



# Safeguarding & Protecting Children Core 1 Cymru Workbook

Barnardo's Registered Charity Nos. 216250 and SC037605

# Exercises and Reading List for Core Child Protection Module 1

## Cymru

## Exercise : Legislative/Policy Quiz

1. I have a duty to investigate child protection concerns. True/False
2. If I report a concern the child will be taken into care.  
Always/Sometimes/Never
3. Which of the following Acts are part of the framework for child protection work
  - Children Act 1989
  - Children Act 2004
  - Education Act 2002
  - Homelessness Act 2002

*Can you explain the main principles of:*

- Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 - raised profile through creation of strategies to promote consistency and best practice
  - Education (Wales) Act 2014 - introduced a new, more robust registration system for the whole education workforce.
  - Social Services & Wellbeing Act 2014 - stronger powers to keep people safe from abuse and neglect .
4. Within the Social Services & Wellbeing Act (Wales) 2014 what are children in need of?
  5. What is a child at risk (under the Social Services & Wellbeing Act (Wales) 2014)
  6. Who should attend a Child Protection Conference?
  7. Name any policy or set of guidance's that you need to follow to safeguard children.
  8. I should only share information about a child with another professional if the parent consents. True/False
  9. What does 'whistleblowing' mean?

## What Do You Think? - EXERCISE

	Strongly disagree	Disagree	Agree	Strongly agree
<b>1. Hitting children is always wrong and is a form of child abuse</b>				
<b>2. Disabled children are more at risk of being abused than other children</b>				
<b>3. Staff and volunteers working with children are unlikely to abuse them</b>				
<b>4. Children often make up stories about being abused</b>				
<b>5. Boys are less likely to be sexually abused than girls</b>				
<b>6. A faith leader is unlikely to abuse a child</b>				
<b>7. Only men abuse children.</b>				
<b>8. Children are more likely to be abused by people they know well than by strangers</b>				
<b>9. Cultural practices must be respected, even when they appear harmful to children</b>				
<b>10. It is better to maintain your relationship with a parent than to damage it by reporting concerns</b>				

# Exercise: How Would You Respond?

## **Statement One**

Your neighbours 11-year-old child regularly returns home from school with her eight-year-old brother to an empty house. Their single parent father does not get back from work until 6.30pm.

## **Statement Two**

A 12-year-old boy has a slap mark on his face. He tells you that he has been slapped by a religious leader. His father has told him that he must always respect his elders.

## **Statement Three**

You often hear your neighbours fighting late in the night. They shout a lot and you have heard the woman crying. They have a baby. When you have seen the baby, she looks well and is always clean and nicely dressed.

## **Statement Four**

A six-year-old boy always comes to school late and never has the proper uniform. He looks scruffy and his hair is generally greasy and unwashed. You notice that the other children make fun of him.

## **Statement Five**

A 10-year-old wheelchair user spends the evenings looking out of the window or watching TV alone because she is unable to get around without help. She has two younger sisters, ages six and three, who are full of energy and take up a lot of their mother's time and attention.

## **Statement Six**

A 14-year-old girl goes out to nightclubs on most Friday nights and comes home in the early hours so drunk that she can barely walk. She appears to have a boyfriend who is much older. She announces her intention to stay over at his place one weekend.

## **Statement Seven**

A refugee family has been placed on the top floor of a tower block in a run-down area where there is a history of racism. The children are subject to racist abuse whenever they go out and the family has had eggs thrown at their door and racist graffiti painted on their windows.

To each scenario how do you respond? Are you **VERY CONCERNED**, *SLIGHTLY CONCERNED* OR not concerned?

# Recording Exercise

What was the detail of the situation?

What indicators were there that may lead to further concerns?

## Professional Boundaries: Within a Work Setting – Is it OK...?

	<b>Yes</b>	<b>No</b>	<b>Depends/ Not Sure</b>
<b>For your friend to start using the service that you work at?</b>			
<b>To have a private conversation alone with a service user?</b>			
<b>To give a service user your private phone number or e-mail address?</b>			
<b>To talk with a service user about your own sexual experiences?</b>			
<b>To compliment a service user on how they look?</b>			
<b>To comfort a service user who is upset?</b>			
<b>To give a service user a present?</b>			
<b>To ask a service user to collect something from your home?</b>			
<b>To offer a service user a lift home in your car?</b>			
<b>To be responsible for a service users child while visiting them at home?</b>			
<b>To have a sexual relationship with a service user?</b>			
<b>To send a service user a friend request on Facebook etc.</b>			

## Policy and Law Reform

The issue of rights and well-being of children has been significant on the Welsh political landscape for many years, not least because there have been strong links between government and non-governmental organisations. Since the devolution settlement and the establishment of the National Assembly in Wales in 1999, there has been a plethora of policy and strategy documents relating to children and young people. Devolution has heralded a new more inclusive approach to governance, and within this context children have assumed critical importance to the new governments of Wales.

### National government

The Welsh Government has been quoted as seeing children as rights bearers:

*"Children and young people should be seen as young citizens, with rights and opinions to be taken into account now. They are not a species apart, to be alternately demonised and sentimentalised, nor trainee adults who do not yet have a full place in society". (Rights to Action)*

In 2002, the UN Committee on the Rights of the Child welcomed the fact that the Welsh Government had used the Convention as the framework in its strategy for children and young people. In 2004, the emphasis on the importance of children's rights can most clearly be seen when the Welsh Government, within the limits of its powers, adopted the Convention as the basis of all its policy making for children and young people, positioning its overarching strategy for children within a rights-based framework linked to UNCRC implementation.

In 2004, the Welsh Government issued [Rights to Action](#), a policy document adopting [7 Core Aims for Children](#), which are presented as a direct translation of the UNCRC's articles into the following broad policy aims:

- A flying start in life: Articles 3, 29, 36
- A comprehensive range of education and learning opportunities: Articles 23, 28, 29, 32
- Enjoy the best possible health and freedom from abuse, victimisation and exploitation: Articles 6, 18-20, 24, 26-29, 32-35, 37 and 40.
- Access to play, leisure, sporting and cultural activities: Articles 15, 20, 29, 31
- Be listened to, treated with respect and have their race and cultural identity recognised: Articles 2, 7, 8, 12-17, 20.
- Have a safe home and community which supports physical and emotional well-being: Articles 19, 20, 25, 27, 32-35, 37 and 40.
- Are not disadvantaged by poverty: Articles 6, 26, 7, 28.

Specific national initiatives have followed which are based on these 7 Core Aims and cite the UNCRC as a basis:

[National Service Framework for Children, Young People and Maternity Services \(NSF\)](#)

[The All Wales Youth Offending Strategy](#)

[Sexual health and well-being strategy](#)

The first Child Poverty Strategy for Wales '[A Fair Future](#)' and the current [draft Child Poverty Strategy for Wales](#)

[Children and Young People Well-being monitor](#) has been developed with statistics that are explicitly linked to the UNCRC and can be seen as measures to implement the seven core aims.

[Extending Entitlement](#) is another national initiative that falls under the umbrella of the 7 Core Aims and is the Assembly's legal direction on youth services. It sets out universal basic entitlements for young people aged 11-25 years. The 10 entitlements are not explicitly linked to the UNCRC but are clearly consistent with it, the significant point being that the language of entitlement is adopted, making a shift in the conceptual approach towards a rights based approach.

### **National Action Plan on children's rights**

On November 20th 2009, the Welsh Assembly Government launched [Getting it right](#), an action plan for Wales developed in line with the principles as set out in the UN Committee's Concluding Observations 2008 and forming part of a wider UK-wide action plan across the State party which is underpinned by individual plans for each of the devolved administrations in the UK.

The Plan will be a living organic document and will be subject to regular review and updating to ensure that it keeps abreast of new developments in policy and strategy and remains relevant and timely. This will enable the Government to add any new priority areas if and when they emerge during the 5-year period, and remove from priority status any areas where the Welsh Government and partners may consider sufficient progress has been made during the course of the 5-year period.

By the time of reporting to the UN Committee in 2014, the Welsh Government aims to demonstrate significant progress across all of the priority domains for which Wales has legislative competence and devolved powers, in supporting all children and young people across Wales to know about, exercise and access their UNCRC and human rights. For further information on the National Action Plan click [here](#).

### **Local government**

Further to the Welsh Governments resolution of adopting the UNCRC in 2004, the [Children Act 2004](#) guidance for Wales requires local authorities and their partners to have regard to the UNCRC, enshrining regard for the Convention in secondary legislation:

*"The Welsh Government has adopted the UN Convention as the foundation for all its dealings with children and young people, and local authorities and their relevant partners should have regard to its principles in providing services".*

Strategic partnerships (known as children and young people partnerships) have been in place since 2002 and have been on a statutory footing since the above legislation in 2004. Local authorities and key partner agencies are required in law to cooperate to improve the well-being of children and young people in the local area. The Children Act 2004 placed a duty on every local authority in Wales to appoint a lead director and lead member for children and young people's services.

Local health boards have to designate lead officers and lead members of NHS Trust designate lead

executive and non-executive directors with responsibilities mirroring those of the local authority lead director.

Each of the 22 Children and Young People Partnerships are required to produce a children and young people's plan setting out "how the well-being of children and young people will be improved".

### **Government of Wales Act 2006**

In 2006 the [Government of Wales Act](#) created the possibility of the development of further legislation to support children's rights. Although it is clear that the Welsh Government is not empowered to incorporate the UNCRC in the law of Wales by any general legislative measure, this being beyond the scope of devolved powers, there are opportunities for the National Assembly for Wales to make laws providing for better implementation of children's rights in policy areas within the Assembly's remit. [The Children and Families \(Wales\) Measure 2010](#) is an example of new legislation which takes the UNCRC through the 7 core aims and further promotes the rights of children through tackling poverty and placing a duty to provide for play and participation of children.

### **UNCRC legislative measure for Wales**

The political commitment expressed by the then First Minister, Rhodri Morgan, to explore further the possibility of introducing a measure to embed the principles of the United Nations Convention on the Rights of the Child into law on behalf of Welsh children in the National Assembly's debate on 14th July 2009 was seen as a continuation of a position consistently held both by the Welsh Government and by the National Assembly. It was one which enjoyed substantial cross-party support within the Assembly, as reflected in the contributions to that debate.

In early 2010 a consultation on a draft Proposed Rights of Children and Young Persons Measure was launched by the Welsh Government; a summary of the responses can be found [here](#) and the papers from the Children and Young People Committee who undertook some pre-legislative scrutiny can be found [here](#).

On the 14th of June 2010 Deputy Minister Huw Lewis introduced the Proposed Rights of Children and Young Persons (Wales) Measure and Legislation Committee 5 of the National Assembly for Wales have been taking the measure through the scrutiny process.

The Wales UNCRC Monitoring Group working with partners in 2010 successfully lobbied for a legal duty to be imposed on Welsh Ministers to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child (UNCRC) and its Optional Protocols in exercising any of their functions. To view the legislative timetable and the evidence submitted to the Legislation Committee during the scrutiny process click [here](#)

On January 18th 2011 this landmark piece of legislation, the Rights of Children and Young Persons (Wales) Measure was passed by the National Assembly for Wales with cross-party unanimous support. To access the measure click [here](#)

As of the 1<sup>st</sup> May 2012 under the new [Children's Rights Scheme](#), Ministers must show due regard to the rights in the UNCRC when making decisions about proposed new policies or legislation, or about reviewing or changing existing policies.

Read the written statement from 31st January 2013 on the Children's Scheme [here](#)

From the 1<sup>st</sup> May 2014, this will apply to all of Welsh Minister's functions. It will also bring in the duty to promote knowledge & understanding of the UNCRC. This ground breaking legislation is unique within the UK goes a long way to incorporate the UNCRC within the limits of devolved powers in Wales

### **Rights of Children and Young people (Wales) measure accepted with cross-party unanimous support**

The Wales UNCRC Monitoring Group working with partners in 2010 successfully lobbied for a legal duty to be imposed on Welsh Ministers to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child (UNCRC) and its Optional Protocols in exercising any of their functions. To view the proposed Measure together with the legislative timetable and the evidence submitted to the Legislation Committee during the scrutiny process click [here](#)

On January 18th 2011 this landmark piece of legislation was passed by the National Assembly for Wales with cross-party unanimous support.

The legislation will come in two stages: first, from May 1<sup>st</sup> 2012, applying to the making of new law or policy and review of existing policies and then from May 1<sup>st</sup> 2014 will apply to all of the Welsh Minister's functions. It will also bring in the duty to promote knowledge and understanding of the UNCRC.

This piece of legislation brings in a children's scheme which will set out the arrangements the Welsh Ministers must have in place in order that they comply with the UNCRC. This imposes an obligation to consult with external stakeholders including the Children's Commissioner for Wales, the voluntary sector and children and young people themselves in the development of the children's scheme.

This ground breaking legislation is unique within the UK.

<http://www.childrenswales.org.uk/policy-law-reform.aspx>

### **Social Services and Well-being (Wales) Act 2014**

The Social Services and Well-being (Wales) Act received Royal Assent and became law on 1 May 2014. It came into force on 6 April 2016.

The Act provides the legal framework for improving the well-being of people who need care and support, and carers who need support, and for transforming social services in Wales.

Read the [Social Services and Well-being \(Wales\) Act](#).

You can also read the content of the Act by using the [Easy Read version and Young Person's summary](#).

[The Essentials document](#) provides an overview of the Act and its wider legal framework.

Information about the [regulations](#) and [codes of practice and statutory guidance](#) that will support the Act can be found here. An overview of the legislative framework is also [available to download](#).

You can find details about [legislative and policy developments under the Act here](#).

The Minister for Health and Social Services issued a statement on the implementation of the Act on 1 April 2016. [You can read it here](#).

### **Changes to other legislation**

Guidance on repeals and transitions in relation to the Act [can be found here](#).

You can find a table that sets out the repeals and amendments to pre-existing legislation as a result of the Act [here](#).

[This table](#) details the relationship between the Act and the Children Act 1989.

