

Social Services and Well-being (Wales) Act 2014: a critical overview

Luke Clements

Cerebra Professor of Law & Social Justice,
the School of Law, Leeds University

It is a great honour to be asked to speak at the BASW Cymru Conference. In this talk I emphasise the importance of an independent critical commentary concerning social care in Wales. BASW Cymru is independent: it does not rely on Welsh Government or local authority support and this is one of the many reasons why it (together with genuinely independent Disabled People's and Carers' organisations) should have a key role in shaping social care arrangements in Wales. It is in a position to 'speak truth to the Welsh Government: to 'tell it how it is' – even if the Government is not always keen to listen to that message.

I should start with the positives – of which historically there are many: with Robert Owen; Lloyd George; and Aneurin Bevan – with the 1983 All-Wales Mental Handicap Strategy and the (sadly repealed) 2010 Carers Strategies Measure.

The 2014 Act itself is broadly a positive development and (compared with the not dissimilar English Care Act) has a few innovative provisions – for example its support for the development of social enterprises. Whether in practice this adds up to much is questionable. The delivery of social care should not depend upon the exploitation of social workers or carers (paid or unpaid). It depends upon people having decent terms and conditions. I don't see that in Wales any more than I see it in England: I see social workers with absurd case-loads labouring under mountains of unnecessary and unnecessarily complex paper work: I see care workers on zero hours contracts and on the minimum wage – stretched beyond endurance. I see disabled people's packages being reduced and they and their carers taking the strain. In this light, the section 16 duty to 'promote the development of social enterprises' seems a little irrelevant. If there was a duty to prioritise the use of social enterprises in the care commissioning process – then that would be a material improvement.

Since the 2014 Act was drafted and has been implemented in a period of imposed austerity one would have expected that the Welsh Government would have done everything it could to reduce unnecessary paperwork, to target resources on those in most need and to minimise the turbulence of organisational change. My concern is that when measured against these three considerations, the Act has major flaws and I will focus on these in this talk.

Before doing this I'd like to say a few words about 'speaking truth to the Welsh Government' and 'telling it how it is'. As I have said, I think BASW Cymru is one of the few social care organisations in a position to do this. My many years working in Wales has left me with the strong impression that notwithstanding the exhortations to listen to people in need and carers and the importance of valuing social workers, social care workers and other professionals involved in the delivery of social care, this rarely translates into tangible actions. The unhealthy characteristics of a controlling administration that is averse to criticism gave rise to significant problems in the crafting of the social care legislation. Had the Bill been properly scrutinised: had the Assembly been more independent, had the Government been less defensive

and willing to consider amendments – then many of the problems with the legislation would have been addressed before it received Royal Assent.

I say this with regret, because I don't doubt that the Welsh Government is committed to improving social care and I believe that it gives this a higher priority than does the current Government in England. The figures bear this out – in the last eight years total spending on social care in Wales has (compared to England) been relatively protected.¹

1. The turbulence of organisational change

Welsh local authorities are comparatively small. If my arithmetic is correct,² in population terms they average about 140,000. The average English social services authority is over two and a half times larger: indeed the biggest Welsh authority (Cardiff City) is smaller than the average English social services authority. The point being that Welsh local authorities are not well equipped to implement major organisational change. They need practical help from the centre and there must be a concomitant obligation on the Welsh Government not to make any unnecessary changes and to keep the process of change as simple as possible. In my opinion it has failed, on both scores.

As to unnecessary change, I have yet to understand why the Act repealed and then re-enacted much of Part III Children Act 1989. I am not alone in this respect. The (then) Children's Commissioner for Wales expressed deep concern about this exercise – noting that he failed to understand 'how the replacement or restatement of parts of existing legislation relating to children [would] give greater effect to the best interests of the child.'³ Objectively this was a change that prioritised political considerations over the best interests of children in need. Social workers in Children and Family Social Work in Wales have had to spend time over the last year discovering where the Children Act 1989 provisions had been secreted in the 2014 Act and assessing whether there were any changes of substance while still having to work with Part 4 & Part 5 of the 1989 Act. A key question is whether this has added value and improved the experience of children in need and their families: the answer must be 'no'.

