

Response to White Paper: Rebalancing Care and Support

April 2021

Introduction

The Commissioner welcomes the opportunity to respond to this Welsh Government's consultation on the Rebalancing Care and Support White Paper ('the White Paper') which focusses on the commissioning arrangements for care and support services.

Social care provides essential support to people of all ages, helping them to live as independently as possible, do the things that matter to them and have the best quality of life. Our social care system must deliver care and support of the highest standard, and commissioning plays a vital role in this. However, our social care system must also have the resources it needs if it is to deliver the aspirations set out in the Social Services and Well-being (Wales) Act 2014 ('the 2014 Act') and respond to the changed environment as a consequence of the Covid-19 pandemic.

Financial pressures in recent years have impacted on social care services for people of all ages and the Commissioner has consistently called for more investment in our social care system. The debate around social care funding has gone on too long. The Commissioner is disappointed that the challenging environment of the Covid-19 pandemic has hindered the development of practical proposals to address how the delivery of social care can respond to increasing demand – both from an ageing population and as a consequence of the Covid-19 pandemic on society's health.

The pandemic has both highlighted and exacerbated the longstanding fragility of the social care sector. However, the need to ensure the availability of high quality, sustainable care and support services for those who need them remains and is becoming more urgent. We need also to value the contribution made by the social care workforce through ensuring that their value is reflected in their Terms and Conditions. The future funding of social care will therefore need to be prioritised by the Welsh Government within its future budgets.

The White Paper does not address the central question of funding and without knowing what funding will be available in the future, it is difficult to gauge how far the expected benefits of the changes proposed in this White Paper would be realised for older people.

Rebalancing rights

A fundamental part of delivering high quality social care is ensuring that people's rights are always promoted and upheld – including when the operating context is at its most difficult. The Covid-19 pandemic has sadly shown that rights – including people's fundamental human rights – have not always been at the fore in the delivery of social care.

A particular area of concern has been within the delivery of social care through accommodation-based services. As such, the Commissioner expressed concern early in the pandemic about the potential breach of the human rights of older people living in care homes. The Equality and Human Rights Commission (EHRC) subsequently published a [briefing](#) on equality and human rights in residential care in Wales during coronavirus which concluded that there is evidence that equality and human rights standards have not been upheld, including in key decisions about care home admissions, visits and access to critical care. This is a concern, especially given the central principle of the 2014 Act to give voice and control to people who need care and support.

Social care services must be fundamentally based in a culture of promoting human rights and this must also be a consideration for commissioners. This must include ensuring that people know what rights they have and how to exercise them. The lack of clear and accessible avenues of enforcement of people's human rights places even greater importance on the need for service commissioners to ensure that upholding rights is seen as a core element of high-quality social care. This must include the commissioning of Independent Advocacy services to help ensure that people in need of care and support are informed of and have access to their rights.

Work is also required to address the power imbalance between people who are receiving services and those delivering or providing access to care and support services. Despite the ambition of the 2014 Act to embed coproduction throughout social care, there remains an implementation gap. This is most evident in the context of accommodation-based services and the inability for an older person living in a care home to 'vote with their feet' and seek out an alternative service if they are unhappy. Many older care home residents and their families fear eviction if they challenge poor care or act to enforce their rights. Whilst in theory the law offers protection from such instances, the Commissioner is aware of cases where this protection was not sufficient.

Annex 1 describes how the 2014 Act put into law the rights and responsibilities of people who need care and support and carers who need support. It states that the 'social care sector will use the statement of well-being to design and deliver services with people' and that this will be 'an important driver in the shift to an approach which puts people at the centre, the outcomes they wish to achieve, and in giving them greater voice and control'. However, it remains unclear how any of the proposals in this White Paper will help ensure that people know their rights and that those rights are upheld within the context of social care. The Commissioner seeks further clarification on this central issue of rights.

