

The enigma of section 16

June 2021

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When the (then) National Assembly for Wales enacted the Social Services and Well-being (Wales) Act 2014 (SSWWA), it intentionally created a distinctive legislative basis for social care in Wales. Despite sharing a common policy heritage with the Care Act 2014, which covers much of the same ground in England, the SSWWA contains a number of provisions that are unique to Wales and which are intended to reflect a distinctive Welsh public sector agenda, reflecting principles of collectivism and mutuality.² One of these is section 16, which imposes a duty on local authorities to promote ‘social enterprises, co-operatives, user led services and the third sector’ in the delivery of social care.

Section 16 exists to ensure that in relation to social care provision, local authorities promote two things: firstly the involvement of people who need or use support in ‘the design and operation’ of the support they receive, and secondly the development and use of not-for-private-profit organisations. This latter requirement stands in direct contrast with the duty in section 5 of the Care Act 2014 that local authorities promote ‘the efficient and effective operation of a market in services’. It reflects the longstanding interest of successive Welsh governments in pulling back from the market models of public service provision that have dominated in Westminster since the 1980s.³ Amendments that would have introduced provisions to the effect of section 5 of the Care Act – introduced by Conservative (then) AMs – were not supported by the Welsh Government and were not passed.⁴

Section 16 is curiously worded. Section 16(1) states (in full):

16 Promoting social enterprises, co-operatives, user led services and the third sector

(1) A local authority must promote—

(a) the development in its area of social enterprises to provide care and support and preventative services;

(b) the development in its area of co-operative organisations or arrangements to provide care and support and preventative services;

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² See the white paper which preceded the Act: ‘Welsh Government, Sustainable Social Services for Wales: A Framework for Action’ (Welsh Government 2011).

³ For example, Mark Drakeford, ‘Social Justice in a Devolved Wales’ (2007) 15(2) Benefits 171; Institute of Welsh Affairs, ‘Unpacking the Progressive Consensus’ (IWA 2008) <https://www.iwa.wales/wp-content/uploads/2016/04/progconsensustext.pdf> accessed 20 May 2021.

⁴ Senedd Cymru Record of Proceedings, Health and Social Care Committee 11 November 2013 paras 202-214 <https://business.senedd.wales/documents/s21863/13%20November%202013%20-%20Draft.html?CT=2> accessed 29 April 2021.

- (c) the involvement of persons for whom care and support or preventative services are to be provided in the design and operation of that provision;
- (d) the availability in its area of care and support and preventative services from third sector organisations (whether or not the organisations are social enterprises or cooperative organisations).

There are two things to note about the duties imposed here. Firstly, it contains two broad requirements – for ‘user ’involvement and the promotion of specific types of provider organisation – which are conceptually entirely distinct, despite their co-located positioning in the statute. Involving those using support in its design and delivery is not the exclusive preserve of the types of organisation set out in section 16, although social enterprises and cooperatives in particular may be inclined towards such ways of working. Secondly, section 16 was always entirely ideologically driven. The Welsh Government acknowledged that at the time of the passage of the Act the cooperative and mutual social care sector in Wales was ‘modest’, albeit with potential to be developed further.⁵ Similarly, there are suggestions in the legal guidance which elaborates on section 16 that it is unclear whether these forms of organisations will be effective social care providers.⁶ The core purpose of section 16 was, quite clearly, to create a legal mechanism to expand the presence of preferred types of businesses within the Welsh foundational economy.

Section 16 was always going to be difficult to implement, even outside the context of austerity in which the statute was passed and implemented. At the time the 2014 Act was passed the significant majority of adult social care provision was provided by the private sector.⁷ Promoting the development of new forms of providers, particularly in the absence of an evidence base for either effectiveness or efficiency, would require both faith and resources on the part of local authorities already dealing with a savage financial situation. In their detailed examination of how the objectives of section 16 might be realised, Cowie and Rees Jones found multiple barriers to its effective implementation including the existence of conflicting aims within authorities (particularly difficulties in balancing support for new organisations and the need to cut costs), the ability of for-profit organisations and particularly large companies to undercut social enterprise on price and in the tendering process, a disinclination among local authorities to manage large numbers of small contracts (not least as a result of resource constraints), and the lack of information, support and funds available to organisations in early stages of development. This last was seen as

⁵ Welsh Government, ‘Explanatory Memorandum to The Social Services and Well-being (Wales) Act 2014 (Social Enterprise, Co-operative, and Third Sector) (Wales) Regulations 2015’ (2015), para 29.

⁶ Welsh Government, Social Services and Well-being (Wales) Act 2014: Part 2 Code of Practice (General Functions)’ (2015), para 256.

