 26 and 27.

82. By virtue of section 50(1), offences created under such regulations may be punishable:

- (a) on summary conviction to a fine or to imprisonment not exceeding 6 months or to both,
- (b) on conviction on indictment to a fine or imprisonment not exceeding 2 years or both.

83. There is no limit as to the amount of a fine that may be imposed on summary conviction or on conviction on indictment.

84. Sections 51(1) and 51(2) provide that certain offences—including those under regulations made under sections 43 and 44—may be discharged by a penalty notice rather than conviction in a court.

85. Section 51(6)(b) allows the Welsh Ministers to make regulations that specify the sum payable under a penalty notice.

86. Section 51(7) states that such penalty notices cannot exceed a sum two and a half times level 4 on the standard scale. Level 4 is currently £2,500, so the maximum penalty notice under section 51(6)(b) would be £6,250.

87. The UK Government proposed, but has since withdrawn the proposal, to increase the standard scale of fines by 400%. This would have increased the level 4 fine to £10,000 and the maximum penalty notice under section 51(6)(b) to 25,000.

88. There remains the potential for the standard scale of fines to be increased in the future (by affirmative regulations in the UK Parliament).

89. The statement of policy intent states that there will be full engagement with the regulator, the sector and citizens in the development of regulations made under section 51(6). However, there is no such duty to consult on the face of the Bill.

90. When we asked whether the super-affirmative procedure should apply to regulations made under sections 43, 44 and 51, the Minister said he accepted that the Bill provides the potential for new offences to be committed, and that the corresponding penalties would be significant.⁵¹ As such he was happy to consider whether a duty to consult would be better placed on the face of the Bill,⁵² although the use of a super-affirmative procedure would require careful thought.⁵³

91. It was also noted that these provisions are linked to the section 26 power to impose duties upon providers; section 26 includes a power to consult and so consultation would occur on sections 43, 44 and 51 as a result.⁵⁴

92. The Minister subsequently added:

“I’m happy to look at whether, if we were to place a duty to consult on the face of the Bill in relation to the new offences and the penalties attached to them ... it would make sense ... to extend that same duty to the issue of the standard scale of fines that matter too, because they are connected in the Bill.”⁵⁵

Our view

93. Since the Minister has acknowledged that regulations made under sections 43, 44 and 51 could create new offences, with significant

⁵¹ CLA Committee, RoP paragraph [45], 27 April 2015

⁵² CLA Committee, RoP paragraph [45], 27 April 2015

⁵³ CLA Committee, RoP paragraph [45], 27 April 2015

⁵⁴ CLA Committee, RoP paragraph [46], 27 April 2015

⁵⁵ CLA Committee, RoP paragraph [54], 27 April 2015

penalties attached to them, we believe that the regulations should be subject to the super-affirmative procedure.

Recommendation 8: we recommend that the Minister should table amendments to the Bill applying a super-affirmative procedure to regulations made under sections 43, 44 and 51.

Chapter 6 – Local Authority Social Services

94. Chapter 6 of Part 1 of the Bill concerns local authority social services and consists of sections 55 to 57.

95. Each of these sections inserts new sections into the 2014 Act that are concerned with the Welsh Ministers regulatory powers in respect of local authority social services functions.

Section 56: Reviews, investigations and inspections

96. Section 56(1) inserts section 149B (Review of local authority social services functions) into the 2014 Act. It enables the Welsh Ministers to make regulations prescribing criteria by which a rating may be given in relation to the exercise of a specified local authority social services function.

97. It replicates for local authorities the provision that is made in section 35 of the Bill in relation to private sector providers. The policy intention is to provide parity with the ratings system which will be adopted under section 35.

98. The Explanatory Memorandum states that the use of the power would be new, and to provide parity with section 35, should be subject to the full scrutiny of the Assembly, and the affirmative procedure.⁵⁶

Our view

99. We note the Minister's response when questioned about this provision and section 35 (see paragraph 78 of this report). We believe that the same procedure should apply to regulations made under section 149B(4) of the 2014 Act as are made under section 35 of the Bill.