Appointment of a Chief Social Care and Social Work Officer

The Commissioner welcomes the proposal to create the function of a Chief Social Care and Social Work Officer to be located within the Welsh Government. In her report, [Leave No-One Behind](#) the Commissioner called for a Chief Social Care Officer to act as the head of

the profession in Wales and to ensure that social care expertise is at the heart of decision making, on a par with the NHS. Given the complexity and diversity of social care and to ensure a strong voice for social care users and workers as well as representing the social care profession at the highest level, this function may need to be covered by two roles. This could be through appointing a Chief Social Care Officer for Adults and a Chief Social Care Officer for Children, or through appointing a Chief Social Care Officer focused on those using social care services and those who work in social care, and a Chief Social Worker representing social workers and providing social work expertise.

The White Paper does not outline how the Chief Social Care and Social Work Officer role will work with the proposed new 'national office' for social care, in whatever form this new office will take. Moreover, the role of the proposed 'national office' will need to be explained in respect of the new proposed framework for Regional Partnership Boards (RPBs). The Commissioner would, therefore, like to see further clarity on these points.

A national commissioning framework

The Commissioner welcomes the proposal for a national approach to commissioning across Wales in order to help create greater consistency and fairness. However, whilst this White Paper aims to focus on addressing commissioning and structural challenges that currently exist, less attention has been given to how the proposed changes will improve outcomes for those using care and support services. It is unclear how the proposals in the White Paper will place the person at the centre of commissioning, which is a concern as this is fundamental to delivering high quality services.

To deliver high quality services, the national framework must include a requirement for systematic and thorough engagement with older people. Older people, including those living in care homes, must have a voice in the definition of what constitutes quality in a service. The framework must also ensure that the provider perspective is included to ensure that their expertise does not go overlooked.

The Commissioner's Review of the quality of life and care of older people living in Care Homes in Wales, [A Place to Call Home? 2014](#), highlighted the need for older people living in care homes to feel a greater sense of control over the care they received and for services to be responsive to their needs as an individual. Moreover, the Commissioner's engagement with people living and working in care homes, and their families and friends during the pandemic, reconfirmed a number of factors which are essential to a quality service, including: advocacy, voice, choice and control; proactive communication with families; help and support for managing bereavement and grief, for managers and residents; access to clinical services and appropriate hospital admission and discharge arrangements; access to other services and community resources.

To ensure that older peoples' perspectives inform commissioning practices and service delivery, the national framework should specify engagement with older people throughout the commissioning cycle: at the "analyse" stage, to identify needs and aspirations; at the "plan" stage, to influence service transformation; at the "secure services" stage, to improve quality and safety, and at the "review" stage, to ensure that the right outcomes and experiences are monitored, good practice identified and lessons learned.

It is unclear also how a new national commissioning framework will align with The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017. These Regulations enact the powers in section 27 of the 2016 Act and impose requirements on service providers as to the standard of care and support to be provided. There was significant consultation on these Regulations which sought to place the person at the centre of what constitutes high quality care, responding to some of the concerns raised by the Commissioner in her A Place to Call Home? report.

These Regulations aimed also to move the sector towards a single outcomes framework to be used by all bodies involved in the regulation, provision and commissioning, and inspection of care homes. The aim of such was to put quality of life consistently at the heart of the delivery, regulation, commissioning and inspection of regulated care and support services and to cut down burdensome duplication of work. Whilst The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 will remain the standard against which Care Inspectorate Wales will regulate and inspect, and the White Paper makes reference to these Regulations, it does not provide detail on how a national commissioning framework will complement them in practice.

In its description of the complexity of the social care market, the White Paper recognises that people commissioning care and support for themselves directly are part of the picture. However, it is disappointing that this White Paper does not address the difficulties people encounter within the direct payments scheme.

Direct payments can be used for an individual to arrange for home care, for example through a personal assistant, instead of the traditional approach via a Local Authority. There is variation across Wales in how these are used and take up has been low. It would seem that direct payments to older people are often used as a last resort, especially in rural areas, when domiciliary care providers are unable or unwilling to provide care. As such, the new commissioning arrangements 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.

