

# Submission to The Health & Social Care Committee concerning the state of social care in Wales.

In anticipation of the [Committee's hearing on the Thursday 25 May 2023.](#)

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## Background

Notwithstanding the fanfare that heralded the implementation of the Social Services and Well-being (Wales) Act 2014 (the '2014 Act') seven years ago, the post implementation years have shown that the delivery has not matched the rhetoric. The Coronavirus Pandemic has thrown into sharp relief the weaknesses inherent in the social care system in Wales: weaknesses which were amplified during the height of the pandemic and continue.

In fulfilment of the co-operation agreement between the Welsh Government and Plaid Cymru, the Minister for Social Services announced the establishment of an Expert Group to advise on the development of a National Care Service for Wales. The Expert Group were presented with Terms of Reference and given a very short timescale in which to complete this work, but the deadline had to be extended on two occasions.<sup>2</sup> The Expert Group presented their final report to the Minister in November 2022.<sup>3</sup> The Minister has made a brief response to the completion of the work of the Expert Group and we now await a full response to the report.<sup>4</sup>

In evaluating the impact of the 2014 Act it is appropriate to comment on aspects of the Report of the Expert Group and on the state of social care in Wales.

The Report and its recommendations read like a passive acknowledgement of the fragile nature of social care in Wales and of the continuing challenges faced by the Government to develop a well-functioning service, despite its ambition and the cumulative plans, strategies, and organisational changes that have taken place since 1998.

It would be regrettable if the floating of the concept of a National Care Service is fastened upon as a panacea for the accumulated ills in social care provision in Wales; it would be unfortunate if the proposal became a device used to throw into the 'long grass' the imperative of addressing the many conspicuous weaknesses that need to be addressed now.

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<sup>2</sup> Welsh Government *Written Statement: National Care Service – Expert Group Report* (2022).

<sup>3</sup> Expert Group *Towards a National Care and Support Service for Wales* Report of the Expert Group (2022).

<sup>4</sup>Welsh Government *Written Statement: National Care Service – Expert Group Report* (2022).

The Expert Group has accepted as ‘a given’ (and premised its Report on) an uncritical view of the 2014 Act. It, with respect, exaggerates the vision, values and principles underpinning the Act. The Report seems to convey the exceptionalism of the Wales Act without acknowledging that the Act in Wales, as in England, arises from the Review undertaken by the Law Commission and whose Report forms the bedrock of the Acts in both countries. The commonalities between the legislation in Wales and England are far greater than the differences especially when one looks at the ‘Principles’ enshrined in the legislation. It should also be noted that there are significant concerns about aspects of the regulatory regime underpinning the 2014 Act - not least the framing of the Welsh Eligibility Criteria regulations.<sup>5</sup>

The 2014 Act and Care Act 2014 were drafted, enacted and implemented within the strictures of a residual welfare state and in truth, the differences between these primary statutes are minimal.

### **The Spirit of the Act**

The report is peppered with references to ‘what matters’, ‘co-producing’, ‘voice’ and ‘control’ as integral to achieving the social care service that will meet the needs of the citizens of Wales. With the exception of ‘control’ these ‘principles’ do not get specific mention in the 2014 Act.<sup>6</sup> The Expert Group, concedes (para 24) that more work is needed to deliver the ‘spirit’ of the Act.

Seven years on from implementation of the Act – and despite growing levels of inequality in the countries of the United Kingdom, Brexit<sup>7</sup> and a Pandemic – the Report presents an unwarranted level of optimism. It is a Report that fails to reflect the context of life in Wales and its concomitant impact on the need and provision of social care. The words / phrases ‘poverty’, ‘social exclusion’, ‘social justice’ do not appear in the report and there is but a cursory reference to human rights.

Objectively, it is difficult to understand how – without a contextualising of a Country with high levels of poverty<sup>8</sup> and social exclusion, and an ageing population<sup>9</sup> – it is possible to respond adequately to the social care needs of the citizens of Wales.