⁵⁶ Explanatory Memorandum, Section 5, page 93

Recommendation 9: we recommend that the Minister should table an amendment to apply a super-affirmative procedure to the making of regulations under section 149B(4) of the Social Services and Well-being (Wales) Act 2014 (as inserted by section 56(1) of the Bill).

Chapter 7 – Market Oversight

100. Chapter 7 of Part 1 of the Bill concerns local authority social services and consists of sections 58 to 62.

Section 58 – Specifying criteria for application of market oversight regime

Section 60 – Assessment of financial sustainability of service provider

101. Section 58 requires the Welsh Ministers to establish criteria in regulations that will be used to identify providers who will be the subject of the market oversight provisions in the Bill. Where the criteria apply to a particular provider, section 60(1) requires the Welsh Ministers to assess the financial sustainability of the service provider’s business of carrying on regulated services.

102. Section 60(6) provides the Welsh Ministers with a power to make provision for enabling them to obtain, from such persons as they consider appropriate, information which they believe will assist them to assess the financial sustainability of a service provider to which section 60 applies.

103. The Explanatory Memorandum states that these powers have the potential to be exercised widely and therefore the affirmative procedure should apply.⁵⁷

104. When questioned about section 60(6), the Minister said:

“... I would remain to be convinced about the need for the superaffirmative, given that these are new and significant powers, if the committee felt that the duty to consult be on the face of the Bill rather than in the statement of policy intent, I’d be happy to look positively at that.”⁵⁸

⁵⁷ Explanatory Memorandum, Section 5, pages 94-95

⁵⁸ CLA Committee, RoP paragraph [64], 27 April 2015

Our view

105. Given the nature of the regulation-making power in section 60(6), we believe that the super-affirmative procedure should apply.

Recommendation 10: we recommend that the Minister should table an amendment to the Bill to apply a super-affirmative procedure to the making of regulations under section 60(6).

Part 3 – Social Care Wales

Part 4 – Social Care Workers

Background

106. Part 3 of the Bill renames the Care Council for Wales as Social Care Wales. It will have responsibilities around service improvement in addition to its current workforce regulation and development roles.

107. Whilst the Bill sets out the frameworks for the investigation of allegations of impaired fitness to practice and the governance of fitness to practice hearings, the Bill confers on Social Care Wales powers to make the relevant procedural rules, a power that the Care Council for Wales already has.

108. However, there are some changes to the arrangements: Social Care Wales will no longer require the consent of the Welsh Ministers to make such rules, although the Welsh Ministers will have power to prescribe some minor procedural requirements, for example persons to whom notice of matters such as the outcome of a hearing is to be given.

109. Part 4 of the Bill confers a number of powers on Social Care Wales. The Explanatory Memorandum explains that Part 4 (as well as Parts 5 to 8) restate many of the relevant provisions from the *Care Standards Act 2000* dealing with the registration of social care workers, fitness to practise etc. It also explains that it has been informed by the recent Law Commission report on the regulation of health and social care workers.⁵⁹

110. Section 72 sets out the procedure for rules made by Social Care Wales and states that the rules it makes must be exercised by an

⁵⁹ Explanatory Memorandum, Annex A – Explanatory Notes, paragraph 11

instrument in writing. Section 74 further stipulates that any rules must satisfy consultation requirements before they are made.

Social Care Wales: rule making powers

111. The Minister explained the background to these provisions in the Bill and how they were intended to operate:

“This is primarily the part of the Bill where we have placed a great deal more on the face of the Bill than is in the Act of Parliament that it supersedes. We have elevated into primary legislation the fundamental principles and processes of workforce regulation. So, there’s a great deal more clarity on the face of the Bill about registration and about regulation. We feel that, with that greater, full legislative force, it is sensible to allow Social Care Wales some greater operational autonomy in the way that it goes about the practical discharge of these duties. I think there are three reasons for that. One is that these then become essentially operational matters. The policy is clearly on the face of the Bill and they have to operate within that policy, but they are discharging it operationally and my belief is that there is a case for allowing them to get on with that. Secondly, I think we are talking about an organisation that has proved itself, over the 15 years of devolution, to be a competent organisation that already goes about its business in a way that has withstood every review and inspection and so on of it. Thirdly, we are directly drawing on the advice of the Law Commission, because the Law Commission, as I’m sure you know, produced a draft Bill of its own over workforce regulation and was very clear in its advice that these rule-making powers should not be capable of being interfered with by Ministers, other than that everything that Social Care Wales will do has to be within the parameters of the rules that Ministers will be responsible for policing. So, we are taking the Law Commission’s advice in this approach.”⁶⁰