Welsh Government delivered training to local authority lawyers on the Act early in 2016 and [you can find that presentation here](#).

### **Background**

The White Paper, [Sustainable Social Services for Wales: A Framework for Action](#), published in 2011, highlighted a number of challenges faced by public services in Wales.

These included demographic changes, increased expectations from those who access care and support as well as continuing hard economic realities.

The Act aims to address these issues and in doing so will give people greater freedom to decide which services they need while promoting consistent, high-quality services across the country.

It will transform the way social services are delivered, promoting people's independence to give them stronger voice and control.

You can find links to all the key primary legislation relating to social care in Wales on the [Law Wales website](#).

### **Principles**

The fundamental principles of the Act are:

**Voice and control** – putting the individual and their needs, at the centre of their care, and giving them a voice in, and control over reaching the outcomes that help them achieve well-being.

**Prevention and early intervention** – increasing preventative services within the community to

minimise the escalation of critical need.

**Well-being** – supporting people to achieve their own well-being and measuring the success of care and support.

**Co-production** – encouraging individuals to become more involved in the design and delivery of services.

### **How the Bill became an Act**

Follow the progress of the Social Services and Well-being (Wales) Bill, from when it was introduced to the National Assembly on 28 January 2013 to when it became an Act after receiving Royal Assent on 1 May 2014. Here, you can also find the [Explanatory Memorandum, which provides a general explanation of the legislation, including all its different parts.](#)

### **Children and young people**

On 30 June 2015, the Minister for Health and Social Services Mark Drakeford issued [a written statement](#) detailing how the Act will meet the needs of children and young people.

In this video, filmed at the Family Justice Network Conference in Cardiff in January 2016, Ruth Henke QC gives a presentation on local authorities' responsibilities for looked after children under the Act.

### **The Act and the NHS**

Welsh Government issued a [Welsh Health Circular](#) in May 2016 that looked at the implications of the Act for NHS University Health Boards and Trusts.

Welsh Government has published a [summary of how the Social Services, NHS and Public Health outcomes framework align](#) to ensure a common approach to provide consistent direction to services and people in Wales.

### **The Act and the Well-being of Future Generations (Wales) Act 2015**

Welsh Government has developed a [technical brief](#) on how the two pieces of legislation fit together

<http://www.ccwales.org.uk/the-act/>

**Care and support in Wales is changing**

**Last updated 11 February 2016**



## **From April, you will have more say in your social services.**

The Social Services and Well-being (Wales) Act comes into force on 6 April.

It is the new law for improving the well-being of people who need care and support, and carers who need support.

### **What does this mean for me?**

The Act changes the way people's needs are assessed and the way services are delivered- people will have more of a say in the care and support they receive.

It also promotes a range of help available within the community to reduce the need for formal, planned support.

- Services will be available to provide the right support at the right time
- More information and advice will be available
- Assessment will be simpler and proportionate
- Carers will have an equal right to be assessed for support
- There will be stronger powers to keep people safe from abuse and neglect

### **What happens now?**

If you receive care or support, you will take part in the new process during your next scheduled review date. Your local authority will be able to provide more information.

You can access the Social Services and Well-being (Wales) Act on the [legislation.gov website](#) (external link)

## **DOCUMENT DOWNLOAD**

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[Social Services and Well-being \(Wales\) Act 2014: The Essentials](#) (File size: 213KB)



[Social Services and Well-being \(Wales\) Act - A young person's summary](#) (File size: 3.4MB)



[Social Services and Well-being \(Wales\) Act - Easy Read](#) (File size: 4.9MB)

<http://gov.wales/topics/health/socialcare/act/?lang=en>

## Education (Wales) Act 2014

Last updated 02 June 2014

This Act became law in Wales on 12 May 2014.

### Purpose

The Act introduces a new, more robust registration system for the whole education workforce.

The Act will also legislate in the following areas:

- harmonise School term dates
- removal of the appointment of HM Chief Inspector and HM Inspectors of education and training in Wales under section 19 of the Education Act 2005.

### Benefits

The Act will bring greater coherence by changing the way that school term dates are set, so that they may be harmonised across all maintained schools in Wales.

### More information

Full details of the Act are available from the [National Assembly for Wales](#) (external website).

## DOCUMENT DOWNLOAD

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[Equality impact assessments](#) (File size: 1.7MB)

<http://gov.wales/legislation/programme/assemblybills/education-act/?lang=en>

## Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015

Last updated 29 April 2015

This act became law in Wales on 29 April 2015.

### Purpose

The act improves the public sector response in Wales to violence against women, domestic abuse and sexual violence. It provides a strategic focus and ensures consistent consideration of preventive, protective and supportive mechanisms in the delivery of services.

## Benefits

The act:

raises the profile of violence against women, domestic abuse and sexual violence in Wales through the creation of strategies

- provides a strong strategic direction, promoting consistency and best practice
- ensures ownership of the issue at a strategic level with the appointment of a ministerial adviser.

## More information

Details the act are available on [National Assembly for Wales](#) (external link).

## DOCUMENT DOWNLOAD

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[Equality impact assessments](#) (File size: 974KB)

<http://gov.wales/legislation/programme/assemblybills/domestic-abuse/?lang=en>

# Care and support in Wales is changing

Last updated 11 February 2016



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<http://gov.wales/topics/health/socialcare/act/?lang=en>

# The Social Services & Well-being (Wales) Act 2014: An overview

Professor Luke Clements<sup>1</sup>

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## Background

In 2011 the Law Commission proposed that the confusing patchwork of conflicting social care statutes be repealed and replaced by a single Act which service users, carers and others could look to understand their rights.<sup>2</sup> The [Social Services and Well-being \(Wales\) Act 2014](#) is the Welsh Government's response to the Law Commission report and if the aim was comprehensibility, it fails: it is often opaque and frequently reads like a regulation.<sup>3</sup>

The Act received Royal Assent on the 1<sup>st</sup> May 2014<sup>4</sup> and will come into force on the 6<sup>th</sup> April 2016. It is the most substantial piece of primary legislation enacted by the Assembly and will have a profound impact on the provision of social care in Wales. It is materially different to the English Act (the [Care Act 2014](#)) and will create a quite distinct social care legal jurisdiction in Wales. The 'headline' difference between the Acts is that the Welsh Act

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Very many thanks to the many colleagues who have helped me gain an understanding of the legislation – including Keith Bowen, Dr Julie Doughty, Aled Griffiths, Ann James, Dr Gwyneth Roberts, Professor John Williams and Dr Lucy Series. This briefing only expresses my views. Although every effort has been made to ensure its accuracy a caveat is required concerning reliance on this material: the primary sources are not always easy to access in Wales and the law is changing rapidly – so details will always need checking. A copy of this briefing is accessible at [www.lukeclements.co.uk/whats-new/](http://www.lukeclements.co.uk/whats-new/)

<sup>1</sup> Cerebra Professor of Law and Social Justice, the School of Law, Leeds University, solicitor and Special Adviser to the Joint Parliamentary Select Committee that scrutinised the draft Care Bill (the Care & Support Bill 2013).

<sup>2</sup> Law Commission *Adult Social Care Law Com No 326*, HC 941 (Stationery Office 2011) para 3.2.

<sup>3</sup> The Act has many provisions that should – at best – appear in subordinate legislation - see for example the sections ss41 and 43 and the provisions concerning people who refuse – sections 20, 22-23, 25-27.

<sup>4</sup> General papers on the passage of the Bill through the Assembly can be accessed at [www.senedd.assemblywales.org/ielssueDetails.aspx?lId=5664&Opt=3](http://www.senedd.assemblywales.org/ielssueDetails.aspx?lId=5664&Opt=3)

applies to people 'in need' of any age and their carers, whereas the English Act is largely confined to the needs of 'adults in need' and their carers. This briefing paper focuses on the provisions in the Welsh Act that deal with the rights of disabled children, adults in need and their carers.

## Repeals and transitional provisions

At the time of writing this briefing (30<sup>th</sup> January 2016) a full schedule of repeals does not appear to be available but in December 2015 [a draft note of the Welsh Government's intention in this respect was published](#). A draft has also published of the proposed transitional provisions<sup>5</sup> which states that where a person's needs are being met under existing legislation on the 6<sup>th</sup> April 2016 then the local authority will be under a continuing duty to provide those needs (under the pre-existing legislation) until the person's needs are reassessed/reviewed. If the reassessment/review has not taken place before the 31<sup>st</sup> March

2017 (or the 1<sup>st</sup> October 2016 in the case of a child), then at that point the duty on the authority to provide services will derive from the 2014 Act.

## The statutory codes and final regulations

The final [regulations](#) and the accompanying [codes of guidance](#) to the Act have now been published.<sup>6</sup> The Act is divided into various chapters (referred to as 'Part's') and in general there is a code to each 'Part' of the Act. These are issued under section 145 of the Act which requires authorities to 'act in accordance with any relevant requirement contained in a code' and in relation to all matters to 'have regard to any relevant guidelines contained in it'. There is no code for Part 7 of the Act (safeguarding): instead '[statutory guidance](#)' issued under section 131 to which authorities are required to 'have regard'. The same approach has been taken to the duty in relation to the duty of local authorities and their partners to cooperate: [statutory guidance](#) has been issued on this duty.<sup>7</sup>

The final Codes are:

- [Part 2 Code of Practice \(General Functions\)](#)
- [Part 3 Code of Practice \(Assessing the Needs of Individuals\)](#)
- [Part 4 Code of Practice \(Meeting Needs\)](#)
- [Part 4 and 5 Code of Practice \(Charging and Financial Assessment\)](#)
- [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#)
- [Part 10 Code of Practice \(Advocacy\)](#)
- [Part 11 Code of Practice \(Miscellaneous and General\)](#)
- [Code of Practice on Measuring Social Services Performance](#)

The Care Council for Wales web 'hub' is the most accessible site for finding the relevant materials – see [www.ccwales.org.uk/the-act/](http://www.ccwales.org.uk/the-act/) . It also has a link to the training materials commissioned by the Welsh Government for the implementation the Act – the '[Hub Prospectus](#)'

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## Underpinning principles: 'well-being' (sections 2 and 5)

Local authorities are under a general duty (under section 5) to promote the well-being of people 'in need' and of carers. Well-being is defined widely in section 2, and in relation to adults it includes 'control over day to day life' and 'participation in work'. 'Control' is in many respects equivalent to 'choice' and the requirement to promote participation in work will be of especial importance to carers (both those caring for adults and those caring for disabled children).

Section 6 of the Act widens the duty on authorities to have regard to various factors (for example the individual's views, wishes and feelings, and the importance of promoting dignity). Materially section 6(3)(a) stresses 'the importance of beginning with the presumption that the adult is best placed to judge' their well-being. This creates a default position (rather like the presumption of capacity in the MCA 2005) for which a local authority will have to produce evidence if it wishes to rebut.

### Independent living

Section 6(3)(b) stresses 'the importance of promoting the adult's independence where possible'. This is amplified by para 56 of the [Part 2 Code of Practice \(General Functions\)](#) which states that the well-being duty 'includes key aspects of independent living as expressed in the UN Convention on the Rights of Persons with Disabilities [CRPD], in particular, Article 19.' Article 19 recognises the right of disabled people to 'full inclusion and participation in the community'; to choose where they live and with whom they live; and to have access to a range of community support services 'to support living and inclusion in the community, and to prevent isolation or segregation from the community.

Further reference to the CRPD is contained in Quality Standard 1 of the [Code of practice in relation to measuring social services performance](#) (considered below) which states that local authorities must ensure that all decisions they make in the exercise of their social services functions:

have regard to a person's individual circumstances and the UN convention on the rights of children  
and the UN principles for older people and the UN convention on the rights of disabled people (p9)

Such express statements are of enormous value, particularly as the courts have shown a surprising willingness to have regard to the CRPD.<sup>8</sup> It is to be hoped that the Welsh Government will follow this welcome recognition by considerably strengthening its unsatisfactory [Framework for Action on Independent Living](#) (2013) which purports to explain how it is fulfilling its obligations under the CRPD but which fails to include any commitment to change the law to protect the right to independent living as enshrined by Article 19.<sup>9</sup> The [Framework](#) (2013) also fails to provide a definition of 'independent living' that accords with Article 19 of the Convention. It mentions the importance of removing 'barriers' that handicap disabled people – but it fails to mention the equally important requirement that states ensure that disabled people 'have access to a range of community support services'.

A potential problem with the Act's treatment of 'well-being', stems from section 2(3) which states that it includes 'welfare' as interpreted in the Children Act 1989. This could result in confusion/complexity – since the 1989 Act does not define 'welfare' in the context of local authorities' duties and powers, although it does provide a checklist of considerations for the court. However, it has been suggested judicially that welfare and wellbeing are synonymous.<sup>10</sup>

### **Definitions: people 'in need' and their carers ~ section 3**

The Act replaces the 'medical model' language of the previous community care legislation, which required need to derive from 'age', 'illness', being 'disabled' and so on. In its place the Act speaks of 'people who need care and support' and of 'carers who need support'. It is therefore (in general) impairment neutral: focusing on the person's need and not the cause of that need. This approach is also adopted, to a degree, by the eligibility criteria (see below).

#### **Disabled person**

People who care for a disabled child are however an exception to this rule (see below) and for this reason 'disabled' has to be defined. This is done (in section 3(5)) by giving it the same meaning as in the Equality Act 2010.<sup>11</sup> For the purposes of section 6 of the Equality Act 2010 a disabled person is someone who has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

#### **Carers**

Section 3(4) defines a carer as a person who provides or intends to provide care for an adult or a disabled child (but paid carers are excluded<sup>12</sup>). This is a major change to the previous definition – in that carers no longer have to establish that they are also 'providing or intending to provide 'a substantial amount of care on a regular basis'.

#### **Disabled children**

The Equality Act definition of a disabled person is of little relevance to disabled children *per se*: the relevance is only to their carers. All children in need are eligible for an assessment (section 21). During the assessment process the eligibility criteria merely require (as outlined below) that the need arises either from their physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances; or that the need is one that if unmet is likely to have an adverse effect on the child's development. Importantly (as noted below), section 21(7) states that there is a presumption that disabled children have needs for such additional / substitute care and support.

