

Explanatory Memorandum to The Social Services and Well-being (Wales) Act 2014 (Social Enterprise, Co-operative, and Third Sector) (Wales) Regulations 2015

This Explanatory Memorandum has been prepared by the Department of Health and Social Services and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Social Services and Well-being (Wales) Act 2014 (Social Enterprise, Co-operative, and Third Sector) (Wales) Regulations 2015. I am satisfied that the benefits outweigh any costs.

Mark Drakeford AM
Minister for Health and Social Services
5 June 2015

Part 1 – OVERVIEW

Description

1. The Social Services and Well-being (Wales) Act 2014 (“the Act”) brings together local authorities’ duties and functions in relation to improving the well-being of people who need care and support and carers who need support in a single Act. The Act provides the statutory framework to deliver the Welsh Government’s commitment to integrate social services to support people of all ages, and support people as part of families and communities.
2. These regulations specify which organisations are to be treated as social enterprises, co-operative organisations and co-operative arrangements. They also make provision as to what constitutes activity which benefits society, is inclusive, involves people and promotes well-being, and what constitutes a section of society.
3. There are definitions of care and support, preventative services, social enterprises, and a third sector organisation on the face of the Act. These Regulations provide further definition to these definitions, where it has been identified as required, through engagement with the sector and consultation.
4. Although the Act gives a regulation making power, there is currently no definition in these regulations of a third sector organisation. The definition on the face of the Act states “third sector organisation means an organisation which a person might reasonably consider to be activities carried on for the benefit of society.”

Matters of special interest to the Constitutional and Legislative Affairs Committee

5. There are no specific matters identified.

Legislative background

6. The powers enabling these Regulations to be made are contained in section 16 of the Social Services and Well-being (Wales) Act 2014. This section places a duty on local authorities to promote the development of social enterprises, co-operative organisations and arrangements, user led services and the third sector, to provide care and support and preventative services. This duty will be referred to as the section 16 general duty.
7. This statutory instrument must be laid before and approved by a resolution of the National Assembly for Wales (the affirmative procedure).
8. The regulations will come into force in 06 April 2016.

Purpose & intended effect of the legislation

9. Section 16 of the Social Services and Well-being (Wales) Act 2014 (“the Act”) imposes a duty on local authorities to promote social enterprises, co-operative organisations, co-operative arrangements and third sector organisations to provide care and support and preventative services in their area.
10. The Regulations provide further detail about the sorts of organisations or arrangements which fall within those different categories. The Regulations also make provision as to what constitutes activity which a person might reasonably consider to be carried on for the benefit of society.
11. The Regulations will support local authorities to involve people who need care and support and carers who need support.
12. Regulations 3, 4, 5 and 6 make provision about what is treated as an activity which a person might reasonably consider to benefit society.
13. Regulation 7 lists examples of organisations which can be treated as a social enterprise. Regulation 8 provides that an organisation may be treated as a co-operative whether or not it is registered under the Co-operative and Community Benefit Societies Act 2014 provided that it conforms to the principles for a co-operative. Regulation 9 specifies an example of what may constitute a section of society.
14. These Regulations will be supported by chapter 4 of the code of practice on Part 2 of the Act, which covers social services general functions. The power to issue codes is contained in Section 145 of the Act, which states that the Welsh Ministers may issue, and from time to time, revise, one or more codes on the exercise of social services functions.
15. Together, the Regulations and the code of practice being made under section 16, will support local authorities to work with their partners to identify, support and promote these not-for-profit organisations so that they can develop and thrive in the social care sector.
16. The *Commission on Public Service Governance and Delivery*¹ reported:
“We are very clear that public services in Wales face severe and prolonged challenges. The effects of recession and austerity on public-sector budgets will continue to be felt for many years. At the same time, our population is growing, becoming older, and public expectations on the providers of public services are higher than ever before. This creates severe pressures – demand for public services is growing while resources to provide them are falling”.
17. The pressures on local authority social services departments relate to many factors including the fact that people are living longer. Projections show that by 2030 there will be twice the number of people aged over 85 than there are currently.