### **The role of the Welsh Government**

In this brief submission, although we do not attempt to provide a detailed resume of the findings of the various reports that have sought to analyse the effectiveness of the 2014 Act, we consider that three observations are appropriate. Firstly, that we do not question for one moment the genuine *bona fides* underpinning the Welsh Government’s endeavours to deliver better social care for those in need in Wales. Secondly, that the Welsh Government is to be congratulated for commissioning and

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<sup>5</sup> The so called ‘can and can only’ test in The Care and Support (Eligibility) (Wales) Regulations 2015 1578 (W. 187) see generally L Clements *The Social Services & Well-being (Wales) Act 2014* (2022) p.16 and see also L Clements ‘*Social Services and Well-being (Wales) Act 2014: a critical overview*’ (2017).

<sup>6</sup> Section 16 does however require that authorities ‘promote’ the involvement of persons for whom care and support or preventative services are to be provided in the design and operation of that provision.

<sup>7</sup> Marmot, M et al *The Marmot Review 10 Years on* Institute of Health Equity (2020).

<sup>8</sup> Public Health Wales *Cost of living crisis in Wales A public health lens* (2022).

<sup>9</sup> ONS *Population and household estimates, Wales: Census 2021* (2022).

publishing independent reviews as to the workings of the 2014 Act.<sup>10</sup> Thirdly we commend the excellent resume provided by Senedd Research<sup>11</sup> – and the quality of its analysis generally on this issue.

Objectively, the predominant ‘take away’ message of these reviews is one of failure. In some areas this is a failure attributable to developments outside the Welsh Government’s control and that has to be acknowledged. However, there are many failings for which the Government must take responsibility and – as a consequence of this review – address.

One ‘Wales specific’ problem concerns ‘size’. As we have referred to on a previous occasion, Welsh local authorities are comparatively small. 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’.<sup>12</sup> The consequence of this reality, is that many authorities are too small to have the strategic resources to develop the necessary local policies, practices and template materials to deliver their legal responsibilities under complex legislation. They need the Government to provide them with the practical ‘fine grained, fit for purpose’ guidance and template materials that could enable them to achieve the aspirational legislation the ‘centre’ has enacted. In so many areas this has simply not happened. Tarrant has referred to a ‘lack of both experience and legal competence’ and a “perceived disconnect’ between the stated policy aims of the Welsh Government and local and national support for implementation’,<sup>13</sup> and Clifton to ‘underlying structural, financial or capacity pressures’.<sup>14</sup> It is simply unacceptable for a legislature to enact major rights based social welfare legislation of this kind and for the Government to fail (due to lack of ability, resources or otherwise) to provide the detailed guidance and other materials necessary to ensure that the legislation has its intended impact at the coalface.

We refer, below, to situations where significant detriment has resulted from the Welsh Government’s failure to provide adequate guidance or template materials of this kind. At this stage, however, reference to the ‘Codes’ that accompany the Act is instructive. For those of us who consider practical social care legal problems in both England and Wales, on a regular basis, it is incontestable that the overall depth and detail of the guidance provided in England to the Care Act 2014 is (by many degrees) more informative and accessible than that provided in Wales to its 2014 Act. In England there is one consolidated set of Statutory Guidance<sup>15</sup> whereas in Wales there are a number of discrete Codes that in general provide far less detail. In order to find out which Code contains material on (say) ‘Eligibility Criteria’ one would need to laboriously search (or already know) that this is primarily located in the Code Part 4 ‘Meeting needs’ or to find detail on ‘Ordinary Residence’, that this is in Code Part 11 (Miscellaneous and General). This may seem a petty point – but

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<sup>10</sup> Most recently, *Welsh Government From Act to Impact? Final Report of the Evaluation of the Social Services and Well-being (Wales) Act 2014* Social Research Number: 36/2023 (2023)

<sup>11</sup> A Clifton *The Social Services and Well-being (Wales) Act 2014* Senedd Research (2023).

<sup>12</sup> See L Clements ‘*Social Services and Well-being (Wales) Act 2014: a critical overview*’ (2017).

