Cynulliad Cenedlaethol Cymru
Y Pwyllgor Iechyd a Gofal Cymdeithasol

National Assembly for Wales
Health and Social Care Committee

Mark Drakeford AM,
Minister for Health and Social Services
Welsh Government

7 July 2015

Dear Mark,

Care and Support (Eligibility) (Wales) Regulations 2015

The Health and Social Care Committee has undertaken scrutiny of the Care and Support (Eligibility) (Wales) Regulations 2015 and the associated code of practice to consider whether they will achieve the aim of the Social Services and Well-being (Wales) Act 2014. To assist us in forming our views, we issued a call for written evidence and heard oral evidence from a range of stakeholders at our meeting on 11 June.

The purpose of this work was to inform Assembly Members' preparation for their consideration of the regulations in Plenary on 14 July. Whilst the evidence presented to us did not suggest that the Assembly should reject the regulations, concerns were raised with regards to a number of issues. We believe that these concerns should be addressed by making changes to the code of practice on eligibility. Further information on these issues is detailed in the annex to this letter.

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A copy of this letter will be shared with the Constitutional and Legislative Affairs Committee.

Yours sincerely,

David F. Rees.

David Rees AM

Chair, Health and Social Care Committee

cc: David Melding AM, Chair of the Constitutional and Legislative Affairs Committee

Annex A – Issues raised in evidence on the Care and Support (Eligibility) (Wales) Regulations 2015

Community resources

The Explanatory Memorandum accompanying the regulations states that this new approach to eligibility will reduce the number of people who require formal care and support services (and a care and support plan) by introducing access to preventative services without the need for a formal plan. Stakeholders raised concerns about this intention, and questioned the adequacy and availability of such services.

Stakeholders also commented that the lack of a definition of preventative services could result in inconsistencies in different parts of Wales if left to local authorities' own interpretation of services.[1] Keith Bowen, representing the Wales Carers Alliance, summed up these concerns by saying:

> "We don't particularly feel that, at the moment, there is that framework or network of infrastructure of community services out there to really fulfil the aims of the Act […] Will there actually be the community preventative services across the whole of Wales for local authorities to be able to refer on to?"

Age Alliance Wales also raised concerns regarding the long term availability of community services, particularly during times of austerity. The Committee heard that people may rely on existing services to help them live independently, and there is no guarantee that such services will continue to be available in forthcoming years if the public funding on which they depend is cut.

The Wales Carers Alliance noted that local authorities only have a general duty to plan for and provide community preventative services whereas these regulations deal with decisions relating to individual legal rights and entitlements. It believes there is a potential area for major dispute where local authorities may consider

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[1] Although preventative services are defined in section 15 of the Social Services and Well-being Act, the definition is drawn in terms of the intended purpose of a service not in terms of a list of services.

that a certain service or community activity is adequate to meet a person's needs (and therefore deems them "in-eligible") but that person disagrees.

Keith Bowen also told us that when local authorities decide that a person's needs and well-being outcomes can be met through a community service, there should be a clear onus on the authority to record the rationale for the decision and how that service will meet the person's well-being outcomes and needs. We were told that the Care and Support (Assessment) (Wales) Regulations 2015 and code of practice on assessments state clearly that the local authority must record exactly what community resource is meeting a particular assessed need (and how), and that stakeholder groups would be more comfortable if the Care and Support (Eligibility) (Wales) Regulations 2015 and the associated code of practice also included the same requirement.

We note the concerns raised by stakeholders around the consistency and availability of community preventative services across Wales, particularly given the Welsh Government's intention that more people can be signposted to these services, and fewer people will require formal care and support services. We believe that the eligibility framework should set out explicitly that if a suitable preventative service (or alternative option) is not available to meet an individual's needs and well-being outcomes, they must automatically become eligible. We recommend that the code of practice accompanying these regulations be amended to:

- **include a requirement to record a person's need and well-being outcome; and**
- **specify exactly how a particular community service would be meeting that need and well-being outcome.**

'Can and can only' test

Several organisations highlighted the risk that the 'can and can only' test could lead to delays in an individual's ability to access the care and support they need, and decisions being made that are not in the person's best interest.