#### **Carers of disabled children**

Section 24 of the Act imposes a duty on authorities to assess the needs of carers who are providing or intending to provide care for an adult or a disabled child. It is in this context that 'disabled child' bears the Equality Act 2010 definition: a definition that may be shown to be problematic, unless augmented by regulations.<sup>13</sup> The 2010 Act and its regulations<sup>14</sup> exclude from the definition people who misuse drugs and/or alcohol misusers as well as those with 'a

tendency to physical ... abuse of other persons'.<sup>15</sup> It is difficult to see the logic of excluding from support the parents of such children – and the likelihood is that any attempt to do so by a local authority will be subjected to significant scrutiny by the courts and ombudsman. Authorities will of course have a power to assess and provide support in such cases.

### **UN principles (section 7)**

The Act requires that persons 'exercising functions' under the Act have due regard to the UN Principles for Older Persons (1991) and the UN Convention on the Rights of the Child. The 'due regard' duty is an onerous one (considered much more demanding than merely 'having regard'<sup>16</sup>) and this may well give rise to challenges to NHS and local authority policy changes (of the type that have characterised the obligations under the Equality Act 2010<sup>17</sup> where a similar 'due regard' duty exists).

While there is a certain logic to the Act prioritising the UN Convention on the Rights of the Child – since it has already been given status in Welsh legislation (ie the Rights of Children and Young Persons (Wales) Measure 2011) – it is less obvious why the UN Principles for Older Persons have been given more prominence than the UN Convention on the Rights of Persons with Disabilities – since the Welsh Government has policies on each.<sup>18</sup>

### **Statement of outcomes / local populations needs (sections 8 & 14)**

Section 8 requires the Welsh Ministers to issue a 'statement of outcomes'. This is intended to be a strategic planning tool that will be used to assess whether the lives of people 'in need' in Wales are being materially improved by the new legislative framework.

The [Code of practice in relation to measuring social services performance](#) sets out six quality standards that local authorities 'must' achieve and on which their performance will be measured.<sup>19</sup> In summary these are:

1. They must work with people who need care and support and carers who need support to define and co-produce personal well-being outcomes that people wish to achieve.
2. They must work with people who need care and support and carers who need support and relevant partners to protect and promote people's physical and mental health and emotional well-being.
3. They must take appropriate steps to protect and safeguard people who need care and support and carers who need support from abuse and neglect or any other kinds of harm.
4. They must actively encourage and support people who need care and support and carers who need support to learn and develop and participate in society.
5. They must support people who need care and support and carers who need support to

safely develop and maintain healthy domestic, family and personal relationships.

6. They must work with and support people who need care and support and carers who need support to achieve greater economic wellbeing, have a social life and live in suitable accommodation that meets their needs.

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<sup>5</sup> The [Social Services and Well-being \(Wales\) Act 2014 \(Commencement No. 3, Savings and Transitional Provisions\) Order 2016](#)

<sup>6</sup> Accessible at <http://www.ccwales.org.uk/the-act/> .

<sup>7</sup> Under section 169 – see <http://gov.wales/docs/dhss/publications/151218part9en.pdf>

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<sup>8</sup> See for example *Burnip v. Birmingham City Council* [2012] EWCA Civ 629 and *R (Bracking and others) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

<sup>9</sup> Such a commitment is a requirement under Article 4 of the Convention and the CRPD Committee has stressed the need for states to 'systematically revise; their domestic law 'in order to bring it into line with the general principles and obligations contained in the Convention' - see for example the Committee's [Concluding observations on the initial report of Costa Rica](#) 12 May 2014 para 8.

<sup>10</sup> *Re G* [2012] EWCA Civ 1233 para 26. For an excellent analysis of this question see Dr Julie Doughty [How do you define a child's 'welfare' as opposed to 'wellbeing'?](#) (Community Care 2016).

<sup>11</sup> See Equality Act 2010 (Disability) Regulations 2010 (SI 2128) reg 3.

<sup>12</sup> Section 3(7).

<sup>13</sup> Which could provide for this – see section 3(6).

<sup>14</sup> See Equality Act 2010 (Disability) Regulations 2010 (SI 2128) reg 3.

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<sup>15</sup> An exclusion that has been held to extend to children – see *X v Government Body* [2015] UKUT 0007 (AAC).

<sup>16</sup> See for example *R (Meany, Glynn & Saunders) v Harlow DC* [2009] EWHC.

<sup>17</sup> See for example, *R (Brown) v Secretary of State for Work & Pensions* (2008) [2008] EWHC 3158 (Admin) .

<sup>18</sup> See Welsh Government [A Declaration of Rights for Older People in Wales](#) (WG 2013) at and Welsh Government [Framework for Action on Independent Living](#) (WG 2013). For a mundane explanation see Helen Taylor 'Welsh Government's legislation needs more focus' in 'Click on Wales' February 20th, 2014 : it appears that the *Declaration of Rights for Older People in Wales* was only included in the Act because of a mistaken abstention – an Assembly member pressed the wrong voting button.

<sup>19</sup> Each authority must have arrangements in place to collect and return the data on the statutory performance measures detailed in this code of practice to the Welsh Government from May 2017 onwards – see [Code of practice in relation to measuring social services performance](#) p.11

Section 14 places a duty on local authorities and LHBs to assess: (1) the care and support needs of the local population; and (2) the consequent need for care and support services to meet those needs.

### **Prevention (section 15)**

The Act creates both a strategic and a practical duty in relation to preventative services. At a strategic level, local authorities and LHB's will be under a duty to assess the extent of need for a range and level of preventative services (section 14). At the practical level, local authorities are required to provide / arrange for the provision of services that will contribute towards preventing / delaying / reducing the development of needs for care and support; minimising the effect on disabled people of their disabilities; helping to prevent people from suffering abuse or neglect and enabling people to live their lives as independently as possible. In relation to children in need there are additional specific provisions – aimed at reducing the need for court proceedings of all kinds (section 15(2)(f)).

Generalised guidance on the obligations local authorities and LHBs have in relation to the development of preventative services is provided in the [Part 2 Code of Practice \(General Functions\)](#) pages 37 – 46.

Whilst the development of preventative services is to be welcomed, two caveats should be added. The first is a general one: that given the very severe budget problems of most local authorities – and the lack of any significant 'new' money to accompany this legislation – it is difficult to see how (in the short term) this duty can be made to be more than cosmetic. To invest in preventative services, without new money would require a local authority to disinvest in an existing area. For many local authorities this would require (in essence) disinvestment in crisis services and is not realistic. The second caveat concerns the eligibility criteria to the Act. Objectively the Welsh Government is attempting divert people in need away from formal support provision – since this will only be available if it is the only way of 'overcoming the barriers' they face. This might mean that a person would have to establish that preventative services had been tried (and had failed) before formal support is available.

### **Promoting social enterprises etc (section 16)**

One of the most distinctive provisions in the Act concerns the requirement in section 16 that local authorities must promote both:

- the development of social enterprises / co-ops / third sector organisations to provide care and support and preventative services;
- care and support and preventative services that involve service users in the design and running of services;

Support for 'not for profits' is thought to be an imaginative idea – in that such enterprises are able to use all their income to develop a quality service without having to divert 'profits' to shareholders. The preferment of such businesses is in stark contrast to the English Act which is likely to result in a significant increase in the privatisation of social care provision (particularly assessments<sup>20</sup>).

Section 16 of the Act requires – in essence – that local authorities prioritise the support of 'social enterprise' care. It defines a social enterprise organisation as one whose activities are carried on for the benefit of society. The [Social Services and Well-being \(Wales\) Act 2014 \(Social Enterprise, Co-operative and Third Sector\) \(Wales\) Regulations 2015](#) (reg 3) stipulate that this requires it to be 'inclusive', involving 'people' and 'promoting well-being'. Regulation 4 defines inclusive as an activity for which regard has been had to the public sector equality (section 149 of the Equality Act 2010).

An uncritical promotion of social enterprise organisations could well have negative consequences – particularly if it marginalised the important role played by the public sector. This is especially so in rural areas where there may be no viable 'business plan' for a third sector enterprise and where the public sector is best placed to make provision and to offer choice. The fear must be that local authorities will see section 16 not so much as an opportunity to increase the range of service options for disabled people, but as a vehicle for offloading their in-house services.

Generalised guidance on the obligations local authorities to promote the development of not for private profit organisations is provided in the [Part 2 Code of Practice \(General Functions\)](#) pages 47 – 61. The guidance stresses the importance of local authority awareness about procurement opportunities – particularly those presented by the [Public Contracts Regulations 2015](#)<sup>21</sup> - regulation 77 of which, for example enables local authorities to give preference to 'not for profit' organisations for certain contracts relating to administrative social, educational, healthcare and cultural services. As the guidance notes (para 282-283) the regulations include provisions designed to ensure that smaller suppliers and third sector organisations have the opportunity to gain public contracts Marketplace. Regulation 20 provides in particular for opportunities relating to organisations whose main aim is the social and professional integration of 'disabled or disadvantaged persons' and the regulations provide considerable flexibility where the procurement relates to an 'innovative' service that is not already available in the relevant market (reg 31).

### **Information (section 17)**

Local authorities are under an enhanced duty to provide people in need and their carers with information about the care and support that is available in their area. The duty includes information about how the local care system operates; the choice of types of care and support, and the choice of providers in the local authority's area; how to access the care and support that is available; and how to raise concerns about safety /well-being of an adult who has needs for care and support.

Whilst this enhanced duty is to be welcomed – there are problems, and these concern the role of the NHS in the provision of information. The Act merely requires the relevant LHB's / NHS trusts to inform the local authority of the care and support they provide. Presumably if the relevant body is providing nothing – then all it need do is tell the local authority this – ie the NHS is allowed to be passive in this process.

On a more positive note, section 14A of the Act requires<sup>22</sup> that local authorities and LHBs develop and publish a strategy to ensure that there is an adequate supply (in terms of range and level) of care and support services to meet the local demand. The duty places responsibility on the LHB for the elements of the strategy which relates to the health and well-being of carers. The Act (section 14(1)) provides for regulations to flesh out the scope of this duty and creates therefore the potential for a scheme very similar to that created by the [Carers Strategies \(Wales\) Measure 2010](#) (which has been repealed by the 2014 Act).

[Part 2 Code of Practice \(General Functions\)](#) pages 62-79 give generalised guidance on the obligations on local authorities to provide information, advice and assistance.

### **Registers of disabled people (section 18)**

The Act has downgraded the previous duty on local authorities to maintain a register of disabled people in their area<sup>23</sup> to a power – save only for sight impaired, hearing impaired and for disabled children for which the duty remains. Whilst many registers have been little used – there is considerable scope for their imaginative use: eg as databases to facilitate planning and as a means to target information appropriately to those who need it.

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<sup>20</sup> The Care Act 2014, section 79 enables local authorities to delegate nearly all their functions to the private sector – including assessments – see L Clements [Care Act 2014 overview](#) p.6.

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<sup>21</sup> SI 102.

<sup>22</sup> The genesis of section 14A is tortuous. In simple terms it was inserted by the [Well-being of Future Generations \(Wales\) Act 2015](#) section 33. The 2015 Act however repealed very similar provisions in the National Health Service (Wales) Act 2006, section 40(2A), (2B) and (2C) which had been inserted by section 14 of the 2014 Act. These provisions were however repealed by the [Well-being of Future Generations \(Wales\) Act 2015](#) (Schedule 4 para 19) which came into force immediately before the 2014 Act. See also in relation to the development and publication of strategic plans sections 37 – 39 of the 2015 Act

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<sup>23</sup> The National Assistance Act 1948 s29(4)(g) and LAC (93)10 appendix 2 para 2(2).

# The duty to Assess

## Assessments - general requirements

The duty to assess is mandatory if the person 'may' have a need for care and/or support. (sections 19, 21 and 24). Once an assessment has commenced, then there is a duty to consider whether the person's needs meet the eligibility criteria. As noted below, the eligibility criteria consider (among other things) the availability of 'non-local authority' care and support. When undertaking the assessment, the Act and the regulations require the local authority to have regard to a wide range of factors and provided these are considered, it is for the local authority to decide how wide and how deep the assessment ranges: ie what is 'proportionate in the circumstances'. This means that the local authority must look at the need for such things as: *support, preventative services, information, advice or assistance, and also whether the individual works or wishes to do so; whether they want to participate in education, training or any leisure activity etc.* Although the authority must consider these factors – it is up to the authority how it does this: it is for the authority to decide what is 'proportionate'. In this context, proportionality goes to the question of how wide and deep the assessment ranges – and not to whether it is undertaken at all.

Having completed the assessment, if the authority is satisfied that the person has needs for care and/or support then it must decide if any of these needs meet the eligibility criteria: it is the need for 'support' that is the triggering issue, requiring that the authority take the assessment to the next stage. Section 32 states that where an authority has done an assessment which has revealed that the person has needs for care/support then it must decide if these needs meet the eligibility criteria and if they do, then it must meet those needs by providing assistance in a variety of ways (listed in section 34).

The [Care and Support \(Assessment\) \(Wales\) Regulations 2015](#) (reg 2) require that there must be a named person for every assessment and that she/he must have the skills, knowledge and competence to carry out the assessment and have received training in the carrying out of assessments (reg 3). [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at para 43 stipulates that for this purpose the appropriate levels of qualification

'include':<sup>24</sup>

- either a registered social work or social care practitioner holding a professional qualification at level 5 or above
- or a person holding a social care qualification at level 4 or above, which includes knowledge and skills undertaking person centred assessment, under the supervision of a registered social work or social care practitioner

Assessments must consider — (a) the person's circumstances, (b) the person's personal outcomes, (c) the barriers to achieving these outcomes, (d) the risks if these outcomes are not achieved, and (e) the person's strengths and capabilities (reg 4). Copies of

assessments must 'offered' to the person assessed (reg 6) and reviews must be undertaken when there has been a 'significant' change in circumstances (reg 7).