<sup>13</sup> A Tarrant ‘*Devolution and the difficulty of divergence. The development of adult social care policy in Wales*’ *Critical Social Care Policy* (2022) 1-21 at 12 & 14 citing L Cowie, & I Rees Jones *Adult social care social enterprises and the foundational economy in Wales* (2017) Report, WISERD, Cardiff University, UK, June p.57.

<sup>14</sup> A Clifton *The Social Services and Well-being (Wales) Act 2014* (Senedd Research 2023).

<sup>15</sup> Department of Health and Social *Care The Care and Support Statutory Guidance* (updated 2023).

guidance of this kind is vital for ordinary citizens in order that they can understand their rights and where necessary challenge those in power. If, for example, one correctly identifies the Code that contains the guidance on Direct Payments – it will be seen that the relevant section runs to 10 pages (just under 4,000 words). This is half the length of the guidance on the same topic in England. A response to this analogy might be that a country the size of Wales has not the Civil Service resources of England to produce such guidance. If this is the case, then it clearly raises more questions than answers. It would also fail to explain why the (2011) Welsh Assembly Guidance on Direct Payments<sup>16</sup> (that the Code replaces) ran to 81 pages (and just over 27,000 words).

This failure by Central Government impairs the ability of local government to implement the legislation as the Assembly intended and it also provides latitude for authorities to implement it in a way that was not intended. The net effect in either case is that disabled, elderly and ill people, and their carers lose out.

## Workforce

Wales has had an Assembly Sponsored Body the Care Council for Wales (CCfW) and its present iteration, Social Care Wales (SCW) with the specific focus on Workforce, since 2001. Its remit is for the entire social care workforce unlike its predecessor body (The Central Council for Education and Training in Social Work). Training, development, post qualifying training and registration of the entire workforce (not just social workers) have been seen as the priorities of the organisation. Notwithstanding the funding provided for the programmes initiated by CCFW / SCW, often at the request of the Welsh Government, it is clear that they have not delivered the workforce required in social care.

Remuneration is undoubtedly a significant factor, but it is unlikely to be the sole factor that has led to attrition in the workforce and difficulties in recruitment and retention. In seeking answers to this problem, one wonders if the right questions are being asked? For example, questions concerning whether the culture of managerialism within local authorities (of 'target driven', command and control and a wariness of 'professionals') has impacted on the workforce; questions as to whether the failure of the Welsh Government to address the importance of senior managers in local authorities being professionally qualified in social work has impacted on the culture of delivery; questions as to whether the outsourcing of social care services and (in practice) cost being the primary factor in determining the delivery of services has created a hostile environment for care workers, dashing between a succession of 15 minute home visits, on zero hours contracts and the minimum wage.

## Provision

One of the most innovative provisions in the 2014 Act concerns the requirement in section 16 that local authorities promote the development in their areas of third sector organisations (including social enterprises and co-operatives) that can provide relevant services.

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<sup>16</sup> WAG Direct Payments Guidance Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Guidance 2011.

Support for such organisations – especially ‘not for profits’ – is generally considered to be an imaginative idea capable of driving up the quality of support services<sup>17</sup> as well as the terms / conditions and satisfaction of their care workers. Research suggests, however, that significant strategic action is required to bring about such a transformation, not least support enabling such organisations to overcome the not inconsiderable barriers to entry into this ‘market’.<sup>18</sup> 2017 research highlighted the need for (among other things) professional business support, accessible sources of financing and awareness by local authorities of how to develop commissioning arrangements.<sup>19</sup>

The Report of the Expert Group signals a renewed interest in bringing back social care services into the public sector and this has in part been prompted by the current cost of residential child care in the private sector. This may prove difficult to achieve given the side-lining of residential childcare provision and its workforce by Welsh Government over the last 20 years, especially in the wake of the Waterhouse Inquiry. The failure to invest in (and fully support) a workforce that can deliver complex care, infrastructure and more importantly valuing the importance of residential childcare has brought us to this difficult situation in Wales.