Age Cymru told us that it is concerned that the restrictive nature of the test creates potential for its application to become a barrier to accessing personalised services. This is because it could be interpreted in such a way that a person has to demonstrate that their needs are not being met by the preventative services available in the community. It said that steps must be taken to ensure that this does not delay people from accessing personalised services to support the achievement of their well-being outcomes.

Rick Wilson from the Wales Alliance for Citizen Directed Support (WACDS) told us that there is an ambiguity in the ‘can and can only’ framework. He noted:

> “[my] anxiety about ‘can and can only’ is that local authorities could potentially use that to highlight people having to exhaust their own social networks before the local authorities have a duty to provide a care plan and an assessed service.”

The WACDS said that legal opinion has suggested that the ‘can and can only’ test could be interpreted by some local authorities as meaning that people approaching them for support would be expected to ‘prove’ that they had made every attempt to overcome the barriers to them achieving their wellbeing outcomes within family and community resources before being listened to. It noted that this would create unnecessary and harmful delays for individuals, and therefore wants to see guidance that ensures that this approach is not permitted:

> “We are concerned that the requirement for individuals to exhaust all possible family- and community-based options for support before becoming eligible for statutory services could widen the gaps that people can fall through. We do not wish to see people being expected to ‘prove’ that they have made every attempt to overcome the barriers to them achieving their wellbeing outcomes within family and community resources before being listened to. We would therefore like to see guidance that discourages this.”

The Motor Neurone Disease Association said that the ‘can and can only’ test could leave people at risk of receiving low quality or inadequate support for a significant period before the local authority is willing or able to step in. It noted that if people, before they can access the appropriate services, are required to demonstrate that they have exhausted the capacity of local, more generalist services to meet their needs, this would create “a serious risk that people with a rapidly progressive condition could face unnecessary delays in accessing services."

We note concerns raised regarding a potential delay in accessing services should an individual be required to demonstrate that they had tried all other options (such as a generic community service) before they can become eligible for care and support arranged by a local authority. We agree with the view expressed by stakeholders that individuals should not experience delays in accessing services or feel under unnecessary pressure to demonstrate that they are unable to meet their well-being outcomes without care and support arranged by the local authority. We recommend that steps are taken through guidance to local authorities to firmly clarify their responsibilities prior to the commencement of the regulations.

Several organisations including the Wales Carers Alliance raised concerns that it was unclear whose responsibility it will be to demonstrate that a person's assessed needs can or cannot be met with the assistance of services in the community and told us that amendments were required to rectify this. In a published briefing, Carers Wales stated:

> "The draft Code of Practice needs to be more prescriptive about how the process is managed. Will the onus be on the local authority to show that needs can be met elsewhere (by community based or preventative services)? We feel very strongly that this responsibility should lie with local authorities and if the need cannot be met then a person meets the eligibility criteria for a care and support plan."

We strongly believe that the code of practice should be clear that the responsibility for demonstrating that an individual's needs and well-being outcomes can be met through community services should be placed on the local authority rather than on the individual. We recommend that the code of practice be amended to reflect this.

Impact on carers

Stakeholders told us that the need to access services outside of the eligibility criteria could lead to additional pressure on unpaid carers and families. The Social

Care and Wellbeing Alliance Wales told us that its overall impression is that the eligibility criteria as currently written rely too much on informal support from family and friends.

Age Cymru and Wales Carers Alliance also shared concerns that this change of emphasis could easily result in additional demand and expectation being placed on unpaid carers to meet the care and support needs of their loved ones and take on increased care tasks themselves.