Despite significant criticism of the Eligibility Criteria – and in particular the 'can and can only' requirement – the Welsh Assembly voted these through unamended. Some parts of the criteria are, in my humble opinion, unintelligible. Colleagues and I have tried to make sense of them, adopting all manner of interpretative mechanisms, including what we have come to call the 'RTCOL approach' - 'Reading The Criteria Out Loud' to each other – but it has not worked. For example, in relation to assessments of disabled children they fail to acknowledge that parents of disabled children are also carers of disabled children with the consequence that they are either punitive or simply incomprehensible. In relation to adults in need the regulations and the Code suggest that eligibility depends upon a four stage process – but as adjectives go, 'abstruse' is utterly inadequate to describe the fourth stage: mysterious, enigmatic, cryptic, unfathomable If I and my expert legal colleagues cannot make sense of the regulations, then how are disabled people and their carers going to be able to assert their rights: how are they going to be able to challenge assessment decisions that they consider unreasonable? It is not difficult to draft

¹ Luchinskaya, D. Ogle, J. and Trickey, M. *A delicate balance? Health and Social Care spending in Wales* (Wales Public Services 2025, 2017).

² In 2015 Wales had 22 social services authorities and a population of 3,099,100 whereas for England (with 152 social services authorities) the population was 54,786,300 – Office of National Statistics *Population Estimates for UK, England and Wales, Scotland and Northern Ireland: mid-2015* (2016)

³ Children's Commissioner for Wales, *Annual Report 2014, Policy and Public Affairs*.

comprehensible criteria – the FACS criteria and the English Criteria are pretty straight forward. These are problems that proper legislative scrutiny would and should have addressed.

I think most of us have to repress a groan when someone mentions NHS Continuing Healthcare in Wales. It is a mess – as the Wales Audit Office⁴ to its credit has highlighted. One would have hoped therefore that the new Act would not have added to this problem: that it would have reaffirmed the so-called *Coughlan*⁵ criteria. The English Bill was amended to do just this and the Minister went on record to state specifically that the new legislation in no way altered the legal boundary between health and social care. Neither of these steps occurred in Wales. The Act is ambiguous: it is unclear as to whether the *Coughlan* criteria continue to apply and the Minister has given no lead on this question. Without immediate and firm action by the Government I can see the current mess getting considerable worse. Troubling as this is for adult social care, there is an even greater problem for Children's NHS Continuing Care. The current (2012) 'guidance'⁶ defies the Trade Descriptions Act: it is truly dreadful. It could be the operating system for a pinball machine, but 'guidance' it most certainly is not. In reality however section 47 of the 2014 Act has rendered it redundant – which might in one light might be considered a good thing – but it means that at the moment there is no relevant guidance: that it is a free for all.

2. Failing to target those in most need

In relation to this ground, I will highlight two issues. Firstly the complexity of the legislative scheme – and in particular the eligibility criteria. This means that only those who have sisters who are barristers are going to be able to navigate their way through the legislation and feel confident about challenging local authority decisions.

The second concerns the regressive charging regime for adult social care. In Wales, if you are a wealthy person eligible for social care in the community, your charge will be capped at £70 per week. A poorer person will also be liable to be pay the same £70. I know the Barnet formula disadvantages Wales – but I fail to understand why the Government then exacerbates this disadvantage by subsidising the care needs of wealthy people. It is a poll tax of the unfairest kind.

3. Unnecessary paperwork

I am not sure how many of you have read the *Recording Measurement of Personal Outcomes Guidance* issued by the Welsh Government at the end of last year.⁷ Even if you are a devotee of Kafka, I would nevertheless urge you to be cautious before attempting to read it.

It appears that the aim of the guidance is to ascertain whether people are feeling better as a result of the social care and support they receive. I suppose one revolutionary way of doing this would be to ask them this question. Even if the desire is to ask them more than one question, it is important to remember that a substantial proportion of adults who receive care and support have impaired mental capacity – so it is going to be vital to keep it simple. Additionally, since social workers are working under extreme pressure – it is going to be vital to keep the paper work associated with this exercise to a minimum. On both counts (again) this fails.

⁴ Wales Audit Office, *Implementation of the National Framework for Continuing NHS Healthcare* (2013) and Wales Audit Office *Continuing NHS Healthcare – Follow-up Report* (2015).

⁵ *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622: [2000] 3 All ER 850.