In the medium term, there appears to be a powerful case for rebalancing the way social care is delivered through a planned (piloted) programme that rebuilds the role of the public sector and nurtures the ‘not for profit’ sector. As we have already noted – given the small size of most local authorities in Wales – positive change of this kind cannot take place without the Welsh Government grasping the nettle and developing practical programmes for reform (including addressing ‘the basic funding question of social care’). Without action of this kind, the promotion of ‘social enterprises as a policy panacea’<sup>20</sup> and the re-emergence of public provision, will remain nothing more than high sounding rhetoric.

### **Social Care ‘free at the point of need’**

The Welsh Government has recognised the urgent need to address the costs borne by disabled people for their care since 2006/7. The Scottish decision to offer free personal care in 2002 provided an impetus for this initiative as, no doubt, did the 1999 Royal Commission on this issue<sup>21</sup> and the many subsequent discussions in England concerning the general funding of social care. Although in England the Care Act 2014 contains measures to implement a ‘cap on costs’ the Welsh Government (wisely in our view) decided against this.

In its consideration of these questions, the Expert Group drew on a wide range of reports including those commissioned by the Welsh Government, but not (for

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<sup>17</sup> R Millar, K Hall and R Miller 'A story of strategic change: becoming a social enterprise in English health and social care' in *The Journal of social entrepreneurship*, (2013) 4(1), 4-22.

<sup>18</sup> R Millar, K Hall and R Miller 'A story of strategic change: becoming a social enterprise in English health and social care' in *The Journal of social entrepreneurship*, (2013) 4(1), 4-22.

<sup>19</sup> L Cowie and I Rees Jones *Adult Social Care Social Enterprises and the Foundational Economy in Wales* WISERD Research Reports Series WISERD/RRS/0 (WISERD 2017).

<sup>20</sup> L Cowie and I Rees Jones *Adult Social Care Social Enterprises and the Foundational Economy in Wales* WISERD Research Reports Series WISERD/RRS/0 (WISERD 2017).

<sup>21</sup> Royal Commission on the Funding of Long Term Care. With respect to old age: long term care—rights and responsibilities. London: Stationery Office; 1999. (Cmnd 4192-1.)

reasons that are unclear) the Holtham Report.<sup>22</sup> The Report of the Expert Group provides options for paying for non-residential care and residential care with the ultimate aim being free social care.

The commitment to free social care at the point of need is laudable. Like 'world peace' it is hard to express opposition to such an aspiration: almost every argument in favour of a 'free at the point of need' NHS applies with equal force to social care (as do almost every argument against a 'free at the point of need' NHS). It is not surprising therefore that both the left leaning parties have made this a manifesto aim or have set out their stall by commissioning reports and raising this as a matter of core importance. It is, however, surprising that the Expert Group Report did not have a discrete discussion concerning the political and economic context in which this consideration was taking place.

The current commitment to free social care appears to be inextricably linked to the development of a National Care Service and this seems both unnecessary and indeed, disconcerting. Scotland has been able to make good progress towards a free social care system without nationalising social care and objectively, the development of a 'National Care Service' that lives up to its name will take very many years. A cynic might suggest that linking free social care with the establishment of a National Care Service is simply a political device to throw the most pressing issue of the cost of care for those most in need, into the long grass?

At the same time, however, it could be argued that in the context of austerity and a cost of living crisis that impacts on the poorest in society and those facing the additional costs of chronic illness and disability, the immediate challenge is to ensure that costs of care are not a barrier for this group of individuals.

There is a discussion to be had about whether the provision of across the board 'free social care' is the most important priority for a country that is unable to provide a comprehensive health and social care service. Barriers to comprehensive assessment and stringent eligibility criteria leave many in need of care and support and who are left dependent on unpaid carers who are often left with no services or inadequate services to meet their needs.

Free social care can paradoxically shore up inequality, with those who have some assets, or significant assets, to contribute to their care costs being treated like those who cannot. Social inequality is shored up as assets are moved down generations. Free social care (without compensatory fiscal measures) will enable the passing down of assets by those who may previously have had to pay for care, and this will do little to make Wales a fairer country. It follows that the question of funding social and social care charging regimes, falls to be considered in the context of a more general taxation discussion.

### **Taxation and social care**

There may be a fairer way of managing care costs in Wales and the Holtham report offered options for consideration including options that consider inter-generational equality.

