National Assembly for Wales / Cynulliad Cenedlaethol Cymru
Health and Social Care Committee / Y Pwyllgor Iechyd a Gofal Cymdeithasol
Regulation and Inspection of Social Care (Wales) Bill / Bil Rheoleiddio ac Arolygu Gofal Cymdeithasol (Cymru)
Evidence from Auditor General for Wales - RISC 48 / Tystiolaeth gan Archwilydd Cyffredinol Cymru - RISC 48

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Mr David Rees AM
Chair, Health & Social Care Committee
National Assembly for Wales
Cardiff Bay
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Date: 24 April 2015
Our ref: HVT/2314/fgb

Dear Chair

THE REGULATION AND INSPECTION OF SOCIAL CARE (WALES) BILL: CONSULTATION ON GENERAL PRINCIPLES

Thank you for the invitation to the Wales Audit Office to provide evidence to the Committee on the general principles of the Regulation and Inspection of Social Care (Wales) Bill. I am responding as Auditor General since the issues raised are primarily ones that relate to my functions as the auditor of the Welsh public sector.

You will know that the Wales Audit Office has been established as a statutory board and that, since 1 April 2014, it has been responsible for employing staff, procuring services, and providing other resources to enable me to exercise my functions as Auditor General.

As Auditor General I audit the accounts of the Welsh Government, its sponsored and related public bodies, and National Health Service bodies and local government bodies in Wales.

As well as auditing accounts, I also have the functions of undertaking examinations of economy, efficiency and effectiveness in the use of resources, and other study, assessment and inspection functions. In the context of the Bill, it is of particular relevance that I undertake studies for improving economy, efficiency and effectiveness in the discharge of functions of local authorities, which include social services (studies under section 41 of Public Audit (Wales) Act 2004).

It is perhaps appropriate that in responding to your consultation I focus on issues that are relevant to the exercise of the Auditor General's functions, rather than commenting more broadly on the policy merits of the Bill. I have not, therefore, sought to respond to all your consultation questions, but, as set out in the annex, have tried to focus on relevant questions. These chiefly concern the financial implications of the Bill and wider efficiency and good governance in the conduct of public business.

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Given the interests of the Public Accounts Committee and the Finance Committee, I am copying this response to Darren Millar AM and Jocelyn Davies AM.

Yours sincerely

HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES

enc *Annex: Response of the Auditor General for Wales to the Health and Social Care Committee consultation on the general principles of the Regulation and Inspection of Social Care (Wales) Bill*

cc *Mr Darren Millar AM, Chair Public Accounts Committee*
Ms Jocelyn Davies AM, Chair, Finance Committee

RESPONSE OF THE AUDITOR GENERAL FOR WALES TO THE HEALTH AND SOCIAL CARE COMMITTEE CONSULTATION ON THE GENERAL PRINCIPLES OF THE REGULATION AND INSPECTION OF SOCIAL CARE (WALES) BILL

Q4. Do you think there are any major omissions from the Bill or are there any elements you believe should be strengthened?

Omission of access rights for Social Care Wales

1. Clause 69 of the Bill effectively transfers the function of undertaking studies for improving economy, efficiency and effectiveness (in the discharge by local authorities of their social services functions[1]) from the Welsh Ministers to Social Care Wales. (The clause also broadens that function so that it addresses economy, efficiency and effectiveness in the provision of a care and support service, i.e. it is not confined to local authority social services.) The Bill does not, however, transfer or otherwise provide Social Care Wales with the attendant access rights for undertaking such studies. This omission may impede Social Care Wales in undertaking studies.

Omission of duty on Social Care Wales to publish reports

2. The Bill also does not transfer the duty to publish reports of such studies. It appears that the publication of studies can still be achieved by Social Care Wales using its supplementary powers under paragraph 9 of Schedule 2 to the Bill, and I expect that Social Care Wales will choose to publish its reports. I am not sure, however, whether the Assembly is aware that Social Care Wales would have the option of not publishing reports of its studies (as the Welsh Ministers are currently required to), and whether the Assembly is content with such a situation.

Omission of duty on Social Care Wales to pursue value for money in exercising its functions

3. In repealing section 54 of the Care Standards Act 2000, clause 66 of the Bill repeals the general duty (in paragraph 4 of Schedule 1 to that Act) on the Care Council for Wales to carry out its functions economically, efficiently and effectively. The Bill does not, however, re-enact that duty so that it applies to Social Care Wales. While I expect the new organisation will in practice continue to pursue economy, efficiency and effectiveness, the repeal may send an unhelpful message.

[1] This study function is currently contained in section 95 of the Health and Social Care (Community Health and Standards) Act 2003.

Q5. Do you think that any unintended consequences will arise from the Bill?