⁷ Welsh Government, Sustainable Social Services for Wales (n1); Public Policy Institute for Wales, ‘The Care Home Market in Wales: Mapping the Sector’ (2015).

particularly important and creating a 'perceived disconnect' between the stated policy aims of the Welsh Government and the 'tangible support' available 'on the ground'.⁸

There is now a significant 'rowing back' on the content of section 16 – coming at a time when the Welsh Government is consulting on how to 'rebalance' the social care market. A problem arises here as to how the law is being treated in this enterprise. We currently appear to be seeing attempts to make section 16 mean something that it does not. In a recent paper commissioned by the Welsh Government and produced by the Wales Cooperative Centre (WCC), the assertion is made that section 16 duty is (or can be) less about the promotion of certain types of organisation than the general promotion of 'social value' – a term which the authors acknowledge to be 'ill-defined'.⁹ Resting heavily on the duty to promote 'user led services' and the phrase 'cooperative arrangements' in section 16(1)(c), the WCC argues that the term 'social value' has to do with 'ways of working as much as ... organisation types', and that section 16 is actually 'all about ... implementing the principles of the Act'.¹⁰ It goes on to state that while section 16 'reflect[s] a strong push in the direction of not-for-profit organisations ... it also includes a rationale for including the for-profit sector'.¹¹

The rationale for section 16 is clear in the wording of the provision. The section certainly does not preclude the provision of care and support by private companies – it was never intended to do so. But its purpose was to obtain a shift towards support provided by organisations outside the private sector. The guidance under the Act states that it:

introduces a duty on local authorities to promote the development, in their area, of not for private profit organisations to provide care and support¹²

And the explanatory memorandum to the regulations that elaborate on the content of section 16 states that the duty is:

about ... shifting the market balance away from a reliance on the private sector to grow the range of not-for-profit models in the social care sector.¹³

Despite this, in its 'rebalancing' consultation paper, the Welsh Government accepts and appears to promote the idea that phrases such as 'social value organisations' are now being 'used as short-hand for organisations referenced in section 16 ...

⁸ Luke Cowie and Ian Rees Jones, 'Adult Social Care Social Enterprises and the Foundational Economy in Wales' (WISERD, 2017).

⁹ Wales Cooperative Centre, 'Supporting Care Commissioners and Procurers to Promote "Social Value" Models of Delivery' (WCC 2020), page 1.

¹⁰ Ibid, page 5. The principles were broadly identified in the report as being: wellbeing, co-production, partnership working, preventing need, and adding value.

¹¹ Ibid, 9.

¹² Welsh Government (n4), para 203.

¹³ Welsh Government (n3), para 38.

which sets out models for care and support that strive to deliver on the principles of the Act'.¹⁴ Section 16 has, therefore essentially been reinterpreted to refer to organisations that ascribe to a broad and vague concept of social value.

There is no doubt that section 16 relates and is relevant to social value. A distinguishing feature of the types of organisations it references – as they are defined in section 16(2) and the Regulations – is a commitment to some form of social 'good' beyond the creation of private profit. A 'social enterprise', for example, is defined in section 16(2) as an organisation 'wholly or mainly' carrying out activities 'for the benefit of society', which reinvests most of its profits in these 'social objects' and which is owned, controlled and managed consistently with them. The relevant Regulations give various examples, such as housing associations and credit unions.

According to both the WCC document and the recent Welsh Government consultation paper, the talk (and policy concern) now seems to be about ensuring that there is not a shift too far towards not-for-private-profit organisations in the provision of care and support. The Welsh Government speaks of an aim 'to rebalance social care so that there is neither an over reliance on the private sector, nor a monopoly in the other direction'.¹⁵ Similarly, the WCC suggests that a 'more inclusive "level playing field" approach to the Section 16 duty' is needed that embraces all organisations including those which make private profit, regardless of their 'label' (a curious term for fundamental legal distinctions in what different forms of organisation are intended to do and how they achieve it).¹⁶ In reality, there is absolutely no danger of a 'monopoly' of the not-for-profit sector in adult social care provision in Wales any time soon. While private provision makes up a smaller proportion of adult social care provision in Wales than in England, it still accounts for the large majority.¹⁷ Similarly, as Cowie and Rees Jones discovered, there has simply been inadequate support for organisations of the type listed in section 16 yet to get off the ground, and there are no signs of that changing.¹⁸

The consultation paper on the 'rebalancing agenda' has only a limited focus on the forms of organisation listed in section 16. Rather than rebalancing from for-profit towards not-for-profit, the focus is on moving '[a]way from price...[t]owards quality and social value' to enable co-production.¹⁹ The paper suggests that the Welsh

¹⁴ Welsh Government, 'Rebalancing Care and Support (January 2021) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiz3qCro7DwAhUBoVwKHb42Cy0QFjAAegQIBBAD&url=https%3A%2F%2Fgov.wales%2Fsites%2Fdefault%2Ffiles%2Fconsultations%2F2021-01%2Fconsultation-document.pdf&usq=AOvVaw3b7ovpA5YHYUsGbRtlsmBW> accessed 4 May 2021, page 29.

¹⁵ Ibid, 8.

¹⁶ WCC (n7), 12.

¹⁷ Cian Sion and Michael Trickey, 'The Future of Care in Wales: Resourcing Social Care for Older Adults (Wales Governance Centre, 2020).

¹⁸ Cowie and Rees Jones (n6).

¹⁹ Welsh Government (n12), 8.

Government now expects the private sector to have a bigger role than it had originally envisaged, although there is still an interest in developing a more diverse provider base. This may be a reality check, given the amount of provision currently undertaken by the private sector and the multiple complex difficulties inherent in moving away from this, or it may reflect an interest in promoting 'user' involvement over and above the specific type of organisations which provide social care. Placing a greater emphasis on 'user' involvement is certainly valuable, but we do not need to deploy the loose term 'social value' to achieve this, or to attempt to reformulate the meaning of section 16. Perhaps a different way forward would be for the Welsh Government to decide what it wants from section 16, to consider the limits of what can be achieved in the current social and financial climate, and to issue clear guidance to local authorities as to the expectations they are under given those constraints.