Witnesses called for the code of practice to be amended to explicitly state that the willingness and ability of a carer to be able to provide care, at present and in the future, must be recorded, as well as how any preventative services are judged to meet assessed needs and outcomes.

We would be very concerned if the introduction of these regulations resulted in increased pressure on unpaid carers to fulfil the care needs of their family and friends in place of local authority provided care. We recommend that the code of practice be amended to:

- **make it clear that there should not be an over-reliance on voluntary caring arrangements; and**
- **include a requirement for the willingness and ability of a carer to provide care, at present and in the future, to be recorded as part of the eligibility criteria process.**

Best interests of the person

We also heard evidence that when a local authority makes a decision on a person's eligibility for services, it should consider what would be in the best interests of that individual. Jim Crowe representing the Disability Reference Group cited an example of a young adult with learning disabilities who may benefit from living independently of their family. A local authority could use the 'can and can only' test to determine that that young person should remain living at home. Dr Samantha Clutton also spoke of the best interests of children in her evidence. She told us that:

> "In considering 'can and can only', what we would like to continue is what has been the bedrock of children's social care in terms of making a decision

> on whether social care intervention is in the best interests of a child. We believe that that should still be at the heart of decisions about social care intervention in children’s lives. […]
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> A child may, in theory, have access to a community service, but they are not going to be able to achieve that access without the intervention of adults... When we’re making best-interest decisions in relation to a child, we need to ensure that, in deciding there is a service in the community that can meet those needs, we put in place support to make sure that they can access that.”

We believe that when making decisions about a person’s needs, it is vital that the local authority interpret the ‘can and can only’ criteria in a way that meets the best interests of that individual and enables them to achieve their well-being outcomes. We recommend that this should be made clear to local authorities through guidance on the implementation of the regulations.

Advocacy

Several organisations told us that the code of practice should be strengthened in relation to provisions around access to advocacy. Dr Clutton said that Barnardo’s Cymru would like to see a presumption in the code of practice that children and young people will need an advocate:

> “We do believe that there should be a presumption that every child and young person needs an advocate to act for them and help them have a voice within the care and support planning process and the assessment process.”

Age Cymru is concerned that some of the language and phrasing used in the code of practice does not reflect the intention of the work of the Advocacy Technical Group which participated in the development of the draft code of practice on advocacy:

> “In particular, it fails to recognise that support by family and friends may be inappropriate, as opposed to unavailable. Where there are conflicts of interest between an individual and members of their family, or potential safeguarding concerns, advocacy by those family members is entirely

> inappropriate. The paragraph also fails to reflect those situations where independent advocacy is appropriate.
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> In line with the comments above, we are concerned about the phrasing that has been added around inclusion of an advocate ‘where one has been identified’ as this does not reflect the importance of providing advocacy where an individual can, and can only, participate effectively in assessment, eligibility and other processes with the assistance of an independent advocate.”

We share the views of stakeholders that access to independent advocacy should be available as a matter of course to all children and for adults who require this assistance. We recommend that the code of practice be amended to strengthen these provisions. This is particularly important to ensure that support is provided to anyone involved in the eligibility process who needs access to an independent advocate to enable them to understand their rights and how decisions are taken.

Reviewing decisions

Concerns were raised by stakeholders in relation to arrangements for reviewing decisions taken by local authorities on eligibility for care packages. We were told that making a formal complaint was not an appropriate mechanism should an individual feel that their circumstances had not been considered satisfactorily, and that it was unclear how a person would be considered eligible for re-assessment. In its written evidence Age Cymru said that the draft code of practice gives local authorities a large degree of discretion in deciding whether a person requires a re-assessment of whether their needs are being met. It said that the implication appears to be that if the local authority is satisfied that needs have not changed or that needs are being met, then no re-assessment would take place. It also stated that it remains unclear what recourse, if any, exists for the person.