Cost increases following improvements in quality driven by judgement ratings

4. Page 169 of the Explanatory Memorandum sets out risks arising from the introduction of quality judgement ratings under clause 35 of the Bill. One point that is not mentioned, however, is that increased quality may lead to increased costs to service-users and, where care is publicly-funded, to the public purse. Increased cost in return for increased quality may often be justified, but the possibility should nevertheless be recognised.

Potential undermining of proper regulation of service providers arising from use of penalty charges

5. Clause 51 of the Bill provides for the Welsh Ministers to impose penalty notices on service providers for such failings as omission to submit an annual return, with amounts up to two and a half times level 4 on the standard scale (I believe that at the time of writing this would be up to £6,125). The amounts of penalties are to be set by Welsh Ministers in regulations. In the case of an offending service provider convicted in court any fine (under clause 50 of the Bill) would be paid into the UK Consolidated Fund, as is normally the case with fines, but a payment of a penalty under clause 51 would be surrendered to the Welsh Consolidated Fund because of section 120 of the Government of Wales Act 2006.

6. As accessing funds from the Welsh Consolidated Fund requires the approval of one legislature rather than two, and is therefore more straightforward than accessing funds from the UK Consolidated Fund, it is possible that concerns may arise that penalties under clause 51 could exert undue influence on enforcement practice. The proper regulation of service providers could be undermined if there were a perception that the frequency with which penalties were imposed and the level at which they were set had implications for the funding position of the Welsh Ministers. This risk might be addressed by very careful drafting and scrutiny of the penalty regulations.

Impediments to Social Care Wales studies of economy, efficiency and effectiveness

7. The omissions mentioned under question 4 above may be, and may lead to, unintended consequences in terms of Social Care Wales undertaking studies of economy, efficiency and effectiveness.

Q9. What are your views on the provisions in Part 3 of the Bill to rename and reconstitute the Care Council for Wales as Social Care Wales and extend its remit?

8. Please see answer to Question 4.

Q13. What are your views on the financial implications of the Bill as set out in parts 6 and 7 of the Explanatory Memorandum?

9. It is not appropriate for me to comment on the financial implications of the Bill in terms of policy merits. I do, however, consider that it is appropriate to give views on the clarity of the financial implications.

10. The Explanatory Memorandum (see Table 42 on page 279 and Table 43 on page 283) appears to indicate that the net additional cost of the Bill in terms of transitional costs plus additional ongoing costs of the preferred options for five years (less savings in that period) will be some £9 million. Of that amount, some £3.4 million is one-off transition costs, suggesting ongoing additional net costs of £1.1 a year. The largest single item of ongoing expenditure arising from the Bill appears to be £1.5 million a year for quality ratings.

11. However, I have concerns that Table 42 does not give a clear view of costs, and that it may contain some significant errors, in particular:

    a. on page 281 the table appears to double count savings in respect of "due diligence of key service providers"—for the years 2017-18 to 2020-21, rather than recording the cost to service users of supplier exit as zero (i.e. prevented), the table shows negative costs of £92,300 in each year (though only three years appear to have been added together), which is the equivalent of service users not only avoiding costs of £92,300 a year but also being paid that amount each year. Taken together with the cost of producing national statements, the result appears to be an understatement of the cash cost of Chapter 7 of Part 1 of the Bill by £276,900;

    b. paragraph 7.466 (with footnote 74) indicates that the savings in respect of "due diligence of key service providers" is based on a monetised valuation of the well-being effect of "an orderly resolution to a care provider failure". "An orderly resolution" may not be the correct event to take into account, but in any case the point that is not made clear in Table 42 is that the £92,300 figure on page 281 is not cash savings, but a valuation of a benefit. There is nothing wrong with providing monetised valuations of benefits, but I consider it potentially misleading for such benefits to be mixed in the middle of a table of cash figures;

    c. similar to (a) above, Table 42 appears to contain errors that lead to the overstatement of savings in respect of discontinuing voluntary registration by some £60,000.

12. The mixing of monetised benefits with cash costs appears to me to make the Explanatory Memorandum fall short of the requirement of Standing Order 26.2(vi) that the Explanatory Memorandum must:

    set out the best estimates of:

    (a) the gross administrative, compliance and other costs to which the provisions of the Bill would give rise;

    (b) the timescales over which such costs would be expected to arise.

13. There are also other matters that I consider make it hard to obtain a fair view of the costs of the Bill:

    a. the presentation of the costs of the Bill solely by inclusion in a lengthy options analysis (173 pages) makes it hard to readily identify the make-up of various costs without confusion with options other than the Bill;

    b. the summary tables of costs (Table 42 and Table 43) are 166 pages into the regulatory impact assessment, rather than being presented at the beginning.

14. I have not considered in detail the accuracy of individual cost estimates, and cannot therefore comment on them in that respect.