Our view

112. We note the Minister’s comments and are content.

⁶⁰ CLA Committee, RoP paragraph [54], 27 April 2015

Section 110 – Use of title “social worker” etc.

113. Section 110 provides protection of the title “social worker”.

114. Section 110(4) sets out which are relevant registers for the purposes of the protection of title. If a social worker or social care worker is registered in a relevant register then they can use or take the title of social worker or social care worker.

115. Section 110(5) enables the Welsh Ministers to amend section 110(4) by means of regulations. The regulations are subject to the negative procedure because “the detail is relatively minor in the overall legislative scheme”.⁶¹ The Minister told us:

“Normally, powers to amend primary legislation would not be by the negative procedure. These are powers that do allow for primary legislation to be amended. But, my understanding of them is that these are very narrowly conceived powers where the changes would simply be of a factual nature.”⁶²

Our view

116. The power in section 110(5) is very widely drawn, and would permit changes beyond those suggested by the Minister.

117. It is important to consider how powers could be used in the future, not just how they are intended to be used at the time a Bill is introduced.

118. It remains an important point of principle that any regulations that amend primary legislation must be subject, at the very least, to the affirmative procedure.

Recommendation 11: we recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to the making of regulations under section 110(5).

Part 6 – Social Care Workers: Fitness to practise⁶³

119. Part 6 sets out the framework for the investigation of allegations of impaired fitness to practise and the framework governing fitness to practise hearings.

⁶¹ Explanatory Memorandum, Section 5, page 100

⁶² CLA Committee, RoP paragraph [77], 27 April 2015

⁶³ See Explanatory Memorandum, Annex A - Explanatory Notes, paragraphs 155 - 194

120. Fitness to practise panels must determine whether a person's fitness to practise is impaired on any of the grounds listed in section 116 (Chapter 1).

121. Chapter 2 of Part 6 (sections 117 to 132) sets out the framework for the investigation of allegations of impaired fitness to practise made to Social Care Wales in respect of a registered person. The chapter also applies where Social Care Wales has other grounds for believing that a person's fitness may be impaired.

122. Preliminary consideration (section 118) refers to the process of considering allegations or information to determine whether or not a case should proceed to be given further consideration. The purpose of preliminary consideration is to decide whether the matter merits further investigation or, because of its severity, a direct referral to a fitness to practise panel.

123. Sections 124 to 129 provide for allegations of impaired fitness to practise to be investigated by Social Care Wales, or investigated by persons acting on Social Care Wales' behalf.

124. Chapter 3 (sections 133 to 142) sets out the various powers the panels have to dispose of cases.

125. The regime established under the Bill potentially engages Articles 6, 8 and Article 1 of Protocol 1 of the European Convention on Human Rights.

126. We sought to explore these issues specifically in the context of sections 124 and 135 of the Bill.

Section 124 - Duty to investigate

127. Section 124(1) states that Social Care Wales must investigate, or make arrangements for the investigation of, a registered person's fitness to practise. Social Care Wales may make rules about the arrangements for investigations (subsection (3)) and subsection (5) lists those persons who may not undertake an investigation, with a power provided in paragraph (d) to prescribe additional persons.

128. The Bill provides for the regulations under section 124(5)(d) to be made using the negative procedure because the “detail is relatively minor in the overall legislative scheme”.⁶⁴

129. Article 6 of the European Convention on Human Rights provides that in the determination of his/her civil rights an individual is entitled to a fair trial.

130. We pursued this point in the context of whether regulations made under section 124(5) should be made under the affirmative procedure because this section relates to the right to a fair trial under the European Convention on Human Rights and could potentially be compromised by the composition of a fitness to practise panel.