In relation to the assessment of children in need, assessment guidance is also found in the statutory codes under [Part 6](#) (which is concerned with the special position of 'looked after and accommodated' children). The guidance in relation to children in need stipulate a maximum timescale for completion of the assessment (namely 42 working days from the point of referral<sup>25</sup>).

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<sup>24</sup> The use of the word 'include' is clearly intended to create ambiguity – in the sense that the list is illustrative rather than exhaustive.

<sup>25</sup> Para 78 of the Part 3 Code.

## National Assessment and Eligibility Tool

The intention was that the Welsh Government would develop a standard template for assessments – a ‘National Assessment and Eligibility Tool’. This appears to have been shelved, but the [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at paras 54- 63 identifies a minimum record that must emerge from the assessment. It stresses (para 56) that it is essential ‘that all practitioners responding to individuals, families or to referrers are familiar with the principles which underpin the assessment of need and are aware of the importance of the information collected and recorded at this stage.’ The obligation to record all of the ‘core data set’ only comes into being when an individual’s needs are deemed to be eligible and a care and support plan, or support plan in respect of a carer, is required (para 59). The Core Data Set comprises (para 59):

NHS Number	Preferred Language / Communication method / Accessibility requirement
Title	Name(s) of Carer(s) / People with Parental Responsibility
Surname	
Forename(s)	
Preferred Name	Relationship
Address and Postcode	Contact Details for Carer(s) / People with Parental Responsibility
Date of Birth	Is this a child on the Child Protection Register?
Telephone	
Email Address	
Sex	Contact details of Lead Assessment
GP Name and address	Co-ordinator
School name and address	Contact details of Lead Care Coordinator
Occupation	Information taken by (name)
What other assessments have been undertaken by other agencies?	Designation
	Organisation
	Date

### The Five Key Elements

The guidance (at para 63) Act advises that the assessment process (including consideration of the eligibility criteria) require a comprehensive analysis of five inter-related elements<sup>26</sup>, namely:

- the person’s circumstances;
- their personal outcomes;
- the barriers to achieving those outcomes;
- the risks to the person or to other persons if those outcomes are not achieved; and

- the person's strengths and capabilities.

Guidance on these five elements is set out in Annex 1: Guidance on Five Elements of Assessment.

### **Assessment of adults in need (section 19)**

The Act makes little change to the duty to assess adults in need. The duty is triggered on the appearance of need (ie there is no need for a request) and the duty exists regardless of the wealth of the person or the level of their needs. There is a duty to involve carer 'so far as is feasible' – which is new (and positive).

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<sup>26</sup> The five key elements are analysed in greater detail in Annex 1 to the [Part 3 Code of Practice \(assessing the needs of individuals\)](#).

## Assessment of children in need (section 21)

The duty to assess the needs of a child 'in need of care and support' is a very positive development – not least because there was no explicit statutory duty to assess under the previous legal regime (ie the Children Act 1989, s17).<sup>27</sup> As with adults in need, the duty is triggered on the appearance of need and the duty exists regardless of the wealth of the person or the level of their needs. As is noted below, the outcome of an assessment may be a specific duty on the law to provide support which is also a positive development.

In relation to disabled children, section 21(7) creates a presumption is that they have needs for additional / substitute care and support. The relevant guidance stresses that in undertaking the assessment, local authorities must:<sup>28</sup>

Identify all presenting needs including those which would be deemed as eligible if a carer was not meeting those needs. This is so that the local authority is able to respond appropriately and quickly where the carer or the child's family becomes unable or unwilling to meet some or all of the identified care and support needs

## Carers Assessments (section 24)

The Act not only consolidates the existing three Carers Acts,<sup>29</sup> it also removes: (1) the requirement to establish that the carer is providing or intending to provide 'a substantial amount of care on a regular basis'; and (2) the requirement that carers 'request' an assessment – the assessment obligation will be triggered by the 'appearance of need ('where it appears to a local authority')'. The duty is therefore proactive – as page 7 of the [Part 3 Code of Practice \(assessing the needs of individuals\)](#) states:

The duty is triggered if it appears to the local authority that a carer may have needs for support. The duty to assess applies regardless of the authority's view of the level of support the carer needs or the financial resources he or she has or the financial resources of the person needing care.

Section 24 requires that carers must be fully involved in their assessments and makes clear that the duty to assess applies regardless of the authority's view of the level of the carer's needs for support, or their financial situation (s24(3)). It also requires that specific consideration be given to:

- the extent to which the carer is able, and will continue to be able, to provide care, and the extent to which the carer is willing, and will continue to be willing, to do so (s24(4));
- whether the carer works or wishes to do so (s24(5));
- whether the carer is participating in or wishes to participate in education, training or any leisure activity (s24(5));

## Young carers

In general (and unlike the English legislation<sup>30</sup>) the 2014 Act does not distinguish between the rights of adult carers and those of young carers although there are minor differences in relation to the assessment duty. Although the local authority must, for both adult (s24(4)(c)) and young carers (s24(4)(d)), seek to identify the outcomes that they wish to achieve, for the carer's age and understanding', and the views of the parents of the young carer on this question and their well-being generally (s24(4)(d)). Young carer assessments must also pay particular regard to the developmental needs of the child, and whether it is appropriate for the child to be providing the care at all (s24(5)(c)).

As with the assessment duty owed to disabled children (s21(6)) the way a carers assessment is undertaken should be 'proportionate in the circumstances' (s24(7)). Proportionality goes to the scope and depth of an assessment – and not (of course) to the question of whether one is undertaken: the duty to assess (where a need may exist) is obligatory.

### Summary of the carer assessment duty:

#### Stage 1

There is a pro-active duty on local authorities to offer assessments to all carers where it 'appears' to the authority (ie who appear to any arm of the authority) that they 'may' have needs for support.

#### Stage 2.

The Act (s24) requires an assessment of all such carers (unless they make a valid refusal – (sections 25 – 27). Frequently the nature of the need will not be clear until such an assessment has been undertaken.

#### Stage 3

When undertaking an assessment, section 24 and the regulations require the local authority to have regard to a wide range of factors and section 24(7) states that provided these are considered the 'nature of the needs assessment ... is one that the local authority considers proportionate in the circumstances'. This means that the local authority must look at the need for such things as: *support, preventative services, information, advice or assistance, and also whether the carer works or wishes to do so; whether they want to participate in education, training or any leisure activity etc.* Although the authority must consider these factors – it is up to the authority how it does this: it is for the authority to decide what is 'proportionate'.

## Stage 4

Having completed the assessment, if the authority is satisfied that the person has needs for 'support' then it must decide if any of these needs meet the eligibility criteria: it is the need for 'support' that is the triggering issue, requiring that the authority take the assessment to the next stage.

## Stage 5

Section 32 states that where an authority has done an assessment which has revealed that the person has needs for care / support then it must decide if these needs meet the eligibility criteria and if they do then it must meet those needs by providing assistance in a variety of ways (listed in section 34). The support may be provided to the carer – although more commonly it will be provided to the disabled person as a form of replacement care. The range of supports include (for example): (a) accommodation in a care home, children's home or premises of some other type; (b) care and support at home or in the community; (c) services, goods and facilities; (d) information and advice; (e) counselling and advocacy; (f) social work; (g) direct payments; (h) aids and adaptations; and so on (s34(2)).

## Carers and combined assessments (section 28)

Section 28 enables a local authority to combine the carer's assessment with the assessment of the person in need – but only where the parties consent. The only exception to this relates to children under the age of 16 where section 28(6) provides that an assessment can be combined if the authority is satisfied that 'combining the needs assessment would be consistent with the child's well-being'. [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at para 37 states that this would only be where the authority considers that it would be 'beneficial'.

Local authorities must display flexibility on this question and pay particular attention to the needs of parent carers – for whom a separate assessment may well be beneficial in most cases. It would be an unlawful fettering of an authority's discretion to adopt a rigid rule of always combining such assessments.

young carers this is qualified by it being 'to the extent' that it is 'appropriate having regard to

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<sup>27</sup> Although in *R (G) v. Barnet LBC and others* [2003] UKHL 57 the House of Lords held that in general such a duty existed in public law.

<sup>28</sup> Para 80 to the Part 3 Code.

<sup>29</sup> The Carers (Recognition & Services) Act 1995; Carers & Disabled Children Act 2000; and the Carers (Equal Opportunities) Act 2004.

<sup>30</sup> sections 63 – 64 Care Act 2014 and section 17ZA Children Act 1989

## Eligibility criteria (section 32 - 33)<sup>31</sup>

Once the local authority has gathered the relevant information the Act and [The Care and Support \(Eligibility\) \(Wales\) Regulations 2015](#)<sup>32</sup> require that the authority decides if the person's 'needs' are such that they meet the eligibility criteria – and if so, that care and support is made available to address those needs.

The eligibility criteria regulations create a process with four stages, and in general terms the criteria apply to all people in need (adults, children and carers) although there are slight variations. The stages are as follows:

1. The need arises for a specified reason (ie disability / caring)
2. The need relates to certain key activities ('outcomes')
3. The person (or if a child, their parent(s)) is unable to meet that need even with the available support from others / the community
4. The need can't be met without the local authority providing / arranging support services or Direct Payments

Considering these stages in more detail, the position is as follows:

### Stage 1

The eligibility criteria require that for:

#### *Adult's in need (reg 3)*

- The need arises from their physical or mental ill-health, age, disability, dependence on alcohol or drugs or other similar circumstances;

#### *Children in need (reg 4)*

- The need arises from the same factors as for an adult (above) or is one that if unmet is likely to have an adverse effect on the child's development;

#### *Carers (reg 5)*

- The need arises as a result of providing care for either an adult in need (as described by reg 3 above) or a disabled child.

### Stage 2

The need relates to a set of standard tasks (regs 3, 4 and 5):

- Ability to carry out self-care or domestic routines [*see below for a definition of 'self-care'*];

- Ability to communicate;
- Protection from abuse or neglect;
- Involvement in work, education, learning or in leisure activities;
- Maintenance or development of family or other significant personal relationships;
- Development and maintenance of social relationships and involvement in the community

“basic self-care” is defined by reg 1 as “tasks that a person carries out as part of daily life including”

- (i) eating and drinking;
- (ii) maintaining personal hygiene;
- (iii) getting up and getting dressed;
- (iv) moving around the home;
- (v) preparing meals;
- (vi) keeping the home clean, safe and hygienic

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<sup>31</sup> For a background briefing on eligibility see Amy Clifton, *[Who will be entitled to care and support in Wales?](#)*

National Assembly for Wales Research Service 10<sup>th</sup> July 2015.

<sup>32</sup> SI 1578 (W. 187).

In addition to the standard tasks listed above, the regulations have two specific eligible tasks

– one for adults and one for children. These are:

*For adults / adult carers*

- Fulfilment of caring responsibilities for a child;

*For children / child carers*

- Achieving developmental goals.

### **Stage 3**

The person (if a child – then ‘and his/her parents’) is not able to meet that need, either—

- (i) alone,
- (ii) with the support of others willing to provide;
- (iii) with the assistance of services in the community to which the adult has access.

This element effectively makes a person ineligible if their carer indicates they are willing to provide support. It is conceptually flawed since it confuses ‘eligible need’ with the support that is provided to meet a need. The English criteria do not fall into this error. As the [Statutory Guidance](#) to the Care Act 2014 states (para 6.119):

The eligibility determination must be made based on the adult’s needs and how these impact on their wellbeing. Authorities must only take consideration of whether the adult has a carer, or what needs may be met by a carer after the eligibility determination when a care and support plan is prepared.

The approach of the Welsh criteria is not only problematic for carers: it can also cause significant problems for individuals in need. For example a disabled person may have a need for intimate care but have strong objection to a family carer providing that support.<sup>33</sup> If however the family carer were to indicate they were willing to provide the relevant care, this could make the disabled person ineligible and therefore remove from them the opportunity of exercising control over their care arrangements.

To correct this perverse element within the criteria, carers could be advised to state clearly, that they are not able (and therefore not willing) to provide care unless the local authority has first determined that the individual in need is eligible. Then, and only then, will they be able (and therefore willing) to discuss with the individual in need and the authority the nature and extent of the care (if any) they might be willing to provide.

## Stage 4

He/she is unlikely to achieve one or more of the personal outcomes unless the local authority provides or arranges care and support to meet the need (including by a Direct Payment).

### The 'can' and 'can only' test

The Welsh Government initially described the above criteria as creating a 'can and can only' test. This attracted considerable criticism, including the suggestion that it placed the onus on individuals to prove that they had tried generalised community support services (and that these had failed) before they could then access personalised support (such as a direct payment). The Minister strongly rejected this analysis asserting:<sup>34</sup>

"I have read of the anxiety that has been raised that the Act somehow requires users to demonstrate exhaustively that they have explored every other possible avenue of support before becoming eligible for local authority assistance. That is emphatically not the case under these regulations. The responsibility here lies with the assessor, not with the person being assessed"

<sup>33</sup> See for example [Cerebra Legal Entitlements Research Project Digest of Cases 2014 Terri's Story p30](#).

<sup>34</sup> Mark Drakeford [The Minister for Health and Social Services National Assembly for Wales The Record of Proceedings 14/07/2015](#).

The [Part 4 Code \(Meeting Needs\)](#) restate the Minister's assurance in the following terms:

33. The eligibility criteria must not be used as a tool to require individuals to demonstrate they have exhausted every other possible avenue of support before becoming eligible for local authority assistance.

33. It is the responsibility of the local authority to identify and record ... how the personal outcomes will be achieved.

## Care and support (section 34)

Under the previous legal regime the object of a community care / carers assessment was to determine (among other things) whether there was a need for 'services'. The old legislation<sup>35</sup> contained exhaustive lists of services that could be provided for adults in need. The 2014 Act repeals these statutes and provides an illustrative list of 'ways in which a local authority may meet needs' (for people in need and/or carers), namely:

- a) accommodation in a care home, children's home or in premises of some other type;
- b) care and support at home or in the community;
- c) services, goods and facilities;
- d) information and advice.
- e) counselling and advocacy;
- f) social work;
- g) payments (including direct payments);
- h) aids and adaptations;
- i) occupational therapy.