15. As far as I can tell, there is no specific rationale for providing costs of the Bill in terms of transitional costs plus additional ongoing costs of the preferred options for five years (less any savings in the period). There is no indication that the Bill is to have a five-year life-span, so the five-year figure is in a sense arbitrary. It is, however, consistent with other recent Welsh Government Regulatory Impact Assessments contained in Explanatory Memoranda.

16. I note that some of these points are matters that I have previously raised in my December 2014 report *Review of the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill*. Key points raised in that report included:

    a. the need for a clear summary of costs;

    b. consideration of the appropriate time-period over which to analyse costs;

    c. strengthening arrangements for the development and internal review of impact assessments.

17. As the Welsh Government presented the current Bill's Explanatory Memorandum in February 2015, I am not sure whether the Welsh Government has had sufficient opportunity to consider my report.

Q14. Are there any other comments you wish to make about specific sections of the Bill?

Co-operation in respect of value for money studies

18. Paragraph 41 of Schedule 3 to the Bill amends section 41 of the Public Audit (Wales) Act 2004 so as to require the Auditor General and Social Care Wales to co-operate with each other in respect of their relevant value for money study functions (i.e. functions under section 41 of the 2004 Act and clause 69 of the Bill). In practice, the Auditor General would in any case seek to engage in sensible co-ordination, but nevertheless this is an appropriate provision. It reflects equivalent existing provision in section 41 of the 2004 Act, and is conducive to ensuring that the Auditor General and Social Care Wales avoid overlapping work or unintended gaps in work. I am grateful that the Welsh Government liaised with WAO staff regarding this provision.

19. Paragraphs 21 to 23 of Schedule 3 to the Bill also amend sections 41 and 42 of the Public Audit (Wales) Act 2004. In this case, the amendment includes a requirement on the Auditor General and the Welsh Ministers to co-operate with each other in respect of the Welsh Ministers' re-enacted[2] function of reviewing studies and research by others, which is to be inserted as section 149A of the Health and Social Well-being (Wales) Act 2014 by clause 56 of the Bill. This is in addition to a requirement to co-operate in respect of the re-enacted[3] (but augmented) Welsh Ministers' function of undertaking reviews of local authority social services. I understand that, regrettably, the Welsh Government did not liaise with WAO staff regarding the additional co-operation requirement imposed on the Auditor General in respect of reviews of studies and research. However, as far as I can tell, the Welsh Ministers (CSSIW) have not undertaken any such reviews under the existing power. Instead, CSSIW review relevant research in the course of undertaking other reviews and studies (e.g., section 95 of the 2003 Act). If this pattern of activity continues, the additional requirement will not have significant practical consequences. The pattern of activity does, however, also raise the question whether re-enactment is necessary, especially as section 60 of the Government of Wales Act 2006 gives the Welsh Ministers wide-ranging powers to undertake activities for the promotion of well-being.

20. I am also concerned at the potential circularity of the situation and its implications for audit independence. The new section 149A power to review "studies and research undertaken by others" provides for the Welsh Ministers to review of "the methods used in such studies [by others]…and…the validity of conclusions drawn." This appears to provide a power for the Welsh Ministers to call into question the methods and conclusions of the Auditor General and others, including Social Care Wales, and to lay reports to that effect before the Assembly.

21. I gather that the original provision in the Health and Social Care (Community Health and Standards) Act 2003, from which the new section derives, was not necessarily intended to be used in that way, and that seems to have been borne out in practice. As the Explanatory Note for the original provision says, "This section enables the CSCI to evaluate work carried out by other bodies, such as academic institutions." Nevertheless, the provision potentially undermines audit independence.

Value for money and the new section 149D "General considerations" to be inserted by clause 56

22. The new section 149D "General considerations" to be inserted by clause 56 of the Bill into the Social Services and Well-being (Wales) Act 2014 includes (in subsection (d)) in its list of matters that the Welsh Ministers must have regard to in undertaking reviews, "the economy and efficiency of their [local authority] provision and their value for money". This formulation is somewhat confused and circular. Value for money is the short description of economy, efficiency and

[2] The existing provision is in section 93 of the Health and Social Care (Community Health and Standards) Act 2003.
[3] The existing provision is in section 94 of the Health and Social Care (Community Health and Standards) Act 2003.

effectiveness (see, for example, Part 2 of the Public Finance and Accountability (Scotland) Act 2000), so the phrase in section 149D(d) is akin to “apples, oranges and fruit”.

Social Care Wales Accounting Officer and Accounts Directions

23. Paragraph 15(2) of Schedule 2 to the Bill sets out that the accounting officer of Social Care Wales is to have the responsibilities specified in a direction by the Welsh Ministers. Similarly, paragraph 16(2) sets out that Social Care Wales’ accounts must comply with any directions given by the Welsh Ministers. In order to help ensure consistency of approach across the public sector, it is desirable that these provisions provide for directions by the Welsh Ministers with the consent of Treasury.