The national commissioning framework should also specify that services must be provided in Welsh wherever someone requests it. Market management should ensure that there is a sufficient supply of Welsh-language services to deliver this. The Commissioner expects, as a minimum, older people being able to receive services in the language of their choice, and not having to be sent far from home, or even out of Wales, where they cannot do so, to receive any service at all.

Market Stability

Professor John Bolton's [Rapid Review](#) for Care Homes in Relation to Covid-19 in Wales drew attention to the fragility of the domiciliary and residential care markets. The Report highlighted the significant numbers of older people who need to move into extra care or care homes, the rapidly increasing complex physical and emotional needs of people living in these sectors and the knock-on effects of deficiencies in intermediate care supply on the wider health and care sector.

The difference in care home fees between state-funded and self-funding residents is a known area of concern. In particular, this system is increasingly unfair on those who fund their own residential care and are paying more to cross-subsidise state-funded care, while often going without the protection of human rights law to which state-funded residents are entitled.

Prior to the Covid-19 pandemic, demand for nursing homes was increasing but supply was decreasing¹. Care and support for the most vulnerable older people should not be left to market forces. Any new commissioning arrangements must ensure a stable supply of care and support appropriate to need, including high-dependency services.

A new market issue, caused by the pandemic, is the difficulty care homes now have in getting affordable insurance to cover the Covid-related risk attached to their work. This has contributed to care homes concern about enabling residents' relatives to visit them indoors, causing great distress to them and to their loved ones. Any work to address the stability of the care market should therefore include the availability of affordable financial products to avoid this being a barrier to the provision of an appropriate service.

During the pandemic it has not been the time to address the shape of service provision in the care home sector. The priority has been, rightly, to ensure that there are enough care home places available. As Wales emerges from the pandemic, it will be essential to ensure that Wales has a sufficient supply of the right kinds of care homes, especially nursing homes for people with dementia which also nurture family relationships.

In the *A Place to Call Home?* report the Commissioner called for a clear action plan to deliver the preferred provider base/market in Wales. Subsequently, provisions were included within the Regulation and Inspection of Social Care (Wales) Act 2016 in relation to market oversight at both a nation and local level. Given that the Regulations on market assessments were laid this year, consideration must be given to how the proposals within this White Paper avoid creating another layer of complexity.

Regional Partnership Boards

The pandemic has shone a spotlight on the inequalities that exist in our health and care systems and action must be taken at a national, regional, and local level to address this. Regional Partnership Boards (RPBs), with the right tools to develop stronger and effective partnerships, could play an essential role in this. However, it is unclear whether merely establishing the RPBs as corporate legal entities will overcome some of the current issues faced by the bodies.

The RPBs were established to improve the well-being of the population and improve how health and care services are delivered, including to increase integration between social care and health. There have been ongoing discussions about the role of RPBs and their ability to fulfil their role within the current framework. From this perspective, the proposals in this White Paper are to be welcomed. However, the proposals in this White Paper will

¹ *The Care Home Market in Wales: Mapping the Sector* by Professor Keith Moultrie and Nic Rattle, of the Institute of Public Care and Oxford Brookes University 2015 page 14

not necessarily overcome the issues around oversight and governance, including the potential tension between regional working and local democracy.

The White Paper makes reference to the Health Inspectorate Wales (HIW) / Care Inspectorate Wales (CIW) thematic review report on the care of older people which found that progress towards partnership and integrated service delivery for older people remains very mixed. Whilst there is evidence of integrated partnership approaches in some areas, it is concerning that, overall, a 'red' status for partnership working and integration was awarded. The RPBs role in strategic oversight will need to be strengthened so that they prioritise improvements in service integration at a strategic level to deliver better outcomes. Further work is required to set out how the proposals set out in the White Paper will resolve these challenges.