## Duty to meet needs (sections 35 - 45)

The Act (as with the previous legislation) places a duty on local authorities to meet the eligible needs of adults. It however, strengthens the nature of this 'right' in relation to 'children in need' and for carers as it converts what was formerly a 'power' into a duty to have their eligible needs met. There is in addition a duty to meet the needs of people, who (although their needs are insufficient for the purposes of the 'eligibility criteria') are nonetheless considered to be at risk of abuse or neglect. This provision is considered under 'safeguarding' below.

As with the previous law:

- a local authority's primary responsibilities is to persons 'ordinarily resident' in their area (section 194) or to children 'within the local authority area';
- a local authority has power to provide care and support for those whose needs are insufficient for eligibility criteria purposes; and

- certain people are illegible for support if they are subject to immigration control (section 46). Separate sections address the duties in relation to adults, disabled children, carers of adults and carers of children and these are considered below.

### The duty to meet the needs of adults (section 35)

The duty to meet the care and support needs of an adult are little different to those under the previous legal regime – save only that this duty is extended to self-funders (below). Section 35(6) states that the duty to meet the needs of an otherwise eligible adult ‘does not apply ... to the extent that the local authority is satisfied that those needs are being met by a carer’. The potentially negative impact of this provision can be neutralised if (as discussed above) the carer has been explicit in stating: (a) they are unwilling to provide care unless (and until) the individual is assessed as eligible; and (b) that even then the nature and extent of the care (if any) they might be willing to provide will have to be the subject of specific discussion and specific agreement.

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<sup>35</sup> Primarily s2 Chronically Sick and Disabled Persons Act 1970 and ss 21 & 29 National Assistance Act 1948.

## *Self-funders*

Section 35(4)(b) places a duty on local authorities to meet the eligible needs of adults ordinarily resident in their area:

- (i) ... [whose] ... financial resources are at or below the financial limit,
- (ii) ... [whose]... financial resources are above the financial limit but the adult nonetheless asks the authority to meet his or her needs; or
- (iii) ... [who lack] capacity to arrange for the provision of care and support and there is no person authorised to make such arrangements under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.

As (ii) makes clear, therefore, the duty to meet the needs of adults extends to 'self funders' - ie people who have assets above the financial limit (£24,000<sup>36</sup>) and who ask the local authority to meet their needs.

For care home residents there could be a significant incentive for self-funders to ask the local authority meet their needs as they seek to get the price of their placement at the local authority rate (rather than the self funder rate): a change that may have a distorting impact on the market.<sup>37</sup> Self-funders are however liable for the full cost of the placement and may have an additional cost if authorities make a charge for 'putting in place the arrangements for meeting' these needs (section 59(3)).<sup>38</sup> [Part 4 Code of Practice \(Meeting Needs\)](#) (para 75) advises:

In some circumstances an individual with means above the financial limit may need support from the local authority to make arrangements for their care and support. ... . If the needs meet the eligibility criteria and the individual asks the authority to meet those needs, the local authority will be under a duty to make arrangements with the placement provider. In such cases the local authority will be the contract holder with the provider and the individual will be deemed to be ordinarily resident in the area of the local authority in which they were ordinarily resident immediately before the placement, such that the local authority which made the placement would continue to be responsible. The rate at which the local authority commissions the placement is a matter for local authority determination

## *Cap on costs*

The major incentive for self-funders to seek a local authority assessment of their eligible needs would have come about if the Welsh Government had introduced a 'cap on care' costs of the kind proposed (but shelved until 2020) in England. This – in effect – would offer self funders a free insurance policy: that if assessed as having eligible needs, there would be a cap on the potential costs that they would have to pay. The idea, while superficially attractive, is considered by some to be profoundly flawed.<sup>39</sup> In November 2015 the Welsh Government announced that it too would be shelving this policy proposal.<sup>40</sup>

## The duty to meet the needs of children (section 37)

The 2014 Act materially improves the legal rights of some disabled children to support. Under the previous legislation, although authorities were under a 'specifically enforceable duty' to provide community based support services for disabled children,<sup>41</sup> the nature of the duty to provide residential care (such as overnight respite care) and the duty to support non-disabled 'children in need' was less clear. The 2014 Act clarifies the position by placing a specifically enforceable duty on local authorities to provide all children with the care and support they are assessed as needing, or to protect them from harm.

The section 37 duty to meet needs, does not apply to children who are 'looked after' (s37(6))

– i.e. 'accommodated' or subject to a care order. These children are covered by a tranche of provisions under Part 6 of the Act. The duties imposed on local authorities to provide their support under Part 6 largely replicate sections in Part III Children Act 1989 (discussed below). Given that looked-after children have significantly worse well-being outcomes than other children, the purpose of excluding them from s 37 is unclear. This unsatisfactory state of affairs needs to be clarified.

### *Transition*

A troubling omission from the Act concerns the absence of provisions detailing local authority responsibilities to disabled children and carers when a young person is in transition into adulthood (apart from for 'Looked After Children'). It appears that the Act will not repeal or codify the (often ignored<sup>42</sup>) duty to consider the transition needs of children with Special Educational Needs Statements under the Education Act 1996.<sup>43</sup> This means that the duties under the Disabled Persons (Services, Consultation and Representation) Act 1986 sections

5 and 6 remain – namely the duty when the child is 14, that the relevant social services officer be contacted with a view to a -social care assessment of the young person's needs being undertaken – so that services are in place when educational provision ceases.

Although the idea underpinning the Act is that local authority responsibilities for disabled people will exist from 'cradle to grave' the reality is that different departments and teams with different budgets and local criteria will often be responsible for disabled children to those responsible for adults. Transition problems will almost certainly occur as frequently as they do under the current legislation.<sup>44</sup>

In relation to 'looked after' children the [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#) the obligation (when a looked after child is about to turn 16) for the local authority to:<sup>45</sup>

prepare a pathway plan to assist that young person with the transition to adulthood and leaving care. The pathway plan will build upon the child's existing Part 6 care and support plan, which will be subsumed within the pathway plan

## The duty to meet the needs of adult carers and young carers (sections 40 - 44)

The Act imposes a duty on local authorities to meet the eligible needs of carers – both adult carers and young carers. In some of the most convoluted sections and subsections known to social care, the Act then considers all the possible permutations of carers being over / under 18; carers and ‘people in need’ having / lacking capacity to agree to their care arrangements; carers and those ‘cared for’ having assets above and below the financial limits. The long and the short of it, however is that local authorities are under a specifically enforceable duty to provide care and support in such cases unless they can produce cogent reasons / evidence to explain otherwise.

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<sup>36</sup> The Care and Support (Charging) (Wales) Regulations 2015 SI 1843 (W. 271) reg 11(2).

<sup>37</sup> Either causing care homes severe financial difficulties or local authorities (if they have to start paying a larger overall rate).

<sup>38</sup> In such cases there may also an adverse impact on self-funders’ social security benefits (ie the loss of their DLA/PIP or AA / care component).

<sup>39</sup> See for example, L Clements ‘Adult social care law reform’ in *Elder Law* (2013) Issue 3 Volume 3 pp219-224.

<sup>40</sup> Written Statement - *Further Update on Reform of the Arrangements for Paying for Social Care and Support* 11 November 2015.

<sup>41</sup> Under the Chronically Sick and Disabled Persons Act 1970, section 2.

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<sup>42</sup> See for example Local Government Ombudsmen Reports on complaint 08/001/991 against the Isle of Wight Council, 4 June 2009.

<sup>43</sup> In 2013 the Welsh Government published a ‘Table of intended repeals showing where related provision is found in Bill published 2013’ LFGT048813 Doc 1 with subheading ‘NB this list may be subject to further minor change’. This document was (at 2<sup>nd</sup> September 2014 ) no longer accessible on the internet.

<sup>44</sup> See S Broach, L Clements & J Read *Disabled Children: A Legal Handbook* (Legal Action 2010) chapter 10. It should also be noted that the key current Act that provides for the needs of disabled people the Chronically Sick and Disabled Persons Act 1970. ©Barnardo’s 2018. All Rights reserved. No part of this material may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means without prior written permission from Barnardo’s [www.lukeclements.com](http://www.lukeclements.com) 2016

and Disabled Persons Act 1970 is also one that applies from the cradle to the grave.

<sup>45</sup> At para 57 and para 398 – 466.

A problematical curiosity concerning young carers is that they are only entitled to support if (among other things) their needs meet the eligibility criteria (section 42(3)). Adults and children in need are however entitled to support if they are at risk of abuse or neglect (even if they fail to meet the eligibility criteria). This important exception does not apply to young carers. The reasoning is almost certainly that a young carer who is at risk of abuse is likely to be eligible in their own right (ie as a 'child in need') – as [Part 4 Code of Practice \(Meeting Needs\)](#) para 40 explains:

As is the case with adults, a local authority must meet the needs of children which the local authority considers it is necessary to meet in order to protect the child from abuse or neglect or a risk of abuse or neglect or in order to protect the child from other harm or risk of such harm. This is an overriding duty on a local authority irrespective of any application of, or outcome from, the determination of eligibility. A local authority's duties in respect of looked after children are contained within Part 6 of the Act.

### Short break services

Unlike in England, there is no Welsh legislation (from April 2016) that is specifically labeled 'short breaks' or targeted on the rights of families with disabled children to 'short breaks'. The previous provisions are repealed by the 2014 Act and this has been the subject of adverse comment.<sup>46</sup> The Welsh Government has however undertaken to publish guidance (a 'technical briefing') concerning the continuation of the duties for provision of short breaks. The commitment to produce such guidance was noted in a 2014 Children's Commissioner for Wales report<sup>47</sup> concerning short breaks. It stated that the 'benefits of short breaks for children and young people cannot be underestimated' and that 'positive feedback from children and families about the value of their short breaks provision has been overwhelming' (p7). At page 11 of the report it was noted that:

Welsh Government has committed to ensuring that the continuing need for short break service provision is recognised in the regulations and codes of practice which will accompany the Social Services and Well-Being (Wales) Act.

While such guidance will be a welcome addition, it is clear that the core provisions of the Act are designed to provide a range of support services for families with disabled children and (although not specifically named) 'short breaks' are one of these essential support services.

Once a local authority has determined that a disabled child (or her/his carers') have eligible needs, then the authority must prepare a plan<sup>48</sup> that explains the 'operational detail' - the 'how, who, what and when'.<sup>49</sup> The plan must describe how the need is to be met, by whom, in what way and when this will be done. As the Ombudsman has stressed, an assessment must result in a care plan that identifies the child's needs, what is to be done about these needs, by whom and when. If a direct payment is made, it must specify precisely what need these payments are intended to meet, why this level of payment is considered appropriate, or what outcome this will result in.<sup>50</sup> A copy of the assessment record must be offered to the disabled child and their parent(s).<sup>51</sup>

The guidance gives considerable emphasis to the provision of timely support for families,

stressing for example that it is ‘important to identify early on what needs the family has and provide appropriate support and/or make appropriate referrals’.<sup>52</sup>

The duty to meet the needs of the child and/or his/her carers is strict in the sense that it is non-resource dependent. Accordingly if the assessment identifies a need for (say) 10 hours of sitting services a week, or of one weekend a month for the child to be accommodated away from the home – then this need must be met precisely and it is not something that the local authority can ‘trim’<sup>53</sup> because it has to make cut backs due to resource shortages.<sup>54</sup>

The need for short breaks support may arise either from a disabled child’s assessment or that of his/her carers: as section 34(1) of the 2014 Act explains, a local authority may meet a person’s needs by arranging for ‘something to be provided to a person other than the person with [the assessed needs]’. Section 34(2) provides examples of what can be provided in such cases and this includes the three most common mechanisms for facilitating short breaks – namely (a) accommodation in a care home, children’s home or premises of some other type; (b) care and support at home or in the community; (g) direct payments. Examples of (b) would include sitting service (including a night sitting service) as well as a day centre and an after-school (or summer holiday) club. Where the need has been assessed as eligible, the Act (section 51) and the relevant regulations<sup>55</sup> and guidance<sup>56</sup> enable the parent to require the local authority to make them a direct payment rather than arrange the necessary care.

### Short breaks and ‘looked after’ children

Short breaks can also be provided by the child spending time in an overnight placement: for example, a foster home or respite care centre. These arrangements are covered by separate regulations<sup>57</sup> and the [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#). Paras 288 – 301 of the code provide advice on the legal obligations relating to such children (under the heading ‘Short breaks’). While it emphasises (at para 289) that ‘short breaks will often be provided as part of a disabled child’s care and support plan’ (ie under Parts 3 and 4 of the Act) it states (para 288):

Sometimes it will be appropriate to place a child with a foster carer or in a residential setting for a short period of time only – for example, if the child is disabled and it is necessary to place the child away from home temporarily while the parents have a break from caring.

Unfortunately the guidance in the Part 6 Code is far from helpful as to the legal position in such cases.<sup>58</sup> It suggests (para 290) that where such a placement occurs ‘the local authority

may decide' that the short break support is provided under section 76(1)(c) of the Act.<sup>59</sup> The guidance provides a list of factors that should be considered in determining whether the care is provided under section 76(1)(c) or under the general duty to meet the needs of the child under section 37 of the Act (at para 292). Where it is decided that the child is accommodated under section 76(1)(c) then the placement must comply with the relevant 'looked after' children regulations<sup>60</sup> - however these will generally be of a lighter touch in terms of administrative record keeping<sup>61</sup> - provided that the child is:

- (1) not subject to a care order; and
- (2) is receiving a pre-planned series of short breaks in the same setting, and
- (3) where (a) no single placement lasts for more than 4 weeks; (b) at the end of the placement the child returns home to the care of the parents; and (c) the short breaks don't exceed 120 days in a year.

### **Care & support plans (section 54 - 55)**

The duty to prepare care / support plans for individuals whose needs have been assessed as eligible is sustained in the new legislation.