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<sup>22</sup> Gerald Holtham(2018) Paying for Care – report Commissioned by the Welsh Government.

The Welsh Government has had tax rising powers for a number of years but (unlike Scotland) as not chosen to use these powers<sup>23</sup> – for example, to raise money for the NHS or to fund Social Care.<sup>24</sup> This, despite the Minister for Health and Social Services warning in 2023, that due to the finding shortfall, the NHS may have to do less in the future and called upon people to do more to mitigate poor health.<sup>25</sup>

It is also arguable that the Welsh Government has the power to impose capital taxes. The home care charges for people receiving care and support are capped at £100 per week regardless of their capital (unlike the position in England).

A capital threshold of £50,000 applies to those in residential care but this can include the capital value of their home – which is not the case for people receiving home care. These are all, in reality, rules that ‘tax’ (or don’t tax) individuals on the basis of their capital.

In terms of social care, the current charging arrangements are, arguably, highly regressive. The imposition of a maximum charge for non-residential care at £100.00 per week<sup>26</sup> has had the perverse effect of reducing the charges for wealthier people but not for the poorest. Since poverty would appear to be one of the greatest barriers that disabled people and carers face in their struggle to ‘live independently’ it is vital that the Government gets this right. In terms of the obligation to have a rational policy that progressively realises the international human rights obligations of Governments,<sup>27</sup> such a policy appears to be the antithesis of what is required.<sup>28</sup> £100.00 per week is a very considerable sum for someone living on benefits. It might however be argued that few people living on means tested benefits would be required to pay this full sum. If this is so – then there is a compelling case for making it unlawful to charge persons in receipt of means tested benefits for their care and support.

The decision of the Welsh Government to raise the saving limit to £50,000 for residential care was a political decision – just as its decision to allow local authorities to charge up to £100 per week for people on benefits or its decision to cap it at £100 for people with considerable wealth.

The current incremental move towards free home care in Wales has other negative ‘feedback loops’. Take for example, individuals with significant wealth who are objectively in need of residential or nursing care. The current charging policy creates a financial inducement for them to remain living in the community. This in turn can result in social services funding being skewed towards high-cost domiciliary care packages rather than at preventative services for those with lower levels of need.

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<sup>23</sup> Scotland has used its powers to raise taxes for higher earners / second homes etc to pay for improved public services – see <https://www.gov.scot/news/tax-changes-to-support-scotlands-vital-public-services/>

<sup>24</sup> See also The Bevan Foundation *Tax for Good: Devolved taxes for a better Wales* (2016).

<sup>25</sup> BBC News *NHS in Wales could do less in future - health minister* 10 January 2023.

<sup>26</sup> Increased from £90 by The Care and Support (Charging) (Wales) and Land Registration Rules (Miscellaneous Amendments) Regulations 2020 SI 2020 131 (W.24) reg 2.

<sup>27</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>28</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.

## Continuing NHS Healthcare (CHC)

We have elsewhere questioned the lawfulness of certain sections of the Welsh Government's most recent iteration of its National Framework for Continuing NHS Healthcare (CHC) Guidance<sup>29</sup> and expressed the view that it is in other respects, not 'fit-for-purpose'.<sup>30</sup> In our view the Government has, for many years, allowed the NHS in Wales to divest itself of major CHC responsibilities (in relation to adult and children's services) and that the most recent Framework Guidance constitutes a dramatic evidence of this approach. The effect of this policy has been that local authorities are now funding significant numbers of individuals with very high care needs, who in earlier times would have been funded by the NHS. This cost shunting has a number of adverse consequences for the health and social care systems, including:

