



Welsh Government
Consultation – summary of response

Regulations in relation to Business Failure and Section 47

April 2016

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Regulations in relation to Business Failure and Section 47 – Consultation Summary

<u>Contents</u>	<u>Page</u>
 <u>Section 1</u>	
Introduction	3
Background	3
The evidence for change	3
The proposal	4
 <u>Section 2</u>	
Response to the Consultation Questions	7
Annex A - List of respondents	11

Section 1

Introduction

The Social Services and Well-being (Wales) Act 2014 (“the Act”) received Royal Assent on 1 May 2014. The Act forms the basis of the new statutory framework for social care in Wales.

Background

The evidence for change

Social services are at the heart of Welsh public life. They support 150,000 young, old and disabled people every year to achieve their potential and help make them safe. Many of these services are delivered in partnership with others, including housing, health and education services. Society is changing and social services must change in response. There have been and will continue to be shifts in the public’s expectations of social services, as a result of demographic change and changes in our society. Social services need to alter and to respond to all of these.

Furthermore, demand is rising across social services, yet the financial outlook for all public services is difficult. Whilst we have protected social services expenditure, we need to make a more fundamental change than just pursuing the obvious efficiency measures if we are to make social services sustainable. Our White Paper *Sustainable Social Services for Wales: A Framework for Action* sets out a programme of change to meet these challenges based on the following nine principles:

- A strong voice and real control
- Supporting each other
- Safety
- Respect
- Recovery and restoration
- Adjusting to new circumstances
- Stability
- Simplicity
- Professionalism

These have been informed by discussion with stakeholders and debates in the National Assembly for Wales and elsewhere since *Sustainable Social Services for Wales* was published. They sit alongside the evidence of the Independent Commission on Social Services in Wales, the Law Commission review of adult social care legislation¹, and our Review of Safeguarding². All this forms the backbone of our case for change.

This evidence, and the process of considering it through the Assembly scrutiny process on the Bill, has informed and shaped the contents of the Act. The next stage, the development of the regulations and codes of practice or statutory guidance, has been informed by key strategic inputs such as *More than just words*, our Strategic Framework for Welsh Language Services in Health, Social Services and Social Care³, the *Enabling Wales* project which directly supports the delivery and implementation of the Welsh Government’s *Framework for Action on Independent Living* and

¹ <http://lawcommission.justice.gov.uk/areas/adult-social-care.htm>

² <http://wales.gov.uk/topics/health/publications/socialcare/reports/advisory/?lang=en>

³ <http://wales.gov.uk/topics/health/publications/health/guidance/words/?lang=en>

by evidence sourced through technical groups consisting of key stakeholders. These groups have looked at the Act's provisions, and the policy underpinning these, in detail, and provided advice to officials on how the regulations and codes of practice should be framed in order to achieve the aims of the Act and, through this, the requirements of *Sustainable Social Services: A Framework for Action*. This process has secured a range of valuable input which Welsh Government officials have drawn upon to develop the draft regulations and codes of practice which were consulted upon.

The proposal

Business Failure

The regulations define 'business failure'. Regulation 2 sets out the events which constitute 'business failure' for the purposes of the temporary duties on local authorities in Wales. In relation to a provider, other than an individual registered in Wales, business failure consists of:

- The appointment of an administrator
- The appointment of a receiver
- The appointment of an administrative receiver
- The passing of a resolution for a voluntary winding up order
- The making of bankruptcy orders where individual members of a partnership present a joint bankruptcy petition
- In relation to an unincorporated charity, the charity trustees becoming unable to pay their debts as they fall due
- All members of a partnership being adjudged bankrupt; or
- A voluntary arrangement being approved under the Insolvency Act 1986.

In relation to a provider who is an individual registered in Wales, 'business failure' consists of the individual being adjudged bankrupt or proposing or entering into an individual voluntary arrangement under Part 8 of the 1986 Act or Part 8 of the 1989 Order or being subject of a debt relief order.

Under the Act, the temporary duties are triggered where a registered provider becomes unable to carry on or manage an establishment or agency because of business failure if the provider's inability to do so follows business failure.

The Care and Support (Business Failure) (Wales) Regulations 2015 include debt relief orders as part of the definition of business failure. These apply in relation to placements made by Welsh authorities only.

Section 47 Provision of Health Services

Sections 47(6) and (7) of the Act 2014 replace section 26(1C) and (1D) of the National Assistance Act 1948. The purpose of Section 47(6)(a) is similar to section 26(1C) of the 1948 Act in that it allows a local authority to arrange for the provision of accommodation together with nursing care provided by a registered nurse, if it has obtained the consent of the appropriate health body. Regulations under section 47(6)(a) are required to stipulate which is the appropriate health body in such cases.

Sections 47(6)(b) and 47(7) make similar provision to section 26(1D) of the 1948 Act in so far as they enable arrangements for the provision of such accommodation in urgent cases and - when

the arrangements are temporary - without the need to obtain consent of the appropriate health body, provided that consent is obtained as soon as is feasible after the temporary arrangements are made.

Although the wording is different, the effect of the provisions in the 1948 Act and the 2014 Act is the same, with the exception that under the 2014 Act, provision can now be made in the regulations for which Local Health Board must give consent in the case of accommodation in Scotland or Northern Ireland. The regulations also require local authorities to put in place arrangements to resolve disputes.

Section 2 - Response to the Consultation Questions

Question 1:

	We invite your views on the inclusion of debt relief orders within the definition of business failure.				
Total – 6					

Summary of responses

The inclusion of debt relief orders in the definition of business failure was welcomed by all respondents and it was recommended that it be retained in the regulations and guidance. Respondents agreed it is an integral part of the definition and helps outline the position of both Welsh and English local authorities in relation to business failure of a provider organisation.