¹ Report of the Commission on Public Service and Delivery – January 2014 <http://gov.wales/topics/improvingservices/public-service-governance-and-delivery/report/?lang=en>

18. Although demands on social services are increasing, there is no commensurate increase in routine funding to support service delivery. The current financial settlement for 2015/16 has been decreased by 3.4% compared to 2014/15, as a consequence of the large scale budget reductions by the UK Government.
19. Due to this increase in demand it is essential that the future delivery of social care is transformed. The current system is unsustainable. Specifically there is a need to simplify and improve service efficiency and effectiveness. The system must be improved to better integrate services, improve collaboration, create a stronger workforce, and provide people with a greater voice and more control over their own services and well-being.
20. It is intended that the performance of this duty will increase the diversity of provision available, recognising that there is no “one size fits all” approach. It is also aimed at facilitating an environment where people are better enabled to support themselves, where appropriate. It provides a new framework for local authorities to make services more sustainable by working **with** people and organisations to support creativity, innovation and flexibility, as well as securing the benefits of social enterprises, co-operative organisations, co-operative arrangements, user led services and the third sector. It is intended that the performance of this duty will also shift power to local communities, enabling them to create tailored solutions to local issues, and encourage local people and businesses to be more actively involved in their communities to support people to achieve their well-being outcomes.
21. One of the underlying principles of the Act is to increase people’s voice and control in relation to the design and operation of services that affect them. The report of the Independent Commission on Social Services in Wales, “From Vision to Action”² observed that, “Helping to make service users co-producers in their own solutions wherever possible is also much more likely to help people to retain or regain whatever degree of independence is achievable rather than allow them to slip into avoidable dependency. Avoidable dependency is a poor outcome for individuals as well as a continuing drain on resources.
22. The Regulations contain descriptions of these organisations and the arrangements, which are to be used by local authorities when fulfilling this duty. The Regulations set out characteristics and examples which, when read in conjunction with the code of practice, provide a framework for local authorities to identify services, arrangements and activities which benefit society, are inclusive, involve people and promote wellbeing.
23. Social enterprises, co-operative organisations, co-operative arrangements, user led services and the third sector often conduct activities which are deemed to add value, for example, through the employment of local people in delivering the service.
24. People - children, young people, adults and carers, their families and their communities - are rich assets and are at the centre of this legal framework. Working **with** people will be key to delivering well-being and unlocking the potential for

² From Vision to Action - The Report of the Independent Commission on Social Services in Wales
<http://www.icssw.org/vision/?lang=en>

creativity which will make better and more effective use of all of the available resources.

Consultation

25. A 12 week consultation on these regulations was carried out between 6 November 2014 and 2 February 2015. Further details on the consultation process are set out in the Regulatory Impact Assessment in Part 2.

26. The report and a list of respondents can be founds at:

<http://gov.wales/consultations/healthsocialcare/part2/?lang=en>

PART 2 – REGULATORY IMPACT ASSESSMENT

CONTEXT

27. Of the 1,780 settings registered by CSSIW³, 1,562 are owned by the independent sector and 218 are owned by local authorities. Presently, the majority of care and support for individuals is delivered by the private sector. Section 16 of the Act and the accompanying regulations will ensure local authorities change their current practice and promote these alternate service models, by way of contracting, procurement and signposting people to services.
28. Due to an increasing ageing population, the cost of providing care and support to people will increase beyond its already unsustainable level, for local authorities, for the Welsh Government, and for people who receive care and support.
29. The Co-operatives and Mutuals commission report
Social care is a significant economic sector in Wales. In 2011-12, revenue expenditure [of local authorities] on all personal social care services was £1,487 million⁴⁵. The increase in the population of older people and in particular the number of people with long-term health conditions and dementia will mean the sector is set to grow further. A high proportion of social care (87 per cent of adults' services, 69 per cent of children's services and 91 per cent of children's day care) is provided by private, independent or voluntary organisations⁶. There is a modest co-operative and mutual social care sector in Wales at present, with organisations such as Shaw Healthcare, providing residential, domiciliary and special care services, and Gwalia, Hendre, Pennaf and Linc which provide residential care services alongside their housing services. There are also a small number of co-operative children's day care settings. The Commission noted that many organisations have highlighted the potential to develop co-operatives and mutuals in social care. For example, the Welsh Local Government Association said: *The WLGA recognises the value of such delivery models in providing a genuine opportunity for users and carers to shape and deliver services.*
30. The Commission considered that there is a compelling case for a greater role for social care co-operatives because of the added value they can bring to social care services, including:
- High-quality services that are based on co-operative values and principles and not on private profit;
 - Services that are responsive to people's needs, as they are citizen-directed, giving a much stronger voice and greater control to service users and carers;
 - Greater contestability in a market dominated by large, private providers. There is the potential for co-operative day care, social care and community centres to take over community hospitals – possibly with support from the Registered Social Landlords (RSLs).