⁶ Welsh Government *Children and Young People's Continuing Care Guidance* (2012)

⁷ Welsh Government *Recording Measurement of Personal Outcomes Guidance* (November 2016)

The guidance lists eight aspects of well-being and 24 national well-being outcomes. The assessor has then to translate (in each case) these 24 national well-being outcomes into personal outcomes. They have to explain, bear in mind and then score/ record: 'outcomes', 'outputs' and 'process/ activity'. Of course many people won't have a clue about what this is all about, may be unable to define their personal outcomes, may be unrealistic about what these are, and/or have too many. And even if they are able to explain what their personal outcomes are – each of these may apply to more than one national well-being outcome. The guidance states that in such cases the assessor will have to decide which is the relevant national well-being outcome and will also have to ensure that the outcome is 'reasonable'. That it seems is the easy bit!

The adult is then required to score each personal outcome on a scale of 0 to 10 and then be clear about what a score of 10 means, what their goal score is (and what it means) and what their baseline score is. As the guidance explains: *Aggregating personal outcomes for an individual means combining a person's progress against each of their personal outcomes, to provide information to understand whether a person's well-being is improving overall.* In truth it provides no such information – it is an utter bureaucratic nonsense.

Every time the adult has a review these scores must be re-measured to see if progress has been made towards achieving personal outcomes. Many people will of course have had a health crisis or other setback in the intervening period so the revised scores (even if they meant anything - which of course methodologically they don't) would be meaningless.

Local authorities must then aggregate this data for all people in their area 'to understand whether well-being is improving at a local authority level'. The guidance indicates that national aggregated personal outcomes information will be required to be lodged with the Welsh Government. Heaven knows how many bureaucrats will then paw over this irrelevant data and how many irrelevant spread sheets and glossy reports will then be published showing how things are getting so much better in Wales.

This is an absurd, methodologically flawed system that will measure nothing of value, distract social workers from important work and justify an army of bureaucrats in each local authority and in Cathays. It is far removed from the Government's asserted commitment to putting people (adults and children) at the centre of all considerations about them.

Conclusions

The Social Services and Well-being (Wales) Act 2014 is therefore a flawed piece of legislation – but it is entirely remedial. The eligibility criteria regulations need simplifying; the outcomes framework needs jettisoning; the NHS Continuing Healthcare failure can be remedied by a strong statement from the Minister to LHBs to behave; the development of social enterprises should be strengthened by a public procurement duty to promote local and sustainable services; the Children Act changes are water under the bridge: it is too late and reversing them would cause yet more turbulence.

The Government should enter into genuine discussions with truly independent organisations – BASW Cymru, Disabled Peoples and Carers organisations and whatever it then does, it should ensure that it: targets resources on those in most need; minimises the turbulence of organisational change and reduces the bureaucratic burden.

Twelve months on and we know very little if anything at all about the experience of social workers of working under the new Act. There has been no independent research concerning the experiences of people in need and carers of assessment and service provision under the new Act.⁸

Social work in Wales today requires a critical engagement with the law, its interface with the organisational context in which it is practiced and it needs to be informed and grounded in social work ethics.⁹ A mature and independent profession needs to assert its aspirations especially at a time when human rights and natural justice risk being side-lined by 'imposed austerity' and an over controlling, criticism averse Welsh Government.

The need for social workers in Wales to have critical commentary on the Act, analysis of aspects of the law that may be of concern to practitioners and examination of seemingly contradictory statutory imperatives cannot be over stated. To my knowledge there has been a dearth of writing in professional journals on the Act since implementation. Social work education and training in Wales will be weaker without this.

I, along with a few colleagues, would be happy to begin this task with the hope that others here today will take this forward in the years to come. I would like to invite you today to share your experiences of practice since implementation of the Act – the positive experiences and the not so positive experiences, issues and concerns that have come to light since implementation and matters that you would like to see being aired, discussed analysed and debated publicly. My colleague Ann James has offered to collate your views and the views of practitioners not here today. This will enable us to consider ways in which we can support practice through writing and commentary on the Act.¹⁰

I close as I began by thanking you for inviting me to speak at your Conference. I cannot stress enough how important it is for there to be an independent critical commentary concerning social care in Wales and the vital role that BASW Cymru plays (and must continue to play) in this respect.

⁸ Carers Wales has however sought carers' views as to how the Act is working for them –see their [Track the Act Briefing 1](#) (2016).

⁹ Similar to that undertaken 30 years ago – see Preston-Shoot, M., Roberts, G. and Vernon, S. 'Social work law: from interaction to integration' in *The Journal of Social Welfare and Family Law* 20(1) (1998).

¹⁰ Ann can be contacted through email at anjames57@gmail.com