In preparing a care / support plan the local authority must involve:

- (1) the person for whom it is being prepared; together with (if applicable)
- (2) any person with parental responsibility for the child; and if 'feasible'
- (3) the person's carer / or (in the case of a carer) the person for whom she / he carers.

The detail of local authority care planning obligations is provided in [The Care and Support \(Care Planning\) \(Wales\) Regulations 2015](#) and the [Part 4 Code of Practice \(Meeting Needs\)](#) although in most respects the process has changed little. Thankfully the Code avoids the patronising phrase 'respectful conversations' and makes less use of the word 'citizen': language that so bedevilled the [Integrated Assessment, Planning and Review](#).<sup>62</sup>

### **Charging (section 59 - 73)**

Local authorities are empowered (but not obliged) to charge for the care and support they provide / arrange to be provided (under sections 35 – 45) to meet a person's needs. The charge can only relate to the 'cost that the local authority incurs in meeting the needs to which the charge applies' (s59(2)). This restriction is designed to ensure that local authorities do not charge for the actual assessment process – even if the person in need is a 'self-funder'.

The Act also requires that the charge imposed be no more than is 'reasonably practicable for the person to pay' (section 66) which is a welcome 'carry over' from the previous legal

framework.<sup>63</sup> The wicker detail is provided in the [Care and Support \(Charging\) \(Wales\) Regulations 2015](#) and the [Part 4 and 5 Code of Practice \(Charging and Financial Assessment\)](#). The regulations (regs 7 and 22) stipulate that the maximum charge remains at £60.00 per week which has had the perverse effect of reducing the charges for wealthy people but not for the poorest. Since poverty is the greatest barrier that disabled people face in their struggle to 'live independently' it is vital that the Government get this right. In terms of the obligation to have a rational policy that progressively realises the international human rights obligations of Governments,<sup>64</sup> such a policy appears to be the antithesis of what is required.<sup>65</sup> There is a small increase in the personal expenses allowance for adults in residential care to £26.50.<sup>66</sup>

### **NHS interface (section 47)**

Section 47 is concerned with the contested question of 'Continuing NHS Healthcare' – for which Wales has particular problems<sup>67</sup> (and for which in 2014 it issued revised guidance<sup>68</sup>). In relation to this question both the English and Welsh Bill's commenced with the same phrasing. However a number of amendments were made to the English Bill to ensure that the current boundary between local authority responsibilities and the NHS (as defined in the *Couglan* Court of Appeal judgment<sup>69</sup>) remained unchanged. Sadly no such amendments were made in Wales. The result is a serious problem, since the wording in the Act is materially different to the wording used by the court in *Couglan*.

The *Couglan* judgment confirmed that local authorities were prohibited from funding nursing care that the NHS was required to provide but that they could fund nursing care if it was (1) merely ancillary or incidental to the provision of social care support and (2) of a 'nature' that one would expect a social services authority to provide. Although section 47 makes it unlawful for local authorities to fund nursing care unless it is 'incidental or ancillary' to social care, it contains no prohibition in relation to the second element – namely as to the 'nature' of the nursing care'.

In the absence of firm action by the Welsh Government, LHBs will inevitably seek to argue that the Act materially undermines the rights of patients to 'Continuing NHS Healthcare' funding. Unless this is the (unstated) intention of the Welsh Government, this failing will need to be addressed directly in the regulations and in the Code. A clear statement would also be welcome – on the lines of the statement made by the English Minister that:<sup>70</sup>

The provisions [in the English Act] are not intended to change the current boundary—let me place that clearly on the record—and we do not believe that they will have that result. The limits on the responsibility by reference, as now, to what should be provided by the NHS remain the same'.

### **Direct Payments (sections 50 - 53)**

The Act replicates the current law concerning entitlements to direct payments – including how they are calculated and administered. As at present, the detail of the scheme is spelled out in regulations – now [The Care and Support \(Direct Payments\) \(Wales\) Regulations](#)

[2015](#). Section 53(9) of the Act makes a material change – in that it enables direct payments to be used to purchase care and support from (among others) 'the authority which made the

payment'. Guidance on the scheme is provided in the [Part 4 Code of Practice \(Meeting Needs\)](#) – although, disappointingly this is less detailed than the guidance under the previous legislative regime.

As with the English Care Act 2014, the Welsh scheme extends direct payments to cover residential care costs. There is little explanation as to how this will work in practice. In fact it is only acknowledged in the [Part 11 Code of Practice \(Miscellaneous and General\)](#) which makes it clear, when discussing the ordinary residence deeming rule (page 33), that this is the case (namely by stating that the rule 'also applies where a person takes a direct payment and arranges their own care and support'). The potential problems that will arise by permitting direct payments to be used for long periods of residential care, would appear to outweigh any benefits. The complexity of the resulting scheme has caused the English Government to postpone such payments until 2020:<sup>71</sup> the Welsh Government appears to have no such concern.

The other major difference between the legislative arrangements for Direct Payments in England and Wales is their unavailability in Wales for people eligible for NHS Continuing NHS Healthcare funding – a difference that the Welsh Government intends to remain.<sup>72</sup>

The extension to the Independent Living Fund (ILF) support in Wales is scheduled to end in March 2016.<sup>73</sup>

### **Continuity of care (portability) (sections 56)**

The Act prescribes the way local authorities transfer responsibility for the care and support of people when they move from one authority area to another. It does this by attempting to embed 'good practice' (ie what should happen) into legislation. The problem is that there are no sanctions if either authority fails to act properly – and so an individual will have to make a complaint/ go to the Ombudsman if a problem occurs.<sup>74</sup>

Section 56 contains a number of procedural obligations – which may be fleshed out further by regulations (section 56(6)) - but none appear to have been made). The only guidance provided relates to the process for resolving the inevitable disputes that this provision will create (and this is found in the [Part 11 Code of Practice \(Miscellaneous and General\)](#)).

In essence the portability 'right' provides that where a local authority (the 'sending'<sup>75</sup> authority) is providing care and support for an adult or a child in need and another authority (the receiving authority) is notified that he/ she intends to move into their area (and it is satisfied that this is likely to happen) then it must (among other things) undertake an assessment of their needs. If the assessment has not been completed by the time the person actually moves, then the receiving authority must meet the needs identified by the sending authority 'in so far as that is reasonably practicable' until its assessment and care plan is put in place.

A problem that has yet to be fully resolved, concerns individuals who move to live in England, Scotland and Northern Ireland. There is however a brief (one page) protocol setting out '[Principles of Cross-Border Continuity of Care within the United Kingdom](#)' which aims:

to maintain the adult's wellbeing and prevent them from falling into crisis; ensure that the adult is at the centre of the process; and that responsible authorities should work together and share information in a timely manner to ensure needs are being met both on the day of the move and subsequently.

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<sup>46</sup> See for example Clements L [Why implementation of new Welsh social care legislation must be delayed](#) in Community Care 19<sup>th</sup> November 2015.

<sup>47</sup> Children's Commissioner for Wales [Full Lives: A study of short breaks provision for children and young people with disabilities and their carers in Wales](#) (2014).

<sup>48</sup> Section 54 Social Services and Well-being (Wales) Act 2014.

<sup>49</sup> *R (J) v Caerphilly CBC* [2005] EWHC 586 (Admin); (2005) 8 CCLR 255.

<sup>50</sup> Local Government Ombudsman complaint number 13 002 982 against Birmingham City Council 12 March 2014.

<sup>51</sup> Reg 6 The Care and Support (Assessment) (Wales) Regulations 2015 SI 1305 (W.111) and para 116 to the Part 3 Code.

<sup>52</sup> Para 70 of the Part 3 Code.

<sup>53</sup> In *R v Islington LBC ex p Rixon* (1996) Times 17 April; 1 CCLR 119 Sedley J put it thus: 'The practice guidance ... counsels against trimming the assessment of need to fit the available provision'.

<sup>54</sup> Complaint 01/C/03521 against North Yorkshire 19<sup>th</sup> August 2002.

<sup>55</sup> [Care and Support \(Direct Payments\) \(Wales\) Regulations 2015 SI 1815 \(W. 260\)](#).

<sup>56</sup> The Code of Practice on the exercise of social services functions in relation to [Part 4 \(Meeting needs\)](#) of the Social Services and Well-being (Wales) Act 2014.

<sup>57</sup> [The Care Planning, Placement and Case Review \(Wales\) Regulations 2015 SI 1818 \(W.261\)](#).

<sup>58</sup> The Code, for example, at para 291 suggests that the obligation under this section is a 'power' when it is clearly a 'duty'. The difficulty arises because section 76 has no 'power' to accommodate (unlike section 20(4) of the Children Act 1989) – ie in cases where the child does not meet the strict requirements of s76(1) but nevertheless the authority considers it necessary to treat the child as 'accommodated' to safeguard or promote their welfare.

<sup>59</sup> This is broadly equivalent to the duty under section 20(1) Children Act 1989 in England.

<sup>52</sup> Para 70 of the Part 3 Code.

<sup>53</sup> In *R v Islington LBC ex p Rixon* (1996) Times 17 April; 1 CCLR 119 Sedley J put it thus: 'The practice guidance

... counsels against trimming the assessment of need to fit the available provision’.

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<sup>59</sup> This is broadly equivalent to the duty under section 20(1) Children Act 1989 in England.

<sup>60</sup> The Care Planning, Placement and Case Review (Wales) Regulations 2015 SI 1818 (W.261).

<sup>61</sup> Regulation 62(3) – and see paras 295-301 of the Part 6 Code.

<sup>62</sup> Welsh Government Integrated Assessment, Planning and Review Arrangements for Older People: Guidance for Professionals in supporting the Health, Care and Well-being of Older People (2014).

<sup>63</sup> Health and Social Services and Social Security Adjudications Act 1983, s17.

<sup>64</sup> See for example Article 28 UN Convention on the Rights of Persons with Disabilities and Article 23 Convention on the Rights of the Child.

<sup>65</sup> A rational ‘capabilities’ approach would presumably exempt people on means tested social security benefits before imposing a fixed upper limit – see for example Amartya Sen ‘Human rights and capabilities’ in *Journal of Human Development* ( 2005) 6 (2): 151–166.

<sup>66</sup> Written Statement - Further Update on Reform of the Arrangements for Paying for Social Care and Support 11 November 2015.

<sup>67</sup> See for example, Wales Audit Office Report Implementation of the National Framework for Continuing NHS Healthcare 13 June 2013.

<sup>68</sup> Welsh Government Continuing NHS Healthcare: The National Framework for Implementation in Wales (2014).

<sup>69</sup> *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622: [2000] 3 All ER 850.

<sup>70</sup> Public Act Committee Report 16 January 2014 (page 205/208).

<sup>71</sup> In January 2016 the English Government announced that it had decided to postpone the ‘national rollout of direct payments in residential care’ until 2020 - see [www.local.gov.uk/web/guest/care-support-reform/-/journal\\_content/56/10180/7643648/ARTICLE](http://www.local.gov.uk/web/guest/care-support-reform/-/journal_content/56/10180/7643648/ARTICLE)

<sup>72</sup> The First Minister (Carwyn Jones ) First Minister’s Questions 25 March, 2014 – see National Assembly’s Record of Proceedings.

<sup>73</sup> See [www.communitycare.co.uk/2015/03/13/wales-independent-living-fund-users-given-nine-months-protection-cuts-agency-closes/](http://www.communitycare.co.uk/2015/03/13/wales-independent-living-fund-users-given-nine-months-protection-cuts-agency-closes/).

<sup>74</sup> The Act adopts many of the provisions in Baroness Jane Campbell’s Social Care Portability Bill 2012 – but not those that required one local authority to reimburse the other if it had failed to comply with its responsibilities

during such a transfer.

<sup>75</sup> The English Act was amended to remove what was thought to be derogatory language of 'sending and 'receiving' authorities – and speaks instead of 'first' and 'second' authorities.

Annex 2 of the [Part 11 Code of Practice \(Miscellaneous and General\)](#) also provides some detail on this.

### **Choice of accommodation rights (sections 57)**

The Act provides for regulations - [The Care and Support \(Choice of Accommodation\) \(Wales\) Regulations 2015](#) – that continue the entitlement of adults in residential accommodation to choose their care home. These continue to permit a ‘topping up’ payment being made by a third party where the care home is more expensive than ‘the cost that the local authority would usually expect to incur’. There is substantial evidence concerning the improper imposition of topping up payments<sup>76</sup> – largely due to the local authority ‘usual rate’ being too low. The ‘choice’ provisions look to continue to sustain the considerable litigation resulting in judgments against local authorities in such cases.<sup>77</sup>

The Welsh provisions now differ significantly from the English scheme – where the choice of accommodation rights extend to ‘supported living’ and to ‘Shared Lives’ schemes.

### **Support under s117 Mental Health Act 1983**

The Act (in contrast to the English Care Act 2014) leaves section 117 MHA 1983 unamended. It is unclear whether an assessment of need under section 19 (and the application of the eligibility criteria under section 32) apply to needs under section 117. Arguably this is the case (as needs are not expressly confined to needs under the 2014 Act) and Schedule 2 states that section 117 is a social services function. In England (where the legislative scheme is similar) the Department of Health has taken the view that the duty to assess needs for section 117 aftercare support derives from the duty under the NHS & Community Care Act 1990, section 47 – and not the 2014 Act.<sup>78</sup> This in turn means that the English eligibility criteria do not apply to such assessments.

The English Act’s amendment (inserting a new s117(6) into the 1983 Act) to limit aftercare services to need ‘arising from or related to the mental disorder’ and those designed to reduce ‘the risk of a deterioration of the person’s mental condition’ has not been replicated in Wales – but would appear unnecessary. In *R (Mwanza) v. Greenwich & Bromley LBCs* (2010)<sup>79</sup> the High Court had already interpreted the provision to contain such limitations

The Welsh Act (in contrast to the English Act) is also silent concerning ordinary residence for the purposes of s117; the right to ‘choice of accommodation’ for persons subject to s117;<sup>80</sup> and the right ‘top-up’ section 117 care and support packages.<sup>81</sup>

<sup>76</sup> See for example [Local Government Ombudsman Report concerning Solihull MBC](#) 14 014 177 (11 January

2016) and also Anna Passingham, James Holloway and Simon Bottery *Care home top-up fees: the secret subsidy* (Independent Age 2013).