³ CSSIW Case Management System, 2014

⁴ <http://gov.wales/topics/businessandconomy/business-wales/welsh-coop-mutuals-commission/?lang=en>

⁵ latest published figure for 2013-14 is £1,640 million <https://stats.wales.gov.uk/Catalogue/Local-Government/Finance/Revenue/Social-Services/social-services-socialservicesrevenueexpenditure-by-clientgroup>

⁶ Care and Social Services Inspectorate Wales (2011) Information brief: Key activities in regulated settings and services Available at: <http://wales.gov.uk/docs/cssiw/report/110120infobriefen.pdf>

31. An example of reducing costs for individuals is the direct payment co-operatives schemes, such as the Citizen Directed Co-operatives Cymru (CDCC⁷). This is a unique and innovative project which allows recipients of individual Direct Payments to pool their resources. This will allow them access to a wider range of services and supportive activities to better meet their own needs. Pooling resources in this way will also help the individual's direct payments to go further, and potentially provide them with more care or support than they would receive if each person was spending their direct payments on an individual basis.
32. Community-based services generally involve people in the design and delivery of that service. This can help to ensure that people receive the care and support that is appropriate for them, and that their personal well-being outcomes are met. These alternate, not-for-profit business models are often established to meet an identified need in the community. This also supports the desire for services to be designed around people and their personal well-being outcomes.
33. The Report of the Co-operative and Mutuals Commission⁸ states that “stakeholder involvement can add value, increase efficiency and effectiveness of a service”, and “can play a role...to ensure quality is maintained”. It also reports that local authorities and The Welsh Local Government Association acknowledged that co-operatives or mutuals could play a greater role in terms of delivering sustainable public services into the future. Pembrokeshire County Council said: *in the context of a growing demand for personalisation and co-production of services, and increased pressures on public sector finances, there is clear potential for co-operation and mutuals to deliver.*
34. These regulations, and the supporting code of practice, have been developed alongside key individuals, organisations and representative bodies from the sector. The technical group report has informed the development of the secondary legislation which was consulted on, and refinements have been made in light of comments received during consultation.

OPTIONS

35. Options considered by the Welsh Government in relation to social enterprises, co-operative organisations, co-operative arrangements, user led services and the third sector are as follows:

Option 1: do nothing. Maintain the status quo.

36. Under option 1, there would be nothing in legislation requiring local authorities to promote not-for-profit organisations to provide care and support, support for carers, and preventative services.

⁷ <http://www.disabilitywales.org/projects/current-projects/citizen-directed-co-operative-cymru-project/>

⁸ <http://gov.wales/topics/businessandconomy/business-wales/welsh-coop-mutuals-commission/?lang=en>

Option 2: Bring regulations into force

37. Under option 2, section 16 regulations would provide additional definitions and clarity for local authorities to identify and promote these not-for-profit alternate models of delivery, to provide care and support, support for carers, and preventative services. The Regulations would also define involvement, and activities which benefit society, are inclusive, and promote well-being.

38. The Regulations and code of practice will provide clarity and direction for local authorities in fulfilling the duty, which is about encouraging the growth and development of new business models, shifting the market balance away from a reliance on the private sector to grow the range of not-for-profit models in the social care sector. This will increase the diversity of provision available and embed the principles of co-production into service delivery. This will ensure an approach which:

- Recognises people as assets, and as having a positive contribution to make to the design and operation of services.
- Supports and empowers people to get involved with the design and operation of services.
- Empowers people to take responsibility for, and contribute to, their own well-being.
- Ensures that practitioners work in partnership with people to achieve well-being outcomes at an individual and service level.
- Involves people in designing outcomes for services.

COSTS

Option 1: do nothing. Maintain the status quo.

39. As these Regulations provide further definition of organisations, activities and arrangements which are to be included under the Section 16 duties, there are no additional costs associated with the regulations. However, without clear and appropriate definitions in regulations, it may prove more costly in relation to staff time, for local authorities to identify and determine organisations, activities and arrangements which are to be included.

