



Proposed changes to legislation on social care and continuing health care

November 2022

Introduction

The Older People's Commissioner for Wales welcomes the opportunity to respond to the Welsh Government's consultation on proposed changes to legislation on social care and continuing health care. The Commissioner would like to offer comments on the specific areas set out below.

Introducing Direct Payments for NHS Continuing Health Care

The Commissioner agrees in principle with the Welsh Government's proposal to enable health boards to make direct payments to people who qualify for NHS Continuing Health Care Funding (CHC).

The Commissioner is aware of older people who have had to choose between continuing with Direct Payments or receiving CHC funding. In such cases, the needs of the individual have not always been the priority: for instance, when there has been disagreement between different funders over who should pay, and where Health Boards have suggested that individuals need to change care settings in order to receive the CHC funding to which they are entitled. This might mean moving out of their own home, or into a different care home.¹ The Commissioner would expect that the result of introducing Direct Payments for CHC would be to ensure seamless, person-centred care for all older people who need it.

However, the Commissioner has concerns about how Direct Payments are working in practice in social care, and about risks inherent in any CHC direct payment scheme.

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Take-up among older people

Take-up of Direct Payments in social care is low among older people. Audit Wales found that little over a third of those receiving Direct Payments (36.1%) are aged over 65, despite this age group making up over 75% of adults receiving social services.² Direct Payments in both health and social care must include provisions to help more older people, including carers and people living with dementia, benefit from the flexibility of Direct Payments without being overwhelmed with unfamiliar and onerous responsibilities on top of the issues with which they are already struggling.

Supply of care and support services

Local authorities sometimes offer direct payments to older people as a last resort, especially in rural areas, where there are particular problems with the availability of domiciliary care. Direct Payments are no substitute for a sufficient supply of care and support services. The success of Direct Payments is dependent on there being stable sources of support within communities to which people can be referred, or which they can access directly.

Supervision and monitoring

CHC is granted to people who have complex care needs. If people are purchasing services to meet any needs themselves, it is important that the health board undertakes appropriate supervision and monitoring, to ensure the adequacy of the care and support provided.

Top-up fees

The Commissioner is disappointed with the Welsh Government's response to Recommendations 11 and 12 of the Senedd Public Accounts and Public Administration Committee's report on Care Home Commissioning,³ and is seriously concerned about the risk of older people being charged top-up fees to access essential services paid for with CHC direct payments.

The Commissioner's Advice and Assistance team has received several inquiries from individuals with relatives living in care homes who had been asked by a care home provider to pay additional fees on top of Continuing Health Care funding by the Health Board. The reasons given by the provider for levying the top-up fees were contradictory. Inquirers said they had been told that the fees were for additional benefits such as access to the garden (which the residents concerned, who were confined to bed with late-stage dementia and approaching the end of their lives, could not use), or for accompanied visits to a GP, (which the Commissioner regards as a basic essential, not an additional luxury). However, the Commissioner has seen a letter from a care home manager which states that the fees were

being levied because the Health Board rate for Continuing Health Care funding was not sufficient to cover costs.

It is concerning that residents and their families have found it challenging to dispute care home top-up fees. Individuals can take cases to local authority Trading Standards Departments for action by them and can take legal action themselves. However, care home funding is a complex area, and the level of expertise needed is not always available. This means that personal legal representation is the most likely route, but it is expensive and difficult to find an appropriate solicitor.

Despite interventions from the Commissioner with the Health Board and the provider, and despite extensive discussions between the Commissioner's team and the Competition and Markets Authority, there appears to be no avenue for redress and the provider was continuing to charge the additional fees. This is a serious concern. It is essential that anyone paying for a service with a CHC Direct Payment is protected from being charged unjustified top-up fees, and that there should be a viable avenue for redress.

Duty to report an adult at risk

The Commissioner supports the current organisational duty to report an adult at risk under section 128 of the Social Services and Well-Being (Wales) Act 2014, which requires 'relevant partners' of a local authority, such as the police, probation services, a local Health Board or NHS Trust, the Welsh Ministers or Secretary of State (in discharging certain functions) and other local authorities, to report adults at risk in Wales. However, the Commissioner has several concerns about introducing a legal requirement for certain individuals to report an adult at risk.

First, it is important to recognise the rights and autonomy of older people at risk of or experiencing abuse. The extent to which older people may be involved in making decisions and determining actions related to abuse, will depend upon several factors (e.g., issues of mental capacity; whether the safeguarding concern relates to a public interest issue). In general, however, the wishes and preferences of older people must be given full consideration when determining actions around safeguarding concerns. There is a risk that a 'duty to report' will result in the voices of older people being marginalised in safeguarding processes.

If safeguarding interventions are to be effective, practitioners must be allowed to exercise their professional decision-making abilities and to make judgments on an individual basis, drawing upon the knowledge acquired through their relationships with individuals and families. A requirement for a 'duty to report', especially if it is enforced through sanctions,

could dissuade older people from early disclosures of abuse, which might have helped prevent abuse from escalating.

The fear of sanctions could also lead to disproportionate, risk averse practices where practitioners report all concerns of abuse, without fully investigating the specifics of a situation. Premature reporting could harm relationships, both those between older people and practitioners and between older people and wider family members, in ways that could potentially exacerbate, rather than eliminate abuse.

Amendments to regulation of service providers, responsible individuals and the social care workforce

The Commissioner agrees with the proposals to allow Care Inspectorate Wales to access information and to enter a premises of a service, which appears unregistered (contrary to requirements). This is critical to ensuring that those in receipt of that service are receiving the appropriate care and support.

The Commissioner and her team would be happy to discuss these comments further.

¹ Older People's Commissioner for Wales, *Care Home Commissioning for Older People*, May 2022 [Consultation Response - Care Home Commissioning for Older People - Older People's Commissioner for Wales](#)

² Audit Wales, *Direct Payments for Adult Social Care*, April 2022 [Direct Payments for Adult Social Care \(audit.wales\)](#)

³ Julie Morgan AS, Deputy Minister for Social Services, Response to the Report of the Senedd Public Accounts and Public Administration Committee Report on Care Home Commissioning, October 2022 [ANNEX 7 – Format of Cabinet Response to Audit Committee Report \(senedd.wales\)](#)

The Older People's Commissioner for Wales

The Older People's Commissioner for Wales is an independent voice and champion for older people throughout Wales.

The Commissioner is taking action to protect older people's rights, end ageism and age discrimination, stop the abuse of older people and enable everyone to age well.

The Commissioner is working for a Wales where older people are valued, rights are upheld and no-one is left behind.

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