<sup>77</sup> See for example, *Forest Care Homes Ltd v Pembrokeshire County Council* [2010] EWHC 3514 (Admin).

<sup>78</sup> See [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015](#).

<sup>79</sup> [2010] EWHC 1462 (Admin) 15 June 2010 at <http://www.bailii.org/ew/cases/EWHC/Admin/2010/1462.html>

<sup>80</sup> See *R (Wiltshire) v Hertfordshire CC* [2014] EWCA Civ 712 19 para 20.

<sup>81</sup> See [Statutory Guidance Annex A: Choice of accommodation and additional payments](#) para 39.

## Looked after children etc (sections 74 - 125)

Part 6 of the Act (sections 74 – 125) largely re-enacts the provisions in Part 3 of the Children Act 1989 relating to 'looked after and accommodated children – including independent reviewing officers, the Children Leaving Care provisions, secure accommodation etc. The principal regulations are [The Care Planning, Placement and Case Review \(Wales\) Regulations 2015](#) and the principal guidance is contained in the [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#). This briefing does not cover the detail of this aspect of the Act. A review of the relevant law can be found at the [Children's social care law in Wales](#) website.

Concern has been expressed about the likely impact of Part 6. In essence it repeals Part 3 of the Children Act 1989 and in so doing abolishes familiar concepts such as 'children in need'. Commenting on this reform the (then) Children's Commissioner for Wales expressed deep concern that the reformed Act did not recognise 'the distinct circumstances of children and young people'. Referring to the stated intention of the Welsh Government that the Act would 'as far as is possible, integrate and align arrangements so that there is a common set of processes, for people' the Commissioner said that he failed to understand 'how the replacement or restatement of parts of existing legislation relating to children will give greater effect to the best interests of the child.'<sup>82</sup>

Concern has also been expressed about the Act's conflation of the 'well-being' principle with Children Act concept of 'welfare' – and in this respect see – Dr Julie Doughty [How do you define a child's 'welfare' as opposed to 'wellbeing'?](#) (Community Care 2016).

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<sup>82</sup> Children's Commissioner for Wales, [Annual Report 2014, Policy and Public Affairs](#).

## Safeguarding (section 126 – 142)

Part 7 of the Act deals with ‘safeguarding’ both for adults and children – although safeguarding obligations are a theme that runs through the entire Act: ‘protection from abuse and neglect’ is defined as a key ingredient of ‘well-being (section 2); services are to be developed to prevent people from suffering abuse or neglect (section 15(2)); abuse or neglect can trigger ‘eligibility’ (section 32); and support services can be provided when deemed necessary to protect people from abuse or neglect (section 35(3) and section 37(3)).

The safeguarding duty applies to people ‘at risk’. For an adult this is someone experiencing (or is at risk of) abuse or neglect, and has needs for care and support and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it (section 126(1)). A child is at risk if experiencing (or is at risk of) abuse, neglect or other kinds of harm, and has needs for care and support (whether or not the authority is meeting any of those needs) (section 130(4)).

Section 197 defines abuse as physical, sexual, psychological, emotional or financial<sup>83</sup> and which may occur in any setting. Neglect is defined as a failure to meet a person’s basic physical, emotional, social or psychological needs, which is likely to result in an impairment of the person’s well-being.

As noted above, people who are considered to be at risk of abuse or neglect are legally eligible for care and support – even if their needs (in terms of achieving specified outcomes) are otherwise insufficient for the purposes of the ‘eligibility criteria’.

The Act creates a National Independent Safeguarding Board (section 132) and provides (in regulations) for local Safeguarding Boards for adults and for children, whose objectives are essentially to ‘protect and to prevent’. In large measure the Act puts on a statutory footing much of the previous safeguarding guidance (ie ‘In Safe Hands’<sup>84</sup>) – including the imposition of a duty on public bodies to report abuse of adults (s128) and children (s130) and to make enquiries where there is reasonable cause to suspect that a person is at risk.<sup>85</sup> The power to protect property of people being accommodated by a local authority or LHB has also been retained (section 58).

In statutory terms, the most significant new provision concerns ‘adult protection and support orders’ (section 127). This provides for an ‘authorised officer’ of a local authority to obtain an order from the magistrates court that entitles them to speak in private with a person suspected of being at risk in order to ascertain whether she / he is making decisions freely and whether he / she is at risk. The [Adult Protection and Support Orders \(Authorised Officer\) \(Wales\) Regulations 2015](#) reg 3 requires that a local authority only authorise a person to apply for an adult protection and support order ‘who has relevant experience, has completed appropriate training and is an officer of the authorising authority’ – but if this is not practicable it can authorise any officer of the authority. Statutory guidance (rather than a Code) has been issued concerning the operation of the Safeguarding duty –as the [Statutory guidance in relation to part 7 \(Safeguarding\) of the Social Services and Well-being \(Wales\)](#)

## Act 2014.

Only time will tell whether these measures will be effective. The Act has taken a middle way

– between the English Act which provides no new safeguarding powers and the Scottish Act<sup>86</sup> which contains (in addition to a power of entry) a power of removal. There is a fear that the Welsh option may be the worst of both worlds – since it provides no power to do anything if the person is found to be ‘at risk’ and it repeals the one possible option that currently exists (the power of removal under National Assistance Act 1948, section 47 – repealed by section 129 of the 2014 Act). This fear may prove to be ill-founded since the police have extensive powers in such cases.<sup>87</sup> The problem of course is that ‘law and order’ is not a devolution issue and so the extent to which the regulations and Code can dictate the safeguarding role to be fulfilled by the police is limited.

## Human Rights Protection

The Act continues the human rights protection of certain people receiving social care. The protection covers situations where care or support is arranged by a local authority for an adult or a carer, or is paid for (directly or indirectly in full or in part) by the authority and the care is provided by a registered care provider. Unlike the situation under the previous legislative regime protection extend to people in their own homes as well as to people in a care home. In such cases the care provider is deemed to be a public authority for the purposes of the Human Rights Act 1998.<sup>88</sup>

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<sup>83</sup> Section 197 defines financial abuse as including (a) having money or other property stolen; (b) being defrauded;(c) being put under pressure in relation to money or other property; (d) having money or other property misused.

<sup>84</sup> National Assembly for Wales (2000) *In Safe Hands*.

<sup>85</sup> Section 126(2) for adults and section 130(3) for children.

<sup>86</sup> Adult Support and Protection (Scotland) Act 2007, ss 7, 8, 11 & 14.

<sup>87</sup> The English Government when arguing that a power of entry was not necessary, cited existing police powers under the Police and Criminal Evidence Act 1984section 17(1)(e) ‘to enter premises for the purposes of “saving life or limb or preventing serious damage to property’ as well as powers under the Domestic Violence, Crime and Victims Act 2004, the Fraud Act 2006 the Mental Capacity Act 2005 and the High Court’s Inherent jurisdiction – see comments of the Minister of State, Department of Health (Norman Lamb) House of Commons Public Bill Committee 21st January 2014 (morning) at 270-271.

## Complaints (section 171 - 180)

Part 10 of the Act provides for further reform of social services complaints procedures (adults and children – as well as for privately funded care). The 2012 Consultation on reforming the social services complaints process<sup>89</sup> – proposed aligning the system closer to the English system where the third stage of a complaints process had been removed and the Ombudsman is able to investigate complaints by self-funders concerning their social care services.

In August 2014 the Welsh Government introduced the new complaints process in accordance with the proposals ie by removing the right to an independent panel hearing. The regulations<sup>90</sup> and policy guidance<sup>91</sup> underpinning the new procedure make few other changes to the substance or process of complaining in Wales. Complaints can be made by anyone (including a child) who is/was entitled to receive a service from social services – or by their representatives. Local authorities must appoint a Complaints Officer to manage the process although the Director has overall responsibility. The regulations require that any complaint must be acknowledged within 2 days of receipt and within 10 days of this there must be a discussion (possibly over the phone<sup>92</sup>) with the complainant.<sup>93</sup> The guidance advises that at the Stage 1 ‘local resolution’ process the ‘emphasis should be on achieving service user satisfaction rather than avoiding a Formal Investigation’. Although the regulations require that the discussion take place ‘within 10 days’ it does not state explicitly that it must also be concluded within this period – but this appears to be the intention of the statutory scheme.<sup>94</sup>

The Formal Investigation stage arises if the first stage has failed or ‘if seriousness of the complaint means that’ a first stage is inappropriate if the ‘complainant has asked that their complaint be progressed immediately’ to this stage (para 71). The local authority must compile a record of the complaint within 5 working days of the date that it is received as a Formal Investigation and the investigation stage ‘must be completed, and a full written response issued to the complainant, within 25 working days of the start date’ (para 73) although there is provision for this to be exceeded in ‘exceptional cases’ (para 76). This

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<sup>88</sup> This protection derives from the Care Act 2014 section 73(1)(b) because ‘human rights’ is not a devolution

issue. The protection only extends to adults, since the English Act (primarily) only addresses the needs of adults.

<sup>89</sup> Welsh Government [Making things better - Review of Social Services complaints](#) (2012).

<sup>90</sup> The Social Services Complaints Procedure (Wales) Regulations 2014, SI 1794 (W. 187) and the

Representations Procedure (Wales) Regulations 2014, SI 1795 (W. 188). The two sets of regulations streamline the complaints procedures for adults and children. In simple terms SI 1794 does this for adults and SI 1795 for children.

<sup>91</sup> Welsh Government *A guide to handling complaints and representations by local authority social services*

August 2014 (Policy Guidance).

<sup>92</sup> Para 67 of the guidance.

<sup>93</sup> Reg 16, The Social Services Complaints Procedure (Wales) Regulations 2014 No. 1794 (W. 187) and reg 17

The Representations Procedure (Wales) Regulations 2014 No. 1795 (W. 188).

<sup>94</sup> Para 115 of the guidance requires that every year each authority publish basic details about the operation of the scheme, including the ‘number of complaints and representations that exceeded the statutory timescale for Local Resolution (10 working days)’.

stage involves an independent investigator – but ultimately the local authority decides ‘whether or not the complaint is upheld’ (guidance para 88).

### **Advocacy (section 181 – 183)**

The Act (section 181) provides for regulations requiring local authorities to arrange for advocacy services for people with care and support needs (whether or not those needs are being met by a local authority). At the time of writing this briefing (30<sup>th</sup> January 2016) it does not appear that regulations have been issued under this provision.

### **Ordinary residence (section 194 - 195)**

The law concerning the determination of a person’s ‘ordinary residence’ is largely unchanged by the Act – and the two ‘deeming’ rules are preserved. The first deeming rule (now found in section 194(4)) concerns adults in NHS accommodation: such people are deemed to be ordinarily resident in the area in which they were immediately before they entered the NHS accommodation / ambulance.

The second deeming rule (now found in section 194(2)) concerns adults whose accommodation is arranged by a local authority in the area of another local authority. Contrary to expectations, the Act continues to restrict this rule to cases where a local authority arranges accommodation in a registered care home – see the [Care and Support \(Ordinary Residence\) \(Specified Accommodation\) \(Wales\) Regulations 2015](#): the draft regulations<sup>95</sup> had indicated that this would be extended to include ‘adult placement scheme accommodation’.<sup>96</sup>

### **Government Default powers (sections 149 – 161)**

The Act provides the Welsh Ministers with extensive powers to issue ‘Directions’ to local authorities and to intervene. Given the current reality of fragmented and underfunded local authorities this is a power that may have to be used – and a failure by the Welsh Ministers to consider its use may open the Government to challenge (most obviously by way of a judicial review).

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<sup>95</sup> The draft Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015 reg 4.

<sup>96</sup> Namely ‘accommodation which is provided together with personal care to an adult by an individual in the individual’s own home under the terms of an agreement between that individual and a person who is registered under Part 2 of the Care Standards Act 2000 as the provider of an adult placement scheme’ – and see also the

Adult Placement Scheme (Wales) Regulations 2004 SI 1756 (W.188).

## SUMMARY

# Safeguarding

## Introduction

This is a summary of the areas of the Social Services and Well-being (Wales) Act, regulations and statutory guidance that relate to safeguarding. This summary forms part of the suite of learning materials that have been developed to support the implementation of the Act. It is intended for anyone who would like to know more about changes to safeguarding under the Act.

## Context

Safeguarding is everyone's business and practitioners in all agencies need to recognise and act when they identify children and adults at risk. There are some groups of people who need more detailed knowledge of Part 7 of the Act, which is specifically about safeguarding, and how other parts of the Act relate to safeguarding because they have specific duties and responsibilities:

- Practitioners in adults' and children's services in **local authorities** (or organisations they have delegated functions to) and practitioners in **relevant partner agencies** – police, probation, youth offending teams, local health boards and NHS trusts – need to know what must and should be done to safeguard people
- Local authority and relevant partner agency leaders who are involved in **Safeguarding Boards** will need to understand and implement areas relating to Board.
- **Members** of the **National Independent Safeguarding Board** will need to fully understand the guidance and regulations of Part 7 of the Act to enable them to report to Ministers and work effectively with Safeguarding Boards

The Act aims to strengthen and build on existing safeguarding practice in Wales to ensure that people are able to live their lives to the full. There is a new overarching duty to promote the well-being of people who need care and support. In the Act

well-being is defined with eight common aspects, one of which is protection from abuse and neglect. In relation to a child, well-being also includes their physical, intellectual, emotional, social and behavioural development; and their welfare (ensuring they are kept safe from harm).

There are some other overarching duties in the Act. Practitioners have to have regard to people's individuality, dignity and their views, and support them to participate, including considering whether advocacy support is necessary. Practitioners must promote adults' independence and promote the upbringing of the child by the child's family where possible. Practitioners must also have regard to the United Nations Principles for Older Persons, Part 1 of the United Nations Convention on the Rights of the Child, the United Nations Convention on the Rights of Disabled People, as well as the European Convention of Human Rights.