Whilst we were reassured by the Minister’s letter of 10 June in which he stated that “should someone feel that the care service they are receiving is not meeting their needs they, or their representative, can request a review of that service and/or a re-assessment of their needs at any time”, we do not believe that this is reflected in the code of practice as it is currently drafted (which focuses on a right to re-assessment when circumstances or needs have changed).

In our report on the Regulation and Inspection of Social Care (Wales) Bill, we commented that there should be adequate provision for people who have been found ineligible for services to access redress. In that report we recommended that the arrangements set out in sections 19, 21 and 24 of the Social Services and Well-being (Wales) Act 2014 be kept under review to ensure that the mechanisms for reassessment and review of decisions in relation to individuals' eligibility are robust and provide appropriate redress.

We welcome the clarification provided in the Minister's letter of 10 June that someone can request a review or re-assessment at any time should they feel that the care service they receive does not meet their needs. However, we believe that the code of practice should set out a prescribed mechanism that:

- **enables an individual to challenge formally eligibility decisions; and**
- **sets out clearly the timescale within which an individual should receive a re-assessment.**

We strongly believe that service users should feel confident in their ability to seek redress if they believe that the solution provided by the local authority does not – or will not – meet their needs and well-being outcomes. We also believe that, in requesting a re-assessment, service users should not have to demonstrate that their circumstances have changed significantly. In order to provide clarity to local authorities and service users, we recommend that the code of practice is amended to:

- **reflect the information about re-assessment outlined in the Minister's letter of 10 June; and**
- **set out the formal arrangements for users to seek redress outlined above.**

UN convention on the Rights of Disabled People

In our report on the Regulation and Inspection of Social Care (Wales) Bill, we recommend that the Minister for Health and Social Services bring forward amendments to require all those who exercise functions under the Bill to have due regard to the United Nations Convention on the Rights of the Child, the United Nations Convention on the Rights of Disabled People, and the United Nations Principles for Older Persons.

The code of practice on assessments includes reference to having due regard to the United Nations Convention on the Rights of Disabled People. However, the same reference is not included in the code of practice on eligibility, even though it makes reference to the United Nations Convention on the Rights of the Child, and the United Nations Principles for Older People.

This inconsistency was highlighted to us in both written and oral evidence. Jim Crowe representing the Disability Reference Group said:

> "I think it's going to look increasingly odd that the Act and parts of the Act, regulations and guidance, don't refer to the United Nations Convention on the Rights of Persons with Disabilities. That is the fundamental statement of global legislation as it applies to disabled people. It seems extraordinary that it's missing from the face of the Act. It is now in one or two of the codes of practice, but it's not consistent.
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> I think the fundamentals, like referencing Acts that the UK Government has ratified and that the Welsh Government has supported, really should be flagged up within this guidance, because disabled people are a significant sector of the population who will be affected by this legislation and guidance".

We believe that consistency across the relevant pieces of primary and secondary legislation is important for ensuring that provisions are implemented fairly and that service users can access the care they require to meet their needs. We therefore recommend that the code of practice on eligibility make reference to the United Nations Convention on Disabled People, as well as the United Nations Convention on the Rights of the Child and the United Nations Principles for Older People.

Reviewing the implementation of the Regulations

These regulations are an important element of the implementation of the Social Services and Well-being (Wales) Act 2014 and will result in a big change to the way social care services are delivered. We believe that it is vital to ensure that the new eligibility framework delivers the right level of access to care and support for people who require it across Wales. Mr Burch from ADSS Cymru noted in oral evidence that “we will have to make sure that we monitor it in ways that help us ascertain that people aren’t, for example, being denied services they do need”.

We believe that service providers have a responsibility to ensure that people’s needs are being met in order to allow them to fulfil their well-being outcomes. We recommend that the Welsh Government and local authorities monitor closely the implementation of these regulations at an early stage to ensure that the needs of individuals are being met. Additionally, in the legacy report which we will publish at end of this Assembly, we will recommend that our successor committee review the implementation of these regulations at an appropriate time.