



Llywodraeth Cymru  
Welsh Government

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*Dear David,*

10 June 2015

### **Regulation and Inspection of Social Care (Wales) Bill**

I would like to thank you and the Committee for the further opportunity to discuss the Regulation and Inspection of Social Care (Wales) Bill on 3 June 2015.

I am pleased to provide the Committee with information on the following issues which were raised during the session:

- a.) The inclusion of a provision on whistleblowing in the Bill and discussions with the UK Government on the wording of such a provision; and
- b.) The right of appeal for an individual regarding decisions relating to their eligibility to receive care and support services (and support services for carers).

In respect of the matter of whistleblowing, I can confirm that, during the passage of the Social Services and Well-being Act 2014, the Welsh Government made a commitment to consider whistle-blowing in social care within the legislative framework established by the Regulation and Inspection Bill. Members will recall that commitment followed the tabling of an amendment from William Graham.

In response to a question by the Committee on 3 June 2015, I confirmed that commitment. I also outlined my intention to make provision pursuant to the regulation making power in section 26 of the Bill which will place a duty on service providers to ensure that they have adequate policies and procedures in place with regard to whistleblowing. Furthermore, the guidance which will be issued pursuant to section 28 of the Bill would then set out more detail in terms of what is expected from those policies and procedures. This is consistent with the approach taken in the Bill generally that all of the key duties which are to be placed on service providers will be achieved via the regulations under section 26 and section 27 of the Bill.

In relation to the question of competence, previous legal advice regarding proposed amendments to the Employment Rights Act 1996 via the Social Services and Well-being (Wales) Act 2014 has been clear that those amendments would have been outside the National Assembly for Wales' competence.

While in Committee, I made a suggestion to write to the Secretary of State regarding this issue, to which Darren Millar replied:

*"I don't think that we're suggesting that you write to request that dispensation be given to the Welsh Government to make changes to employment law; we're simply asking you to have a discussion about whether there's an appropriate section that can be introduced to the Bill that protects individuals who want to blow the whistle on poor practice that may be putting individuals at risk. I think that's an entirely different proposition that you can make to the Wales Office and the UK Government, and I would suggest that that is the way in which you might want to approach it."*

I have considered the matter further following the Committee. When questions of competence arise, Ministers take advice from Welsh Government advisors. Decisions are taken in light of this advice and it is the Supreme Court who will make the ultimate judgement should the Bill be referred there, after its passing, by the Attorney General or the Counsel General. Enquiring about the Secretary of State's view on the Assembly's competence to legislate in relation to particular issues will not take matters forward and I consider that there is a better approach to take. My officials will continue to discuss policy matters related to the provisions in this Bill with their counterparts in Whitehall and through these discussions will cover our policy approach in relation to whistleblowing as outlined above. This, I feel, is in line with the discussion at Committee and is a better way to direct efforts in this important area.

In addition, I am keen to support the Committee further in this area. Whilst members will be aware that it is not possible to have a definitive answer on whether 'whistleblowing' is in competence, it is possible to consider specific proposals in this way. Questions of competence will always depend on the particular provision in question and therefore any discussion about competence can only be had with reference to a specific provision which might be included in the Bill. If the Committee does have a specific legislative proposal in relation to whistleblowing I confirm that I will share with the committee the Welsh Government's view on whether the provision in question would be within competence.

The Committee has requested that I provide further detail on eligibility and routes of redress for service users and carers. I am happy to do so – and this is set out below - but would take the opportunity to clarify that this is not something which would be appropriate to incorporate within this Bill as it is a matter for the Social Services and Well-being (Wales) Act 2014. By way of background, provision in relation to eligibility is set out in section 32 of the 2014 Act and the determination of eligibility criteria is set out in regulations made pursuant to the power in section 32(3). Those Care and Support (Eligibility) (Wales) Regulations 2015 are subject to the super-affirmative procedure and are currently undergoing the full scrutiny of the Assembly since they were laid on 8 May.

The 2014 Act, its accompanying regulations and the Code of Practice to be issued on Part 3 of the Act: *Assessing the Needs of Individuals*, (a copy of which can be found at: <http://gov.wales/docs/dhss/publications/150508code3en.pdf>) do not make any special provision for a system of appeal against decisions on eligibility. This is deliberate and for good reason because the duties which are being placed upon local authorities means that their approach must be one of assessment, re-assessment and review rather than a blunt decision between eligibility or ineligibility.

Under the 2014 Act people are part of the assessment process rather than passive recipients and the code emphasises our commitment to a partnership, co-production approach in helping people meet their well being outcomes. People have the right for an assessment to be reviewed (sections 19, 21 and 24 of the 2014 Act) and the process is straightforward and can be triggered quickly and without additional bureaucracy. This applies equally to everyone, including carers.

The 2014 Act provides that the appearance of a need for care and support is sufficient to place a legal requirement on a local authority to undertake an assessment of an individual's care and support needs. In all cases – whether an individual is deemed eligible or not - the local authority must include an explanation of how the recommended action (be it the provision of information, advice or assistance, a care and support plan, or other means) will help meet the identified outcome or otherwise meet needs identified by the assessment. The code extends this duty by requiring that a review of an assessment must be undertaken where the previous assessment has not fully addressed the person's care and support needs, or where there has been a change in the person's circumstances.

Where, through assessment, a local authority decides that a need will not be met by a care and support plan it must set out clearly in the record of the assessment how the proposed action will help the person achieve their personal well-being outcomes. This requirement has been included in the updated version of the Care and Support (Assessment) (Wales) Regulations 2015.

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. As a last resort anyone who feels the local authority is not meeting its statutory duties, or who is dissatisfied with the service they are receiving, has recourse through the local authority's complaint procedure.

I hope that the information provided in this letter answers the questions raised by Committee members and I look forward to answering any further questions from members in due course.

*Best wishes*

*Mark*

**Mark Drakeford AC / AM**

Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol  
Minister for Health and Social Services