In 2014, the Commissioner's *A Place to Call Home?* Report called for a national plan to ensure the future supply of high-quality care homes and the Population Assessments and Area Plans under the 2014 Act responded to this. However, the Commissioner raised concerns about the robustness and variability of Population Assessments in her [Making Voices Heard](#) report on advocacy services in Wales which highlighted the lack of planning for independent advocacy services within many Population Assessments, despite the requirement in Guidance to do so.

As such, the Commissioner welcomes the clarity that RPBs will be made subject to joint inspection and review by CIW and Healthcare Inspectorate Wales in relation to the effectiveness of joint working, including partnership working, pooled budgets and joint commissioning. However, it is unclear if oversight will be limited to these areas as inspection of RPBs process, whilst important, will not give a complete picture of RPBs effectiveness.

In terms of meeting their legal requirements to meet the assessed needs of the population that they serve, it would seem that RPBs will be largely based on a process of self-assessment through a performance monitoring framework and a report to Welsh Ministers (the White Paper is unclear on whether this is to be an annual report). The citizen voice should be at the heart of both the annual report and the performance monitoring framework. The Commissioner would like to see further detail on both.

It is proposed that RPBs will use real-time population data, outcome measures and market information to enable more frequent needs analysis and impact measurement to inform their Plans. This is to be welcomed. However, the data currently available on social care is lacking. For example, much of the data published under the new Performance and Improvement Framework for Social Services will not be disaggregated by age, and will not provide more detailed information on intersectionality. Without this data being available to RPBs, it is unclear how RPBs will have access to the comprehensive information that is outlined in this White Paper. It is currently unclear whether the new Social Care Data Strategy will address the current gaps in data.

The decisions made by RPBs must also be transparent. The Commissioner called, in her Leave No-one Behind Report, for a review of spending on social care to determine whether the allocation of social care resources is age discriminatory and for action to be taken on

the findings. RPBs play a leadership role in ensuring that the commissioning and delivery of care and support services meet the needs of older people in Wales and that services for older people have parity with other age groups. It is unclear whether RPBs, as corporate legal entities will be subject to the Public Sector Equality Duty (PSED) under the Equality Act 2010 in the same way as is the case for Local Authorities and Health Boards. To ensure equality of service delivery, decisions by RPBs must be subject to Equality Impact Assessments.

Continuing Healthcare Funding

The Commissioner does not agree with the proposal for the new national commissioning framework to exclude continuing health care (CHC), especially as the proposal is that NHS provision of funded nursing care should be included. Exclusion of CHC makes no sense to the individual service user and is not conducive to service integration.

There are a number of issues relating to the operation of CHC funding which must be addressed. It would be a missed opportunity, therefore, for this White Paper not to address them through including CHC funding within the remit of RPBs. A number of the commonly dealt with issues by the Commissioner's casework team are outlined below.

The Commissioner is aware of examples where the needs of the individual have not always been the priority where there is disagreement between different funders over who should pay. In one such case, an individual without capacity was faced with eviction because of disagreement over who would pay for their increased care package following an increase in their needs while awaiting a CHC assessment. This caused immeasurable stress to the individual's family. The Commissioner's casework team assisted the individual's family to take a complaint forward, which then prompted closer working between the Local Authority and Health Board. Any gap in care during an assessment is unacceptable and it is disappointing that this White Paper does not address this.

The Commissioner's casework team has also seen cases where Health Boards have suggested that individuals need to change care settings in order to receive the CHC funding to which they are entitled – for example moving out of their own home, or into a different care home. This may be because there are insufficient qualified staff to provide care in an individual's own home or existing care home, or the financial cost is greater than in a residential setting. However, it is wrong for individuals to be made to choose between changing their care setting and not receiving CHC funding. This causes unnecessary anxiety for the individuals involved. It is concerning that, whilst there continues to be a shortage of suitably qualified care staff (particularly in rural areas), individuals will continue to feel pressure from Health Boards to move into a care home, or from Health Boards and care homes to move into a 'nursing' home once they qualify for CHC funding.