### ***Links to the rest of the Act***

Other parts of the Act link to the duty to protect people from abuse and neglect, and to protect children from harm. Local authorities must:

- provide services that contribute towards preventing people suffering from abuse or neglect harm, and information and advice on how to raise concerns;
- assess people's needs, even if they refuse assessment, if abuse, neglect or harm (for children) is suspected;
- automatically meet needs for people whose needs aren't otherwise eligible if that is necessary to protect them from abuse, neglect or (for children) harm;
- safeguard and promote the well-being of looked after children; and
- actively engage and co-operate with partners to protect people from abuse, neglect or (for children) harm.

## **Adults Pathway**



An adult at risk is an adult who is experiencing or is at risk of abuse or neglect, has needs for care and support (whether or not the local authority is meeting any of those needs), and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

There is a new duty to report an adult at risk for all relevant partners of a local authority. There is a new duty for a local authority to make enquiries if it has reasonable cause to suspect that a person within its area (whether or not ordinarily resident there) is an adult at risk.

## Adult Protection and Support Orders

The Act introduces adult protection and support orders (APSOs). These are a new function designed to enable a local authority to properly assess whether a person is an adult at risk and, if so, to make a decision about any action

**What:** Order from a Justice of the Peace to enable private conversation, find out if the person is making decisions freely, and assess whether an adult at risk

**Why:** Suspicion that adult is at risk, order needed to gain access, order will not result in greater risk

**Who for:** Authorised officer, constable, others as needed

**Where:** Specific premises

**When:** Specific timeframe

that should be taken.

To grant an order there needs to be reasonable cause to suspect that a person is an adult at risk, and that the order is needed to be able to assess them, and that using the order will not result in their being at greater risk of abuse or neglect. APSOs are only to be used in exceptional circumstances where other attempts to speak to the adult considered to be at risk have failed.

# Children's Pathway



A child at risk is a child who is experiencing or is at risk of abuse, neglect or other kinds of harm, and has needs for care and support (whether or not the local authority is meeting any of those needs).

There is a new duty to report a child at risk for all relevant partners of a local authority. There is a duty for a local authority to make enquiries (linking into section 47 of the Children Act) if they are informed that a child may be at risk; and to take steps to ensure that the child is safe.

## Safeguarding Boards

The Act establishes Safeguarding Children and Adults Boards across Wales. Boards have two main roles: prevention and protection. There will be representation on Boards from a range of statutory agencies, such as health, probation and the police, not just local authorities. Children's and Adult Safeguarding Boards have responsibility to review practice and to disseminate information on best practice. Safeguarding Boards should ensure that national policies and procedures are relevant and fit for purpose. They should also ensure that service recipient participation is embedded into their work. In particular, Boards must publish a plan each financial year setting out what they intend to do, and a report on progress and work achieved at the end of that year. They can also ask for, and be asked for, information from partner agencies.

## National Independent Safeguarding Board



The Act establishes the National Independent Safeguarding Board. This is an advisory Board that advises Welsh Ministers on safeguarding. The Board's duties are to:

- Provide support and advice to local Safeguarding Boards to enhance their effectiveness
- Report on the adequacy and effectiveness of safeguarding arrangements
- Make recommendations about how arrangements could be improved

National board members will be appointed by Welsh Ministers. The Board will regularly engage with a range of expert reference groups, practitioners and individuals.

## Summary

The Act sets out what must and should be done to safeguard children and adults. Statutory guidance and regulations provide more information and should be followed. People must act lawfully. They should act in ways that reflect good practice based on what service recipients and carers have said they want and need, on practice experience, and on research. It is important to identify actions you can take that will lead to good, lawful practice. This will help to strengthen and build on safeguarding practice in Wales.

## Safeguarding Overview



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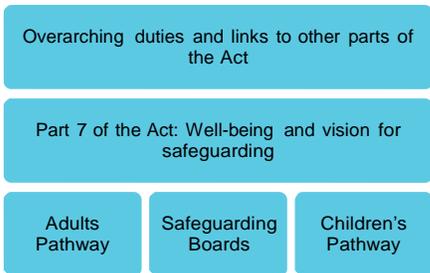
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### What is covered



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### Well-being and overarching duties



*"The Act will transform the way social services are delivered, promoting people's independence to give them a stronger voice and control."*

You also need to follow the other overarching duties:

- Participation
- Dignity
- Views, wishes, feelings
- Culture

A person exercising functions under this Act **must** seek to promote the well-being of people. Well-being includes **protection from abuse and neglect**

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## Human rights

**THE RIGHTS OF A CHILD**

United Nations Principles for Older Persons

Independence  
Participation  
Care  
Self-Fulfillment  
Dignity

**WE SUPPORT CRPD!**

INCLUSION • DIGNITY • EQUITY

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## Links to other Parts of the Act

**1. Introduction**

**2. General functions**  
Prevention of abuse & neglect and harm  
*How to raise concerns*

**3. Assessing the needs of individuals**  
*Duty to assess if person at risk*

**4. Meeting needs**  
*Duty to meet needs if necessary to protect*

**5. Charging and financial assessment**

**6. Looked after and accommodated children**  
*Duty to safeguard well-being of looked after children*

**7. Safeguarding**

**8. Social services functions**

**9. Co-operation and partnership**  
*Co-operation to protect*

**10. Complaints and advocacy**

**11. Miscellaneous and general**  
*Research into Safeguarding Boards*

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## Adults' pathway

The Act, statutory guidance and regulations explain how you must work with adults

**New definition of 'adult at risk'**

**Report it!**  
New duty for relevant partners to report adults at risk

**New duty for local authorities to make enquiries**

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## Adult Protection and Support Order



<b>What</b>	Order from a Justice of the Peace to enable private conversation, find out if person making decisions freely, assess whether an adult at risk
<b>Why</b>	Suspicion that adult is at risk, order needed to gain access, order will not result in greater risk
<b>Who for</b>	Authorised officer, constable, others as needed
<b>Where</b>	Specific premises
<b>When</b>	Specific timeframe
<b>How</b>	Guidance sets out considerations about how to use this well

*only to be used in exceptional circumstances*

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## Children's pathway



The Act, statutory guidance and regulations explain how you must work with children.



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## Safeguarding boards



**Purpose of the Board is:** protection of children and adults from abuse, neglect or other kinds of harm and prevention from becoming at risk

Service recipient participation is a requirement



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## National Independent Safeguarding Board



Works alongside Safeguarding Boards to **secure consistent improvements in safeguarding policy and practice** throughout Wales



- Gives support and advice
- Reports on effectiveness
- Makes recommendations

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## Conclusion



- Safeguarding is everyone's business
- You must act lawfully
- There will be implications for your role
- What further learning do you need?
- What actions will you need to take?




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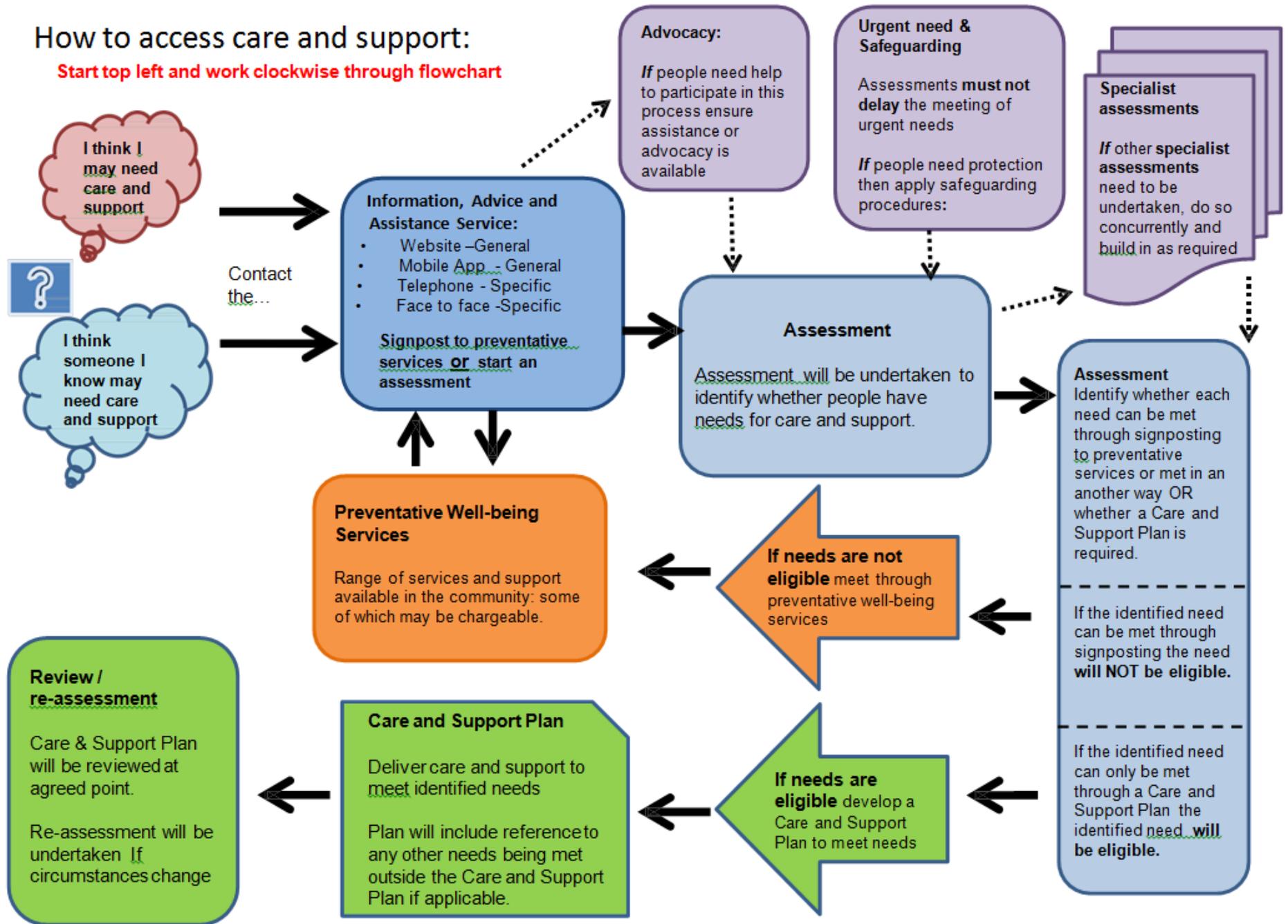
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# How to access care and support:

Start top left and work clockwise through flowchart



# Education (Wales) Act 2014

Last updated 02 June 2014

**This Act became law in Wales on 12 May 2014.**

## Purpose

The Act introduces a new, more robust registration system for the whole education workforce.

The Act will also legislate in the following areas:

- harmonise School term dates
- removal of the appointment of HM Chief Inspector and HM Inspectors of education and training in Wales under section 19 of the Education Act 2005.

## Benefits

The Act will bring greater coherence by changing the way that school term dates are set, so that they may be harmonised across all maintained schools in Wales.

## More information

Full details of the Act are available from the [National Assembly for Wales](#) (external website).

## DOCUMENT DOWNLOAD



**[Equality impact assessments](#)** (File size: 1.7MB)

<http://gov.wales/legislation/programme/assemblybills/education-act/?lang=en>

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# Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015

Last updated 29 April 2015

## This act became law in Wales on 29 April 2015.

### Purpose

The act improves the public sector response in Wales to violence against women, domestic abuse and sexual violence. It provides a strategic focus and ensures consistent consideration of preventive, protective and supportive mechanisms in the delivery of services.

### Benefits

The act:

- raises the profile of violence against women, domestic abuse and sexual violence in Wales through the creation of strategies
- provides a strong strategic direction, promoting consistency and best practice
- ensures ownership of the issue at a strategic level with the appointment of a ministerial adviser.

### More information

Details the act are available on [National Assembly for Wales](#) (external link).

## DOCUMENT DOWNLOAD

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### [Equality impact assessments](#) (File size: 974KB)

<http://gov.wales/legislation/programme/assemblybills/domestic-abuse/?lang=en>

## READING LIST / SUPPORT MATERIALS

These links take you to articles specific to the area for specific issues. Note that you can just use the part up to .uk to access the relevant websites and search for documents from there or navigate around the websites yourselves.

Bullying: <http://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/bullying-and-cyberbullying/>

Domestic Abuse: <http://www.womensaid.org.uk/domestic-violence-survivors-handbook.asp?section=000100010008000100310003>

Neglect: <http://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/neglect/what-is-neglect/>

<http://www.nspcc.org.uk/preventing-abuse/research-and-resources/neglect-serious-case-reviews/>

Child Sexual Exploitation:

<http://www.barnardos.org.uk/search?cx=010239517264350833691%3Aaidjo4m7jsci&ie=UTF-8&q=child+sexual+exploitation&qText=child+sexual+exploitation>

Working Together to Safeguard Children 2015:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419595/Working\\_Together\\_to\\_Safeguard\\_Children.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419595/Working_Together_to_Safeguard_Children.pdf)

Revised by DfE 2018, please see revised version April 2018 [Working Together to Safeguard Children - Department for Education](#)

How Safe Are Our Children 2014: <http://www.nspcc.org.uk/preventing-abuse/research-and-resources/how-safe-are-our-children-2014/>

Learning From Serious Case reviews: <http://www.reconstruct.co.uk/research/research-archive---serious-case-reviews.html>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/184053/DFE-RR226\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184053/DFE-RR226_Report.pdf)

Details of all the relevant documents applying to **Welsh** legislation, policy and law can be found here: <http://www.nspcc.org.uk/preventing-abuse/child-protection-system/wales/legislation-policy-guidance/>

Barnardo's Policies and Procedures: Staff can access these through use of the b.hive search bar on Content Server: i.e. professional boundaries policy, corporate safeguarding, safer recruitment, whistleblowing, IT policy and DPA are all easy search terms to help you find the relevant documents.