Option 2: Bring regulations into force

40. As the Regulations provide definitions to support local authorities in fulfilling their duty under this part of the Act, there are no additional costs associated with the introduction of Regulations under section 16 of the Act.

BENEFITS

Option 1: do nothing. Maintain the status quo.

41. There are no long term benefits under this option. If the system remains the same it would not create the initial burden on local authorities of making the system change

and would not require the necessary retraining of staff already working in the social care system.

Option 2: Bring regulations into force

42. The definitions within the Regulations will provide clarity and direction for local authorities on the key aims of the Act relating to involvement, inclusivity and activities that benefit society.
43. The Regulations will support local authorities in identifying these types of organisations, which work with people to achieve their personal outcomes, and as such, will help ensure that the well-being agenda and personal outcomes for individuals are achieved. The Regulations will also ensure that the views of people are taken into account in the design and delivery of services, in keeping with the principle of voice and control that underpins the Act more widely.
44. As the delivery of social care and support is spread wider across more organisations from the public, private and third sector, and using these alternate business models, the risk of there not being sufficient provision to meet people's personal wellbeing outcomes is spread, especially as those individuals will be involved in the design and delivery of that service. This will also increase the amount of option and choice of service that people have. Under the current landscape, there are instances where large organisations are providing the majority of care in one area. Spreading the delivery of care will spread this risk of business failure wider, should one organisation be unable to continue to operate or provide its current level of care.
45. Option 2 will promote services that help prevent or delay the development of people's need for care and support. People should be able to get help early before the situation becomes more complicated and hard to manage. The regulations will help to ensure there are enough services in place and readily available that will support people and provide help, as well as the services for people who need more care and support.
46. Many of these services are based within local communities and support community resilience and support for people, and local authorities are required to promote these in local communities. This will also support the development of preventative services for individuals, meeting some, if not all of their needs, at home, or within local communities, before there is a need for an individual care and support plan, and for needs to be met by a local authority.
47. The section 16 duty will also meet the direction set out in the Tackling Poverty Action Plan Welsh Government *Tackling Poverty Action Plan*⁹, which identifies these alternate delivery models as being a conduit tackling poverty, as a natural result of the practice of these models is to build capacity and skills, provide economic and social benefits to society and actively boost the economy through improving skills and employment prospects in the community.

⁹ <http://gov.wales/topics/people-and-communities/tackling-poverty/taking-forward-tackling-poverty-action-plan/?lang=en>

RISKS

Option 1: do nothing. Maintain the status quo.

48. Regulations are being introduced to sit alongside the code of practice and support local authorities in identifying these alternate business models when planning, promoting and delivering services. If there is no clear definition within the legislation, then this could result in inconsistency of practice across Wales and a disparity for people in different communities across Wales.

Option 2: Bring regulations into force

49. If definitions are not clear and appropriate, or are too restrictive, there is a risk that organisations could be excluded and therefore not promoted by the local authority. This risk has been mitigated through consultation with the sector and key representative organisations, and as the regulations and code of practice have been developed through an engaged process involving experts from the sector in our technical group¹⁰

Consultation

50. A 12 week consultation on these regulations ran between 6 November 2014 and 2 February 2015.

51. The Consultation Summary Report and a list of respondents can be found at: <http://gov.wales/consultations/healthsocialcare/part2/?lang=en>

Competition Assessment

52. Whilst the duty under section 16 of the Act is to promote social enterprises, co-operatives, user-led services and the third sector, we are not wholly restricting a local authority or a supplier to choose the price, quality, range or location of the services or products they offer. The legislation is intended to promote social value, benefit to society, voice and control, and community-based service delivery but that does not mean that a local authority or supplier is restricted to these to the services or products offered by such organisations, just that these should be promoted alongside traditional models.

Post implementation review

53. The Social Services and Well-being (Wales) Act 2014 contains provisions to allow for Ministers to monitor functions of the Act carried out by local authorities and other bodies. Ministers may require these bodies to report on their duties in implementing these regulations.

¹⁰ <http://gov.wales/topics/health/socialcare/act/resources/draft-regulations/?lang=en>

54. Additionally, the Welsh Government will continue to monitor the impact of the regulation on areas such as the Welsh language, the UN rights of the child and Older People and Equality.