- local authority funding is being diverted to a people with very high needs away from those with lower levels of need – and for whom support services could have prevented or delayed serious deterioration in their ability to live independently;
- local authority funding (already seriously constrained) is not available to facilitate the discharge of patients from hospital – as Senedd Research<sup>31</sup> and the Senedd's Health and Social Care Committee<sup>32</sup> have recently highlighted - the lack of social care capacity is the biggest contributor to delayed hospital discharges and restricted patient flow through hospital. A finding accepted by the Welsh Government.<sup>33</sup> Putting to one side the trauma that delayed discharges are causing to patients and families, the additional costs borne by the NHS resulting from these delayed discharges must outweigh the cost savings the NHS makes due to CHC cost shunting.<sup>34</sup>
- Local authorities appear to be responding to the pressures caused by CHC cost shunting by specifying that domiciliary care support packages cannot include an element that could be described as healthcare related – for example PAs assisting disabled and elderly people to take their essential medication. This action effectively places individuals 'in need' in the middle of an inter-authority squabble – the net result of which is that they cease to have this essential support. It is a squabble that should not be happening, as legally both public bodies are obliged to work together<sup>35</sup> to avoid situations of this kind. We have seen no evidence that the Welsh Government has taken any practical action to address this particular problem.

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<sup>29</sup> Welsh Government *National framework for Continuing NHS Healthcare* Version 2 published February 2022.

<sup>30</sup> Rhydian Social Welfare Law in Wales *The end game: Continuing NHS Healthcare (CHC) in Wales* 9 March 2022 and see also A Greenow *The Problem with Fast Track in Wales* Rhydian Social Welfare Law in Wales, 6 May 2023.

<sup>31</sup> Senedd Research *Who cares? Why lack of social care is the biggest contributor to delays in hospital discharge* 6 October 2022.

<sup>32</sup> *Hospital discharge and its impact on patient flow through hospitals* (June 2022) para 91

<sup>33</sup> Welsh Government's *Written response to the Committee's findings* 2 July 2022.

<sup>34</sup> Cite data on social services being more cost effective: ie being able to fund care needs at a rate significantly below what the NHS would pay for the same person.

<sup>35</sup> NHS Act 2006, s82 and Welsh Government Part 9 Statutory Guidance (Partnership Arrangements) (2020).



The cost impacts of the dramatic change to the CHC Guidance also fall on individuals with capital assets above the maximum charging levels – ie self-funders. If the policy intention behind the CHC eligibility changes is that the NHS should cease to be a universal service (ie for rich and poor alike) then the Welsh Government should be open and honest about this rather than seeking to effect such a change through the use of (arguably unlawful) guidance.

### **NHS CHC and independent living**

The Welsh Government has been aware for many years of the adverse impact on many disabled people of its prohibition of Direct Payments for CHC.<sup>36</sup> Seven years ago it acknowledged that this was an issue to be addressed and noted that one option would be the wider use of the mechanism of Independent User Trusts (IUTs). A commitment to addressing this problem was contained in the 2021 Welsh Labour Party manifesto (p.18). In 2021 we expressed the view<sup>37</sup> that the Welsh Government should (pending any legislative change) take practical action by producing a simple template example of an IUT that could (and should) be used by Health Boards in appropriate cases. As we have noted<sup>38</sup> [cite posting] this has not happened. Instead of providing such a template, the Welsh Government has resorted to its comfort zone of rhetoric - of individuals not losing 'their voice, choice and control over their daily lives' in such cases.

### **Concluding comments**

We express our thanks to the Health and Social Care Committee for Professor Clements' invitation to participate in its investigations concerning the state of social care in Wales. We reiterate the enormous value of a Government committed to delivering better social care for those in need in Wales, and one that has been prepared to commission and publish independent reviews as to the workings of the 2014 Act.

Our concern is, as this submission makes plain, that there is an urgent need for Welsh policy to move from rhetoric to reality. In UK terms, Wales is a relatively poor Country that is, in many respects, at the behest of funding from a regressive Government in London. In relation to the delivery of decent social care for the people of Wales there are however many things that the Government can do to give effect to its strong commitment to social justice, inclusion and to ensure that cost does not act as an obstacle to accessing care.

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<sup>36</sup> See for example letter from the [Welsh Government Director of Social Services and Integration dated 10 February 2016](#).

<sup>37</sup> See for example [NHS Continuing Health Care and Direct Payments in Wales](#) 15 May 2021.

<sup>38</sup> See [NHS Continuing Health Care and Direct Payments in Wales](#) 15 May 2021.