The Commissioner is also aware of individuals who have had to choose between continuing with direct payments or receiving CHC funding. This is particularly relevant in cases where individuals may want to use direct payments to retain particular care staff, or in areas with a limited number of care agencies. One such case resulted in an individual going without the health hours of their care package for months as the Health Board could not find a replacement care agency and were not allowed to fund direct payments. This demonstrates

the need for seamless commissioning and funding arrangements so that the individual is not unfairly impacted by their location and lack of local care agencies.

Older people and their families are contacting the Commissioner's casework team regarding instances where care homes have charged 'top up fees' to individuals with CHC funding. The fees relate to an alleged shortfall in Continuing Health Care funding from a local Health Board. It is not permitted under CHC Guidelines for the resident to be asked to pay top-up fees for CHC-funded care. However, 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 is continuing to charge the additional fees. This is a serious concern.

The evidence from the Commissioner's casework shows that older people can be negatively impacted by the complexities of the CHC system and inconsistencies in its implementation. There is generally a lack of knowledge of CHC amongst the public and individuals and their families are often reliant on the staff's knowledge, awareness and ability to explain the CHC process.

Conclusion

The recent challenges of the Covid-19 pandemic amplifies the need for high-quality social care and made more urgent the debate about how we fund social care. Whilst it is welcomed that this White Paper is aimed at improving the way in which services are commissioned and the social care market managed, it is disappointing that funding is not included, particularly given the central importance of the financial framework to the social care sector.

The Covid-19 pandemic has highlighted that people's rights are not always central in the delivery of social care, despite being a fundamental part of what constitutes high-quality care. Whilst the proposed national commissioning framework is broadly to be welcomed, there is little mention of the role of the 'service user' voice – which is central to embedding rights in service delivery – and how the person will be placed at the heart of the commissioning process.

The role of a Chief Social Care and Social Work Officer or Officers has the potential to play a vital role in ensuring that the social care sector is represented and advised at the highest level within the Welsh Government and this is to be welcomed. Further consideration is needed on how best to enact this function and whether one Officer role can fully represent all areas.

Governance and oversight plays a key a role in ensuring that the appropriate services are available in order to meet the needs of people who need care and support. Therefore, the Commissioner welcomes the proposal to make RPBs corporate legal entities. However, the proposals in this White Paper will not automatically solve some of the current problems experienced by RPBs in relation to regional working and local democracy. Further attention is also required in relation to oversight of the RPBs as, whilst they will be subject to

inspection from HIW and CIW in relation to the effectiveness of joint working there must be assurances that RPBs are also effective in meeting the needs of the population.

More robust and nuanced data will be essential for RPBs and for Welsh Government to judge the effectiveness of the social care sector's ability to meet the needs of the population. The Commissioner has called for improved data collection, in particular in relation to data that is age-disaggregated, to ensure that the experiences of older people who use care and support services are not rendered invisible. Improving social care data and actively filling the gaps in data that currently exist is required if we are to evidence the success or failure of any new policy and practice.

The Older People's Commissioner for Wales

The Older People's Commissioner for Wales protects and promotes the rights of older people throughout Wales, scrutinising and influencing a wide range of policy and practice to improve their lives. She provides help and support directly to older people through her casework team and works to empower older people and ensure that their voices are heard and acted upon. The Commissioner's role is underpinned by a set of unique legal powers to support her in reviewing the work of public bodies and holding them to account when necessary.

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

The Commissioner wants Wales to be the best place in the world to grow older.

How to contact the Commissioner:

Older People's Commissioner for Wales
Cambrian Buildings
Mount Stuart Square
Cardiff
CF10 5FL

Phone: 03442 640 670

Email: ask@olderpeoplewales.com

Website: www.olderpeoplewales.com

Twitter: [@talkolderpeople](https://twitter.com/talkolderpeople)