131. The Minister said:

“... the Bill is carefully constructed to make sure that all necessary investigations and checks and balances are in place prior to any decision to go to a fitness-to-practise panel, and then the Bill is clear that the composition of such a panel cannot draw on anyone who has been involved in the consideration of whether or not to bring such a panel together.”⁶⁵

132. He added:

“... the fitness-to-practise panel must be lay led, so its membership will be drawn from people outside the professional ambit itself. We think that those powers are more than sufficient to make sure that the human rights convention and the rights to a fair trial, and so on, are very, very properly protected. I don’t myself come to the conclusion that there is a need for the affirmative procedure to be applied to those, because I think those rights are very adequately protected in the way the legislation is drafted.”⁶⁶

Our view

133. We note the Minister’s comments but believe that the affirmative procedure would be appropriate.

⁶⁴ Explanatory Memorandum, Section 5, page 104.

⁶⁵ CLA Committee, RoP paragraph [91], 27 April 2015

⁶⁶ CLA Committee, RoP paragraph [92], 27 April 2015

Recommendation 12: we recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to regulations made under section 124(5).

Section 135 – Other consensual disposal by fitness to practise panel: undertakings

134. Section 135 provides that a fitness to practise panel may agree undertakings with a person if that person agrees that his or her fitness to practise is impaired. Social Care Wales is to disclose details of such undertakings to persons listed in section 135(2) and to any other person prescribed in regulations.

135. The Bill provides for these regulations to be made using the negative procedure because the “detail is relatively minor in the overall legislative scheme”.⁶⁷

136. We asked whether, because section 135(2) potentially engages Article 8 of the European Convention on Human Rights (right to respect for family and personal life), the regulations prescribing additional persons should be made using the affirmative procedure. The Minister replied:

“I agree that there is the potential for article 8 rights to be engaged but, again, I think the Bill as drafted is very alert to all of that. We are clear on the sort of information that cannot be disclosed to others ... this is an area, as I said earlier, where you are always having to balance the rights of one individual against the rights of others ...

... I think we’ve set that out in the Bill in a way that balances those competing priorities adequately, and ... there isn’t a need for the affirmative procedure to be introduced...”⁶⁸

Our view

137. We note the Minister’s comments but believe that the affirmative procedure would be appropriate.

Recommendation 13: we recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to regulations made under section 135(2).

⁶⁷ Explanatory Memorandum, Section 5, page 105

⁶⁸ CLA Committee, RoP paragraphs [93-94], 27 April 2015

Part 11 – Final provisions

Section 184 – Power to make consequential etc. provision

Section 186 – Coming into force

138. Section 184(1) contains a power for the Welsh Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provisions and when this would involve the amendment of primary legislation, the affirmative procedure would apply.

139. Section 186(1) contains a power to commence provisions of the Bill by Order, to which no procedure would apply. However, section 186(3) states that an order may include such transitory, transitional or saving provisions as the Welsh Ministers think appropriate.

140. When asked why both provisions were necessary, a lawyer accompanying the Minister said:

“The power in section 184 is a general power making consequential provision, and that regulation-making power is likely to be the main power that’s used to make consequential provision in the Act. The reference to transitory, transitional and savings provision in section 186 is in relation to the making of commencement Orders only, so it’s to make such provision in relation to the commencement. It’s more than likely to be used in the context of commencing provisions in the final schedule to the Bill, so where the final schedule refers to the consequential amendments that are going to be made as a consequence of this Bill, then the commencement Order can make transitory, transitional or, more likely, savings provisions in relation to the current system insofar as the commencement of the consequential provision is made.”⁶⁹

Our view

141. We note the comments explaining the reason for the two provisions.

142. We remain of the view that the negative procedure should be applied to order-making powers that do more than simply identify the date of commencement of a particular provision.

⁶⁹ CLA Committee, RoP paragraph [102], 27 April 2015

Recommendation 14: we recommend that the Minister should table an amendment to the Bill applying the negative procedure to commencement orders made in accordance with section 254(3) that include transitory, transitional or saving provision.