A few respondents felt all companies that are currently providers of care contracted by local authorities and health boards should ensure the organisations that are the commissioners of care have the most up to date financial information to ensure the business is viable and consequently appropriate to place patients / residents in facilities such as care homes or in a patient's own home. It can be the case currently that the full financial details of providers of care are not always made available to Local Authorities and Health Boards to aid decisionmaking regarding placement.

A few others commented that the provision aims to safeguard care provision for those individuals who may ultimately fall through the net if a debt relief order (DRO) did not constitute business failure and highlighted the importance of becoming aware of potential business failure before such orders were put in place. However, whilst the inclusion was welcomed, there was some concern that local authorities will only become aware of an individual being subject to a DRO at crisis point as there does not appear to be scope to identify those being at risk under the proposed Regulation and Inspection of Social Care Act (Sections 59 – 63 – Market Oversight). This seems to suggest that only those providers who present a greater risk if they fail will be identified.

A few respondents observed that sole traders may not be providing care services over a large geographical area or be providing a specialist portfolio and therefore they would not be flagged up to the local authority. It was felt there was therefore a need to ensure a robust approach to identify early intervention and assistance to ensure action can be taken to avoid a crisis situation where local authorities struggle to mitigate the effects of provider failure by the provision of alternative care.

A few respondents acknowledged it is not reasonable or manageable for local authorities to be aware of each individual sole trader's finances, but felt it was essential that local authorities are aware at an early stage, should an individual provider be considering a DRO due to their financial position, to ensure that care users are not left without the care they require. Interruption of care can cause unnecessary stress and anxiety thus affecting the well-being of individuals.

One respondent noted that DROs are only included for business failure in relation to individuals, and felt it could not be ignored that the making of a DRO of an individual can

impact in other ways. Under Section 11(1) (d) of the Company Directors Disqualification Act 1986, an individual subject to a moratorium period under a DRO cannot be a director of a company or manage a company without leave of the Court. This could therefore impact on the running of a care provider's business – and although arguably would not lead to the business failure on this point alone, was something to be borne in mind.

Welsh Government Response

We welcome the support for inclusion of DROs in the regulations.

Question 2:

	We have asked a specific question. If you have any related issues which we have not specifically addressed, please use this space.				
Total – 6					

Summary of responses

Of the six responses received, only one respondent raised an additional issue and asked why the local authority had solely been given the duty. It was felt that where the home has either Funded Nursing Care or Continuing Health Care service users, the duty should be with the health board. It was also noted that, as with current home closures, this is usually a joint exercise.

Welsh Government Response

The consultation does not indicate a need to amend the regulations. The information provided from the consultation will be passed to those leading on the Regulation and Inspection Act to help them develop the appropriate market oversight regime.

In practice, local authorities will work with health boards to secure continuity of care for individuals in need of care and support.

Question 3:

	Are the regulations clear as to which relevant health body the local authority must obtain consent from, in order to make arrangements for the provision of accommodation together with nursing care by a registered nurse?				
Total – 6					

Summary of responses

All respondents felt the regulations and guidance were clear, and commented that the table included in the guidance was particularly useful as a quick reference and it was recommended that this table is retained in the final guidance. Funding arrangements and responsibilities are also made clear in the document in line with the Responsible Commissioner Guidance from WG. It was noted by one that the clarification of c-cross-border arrangements was also helpful.

Welsh Government Response

The Regulations will not be amended in the light of the positive feedback from the consultation.

Question 4:

	Is it clear what arrangements the local authority must make in connection with the resolution of disputes between the local authority and health body about whether or not a service or facility is required to be provided under a health enactment?				
Total – 6					
<p><u>Summary of responses</u></p> <p>A majority of respondents felt the regulations and guidance were clear with regard to the arrangements local authorities must make in order to resolve disputes between the local authority and health body. The inclusion of the list of possible reasons for disputes in the regulations and guidance was welcomed as these issues are common concerns raised to the National Dementia Helpline. It was recommended by respondents that these are retained in the final regulations and guidance.</p> <p>A few commented that resolution of disputes between health boards and local authorities can sometimes be difficult and having the arrangements for disputes made more explicit under the Act will potentially help to resolve disputes between organisations in the future. It was also considered that being explicit regarding the lead on ensuring the policy is in place would be helpful for organisations.</p> <p>It was noted by a few respondents that the regulations appear to place the onus on the local authority to make arrangements for disputes, including those regarding eligibility for NHS CHC funding. It was felt that while the regulations do include provisions that must be included in those arrangements (such as procedure for resolving disputes to be agreed with health, ensuring the individual's needs are to be met pending resolution and requirement that the dispute does not adversely affect the meeting of the individual's needs) it goes no further and there is no suggestion of any guidance to assist.</p> <p>A few respondents highlighted that under the Care and Support (Provision of Health Services) Act 2014, local authorities are to have regard to the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care, agree a dispute resolution procedure with the relevant body and resolve the dispute in accordance with that procedure. Given the lack of direction within the regulations as currently drafted, it is anticipated that the local inter-agency arrangements which are already in place will continue to be applied in Wales adopting the specific provisions as identified in the regulations. Respondents recommended that guidance could clarify this position further if the local inter-agency dispute arrangements are acceptable.</p> <p><u>Welsh Government Response</u></p> <p>The NHS Continuing Care Framework covers disputes.</p>					

Annex A - List of respondents

No	Confidential Y / N		Name	Organisation/On behalf of
1.	*			
2.		*	Laura Cook	Alzheimer's Society
3.		*	Sandra Morgan	Hywel Dda University Health Board
4.		*	Stephanie O'Donnell/Clare Thomas	Denbighshire County Council
5.	*			
6.		*	Eunice Jones	Torfaen County Borough Council