Llywodraeth Cymru
Welsh Government

Commission on Justice in Wales:

Supplementary evidence from the Minister for Health and Social Services, Welsh Government

Contents

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Introduction

This supplementary paper focusses specifically on the correlation between the health service and the justice system[1] in Wales. The justice system often draws upon health services to care for prisoners and others, while, used effectively, health services can reduce offending and lessen pressures on the justice system. However this requires collaboration between public authorities, including collaboration across the divide between what is devolved in Wales and what is not.

The Welsh Government is very conscious of the risk of poor health being a causal factor in criminal behaviour, and of the need to ensure people are able to access health support whilst in the criminal justice system. Offenders, in general, have higher needs for health services. Collaborative working between health and justice bodies is also, therefore, an opportunity to engage otherwise hard to reach people by providing them with health services they may not otherwise seek or receive.

This can be an effective way of tackling health inequalities. Health inequalities are preventable differences in wellbeing that arise from an unequal distribution of social, environmental and economic conditions across society. These can affect the level of risk of people getting ill, their ability to prevent sickness, or opportunities to take action and access treatment when ill health occurs.

Addressing the health inequalities which exist between our most and least deprived communities is a key priority for the Welsh Government. It is well understood that many of the root causes of health inequalities lie outside the health sector. They arise as a result of the social and economic inequalities that shape the conditions in which people are born, grow, live, learn, work and age. The Welsh Government's action to tackle health inequalities, therefore, includes a broad range of activities to address the many socio-economic determinants of health, and involves working across sectors in a collaborative and integrated way as envisaged in the *Prosperity for All* national strategy.

The justice system impacts upon the wider determinants of health such as someone's employment status, where they live and their support network. It has considerable influence on efforts to reduce health inequalities. In consequence, health care policies and operational delivery will often have to straddle the devolution settlement.

There are examples in this field again, therefore, of the devolution settlement representing what is essentially an arbitrary divide that can hamper public authorities' efforts to support and care for the people of Wales. Collaboration across multiple bodies and agencies is difficult enough when all are ultimately subject to the same direction at the political level. It becomes significantly more difficult when they are not.

Collaboration between devolved and non-devolved services and authorities

Interactions between the health service and the justice system arise in a number of different scenarios and examples are provided below of what is currently being done. But whilst collaboration and partnership working both at national and regional level is commonplace, there are tensions in the system. Ensuring that public authorities collaborate so as to provide a seamless experience for those in need of support is difficult, as is acknowledged in a Mental Health Crisis Care Concordat[2] agreed between relevant public authorities in England in 2014:

[1] In referring to the justice system in this paper we also include policing unless the context otherwise requires.
[2] https://www.crisiscareconcordat.org.uk/

"There have long been concerns about the way in which health services, social care services and police forces work together in response to mental health crises.

Where there are problems, they are often as a result of what happens at the points where these services meet, about the support that different professionals give one another, particularly at those moments when people need to transfer from one service to another.

This is a very serious issue – in the worst cases people with mental health problems who have reached a crisis point have been injured or have died when responses have been wrong. In other cases, patients have had to travel long distances when acute beds have been unavailable."

In England, this is difficult despite the main public authorities involved all being subject, ultimately, to the same political direction. In Wales, as referred to above, collaboration is more difficult because the ultimate political responsibility for the public bodies and workers rests with different governments. Collaboration at the operational level can be hindered by different approaches to providing services (differences which can be ideological as well as structural, managerial or practical) and by disputes over who is responsible for what. In creating an equivalent Mental Health Care Crisis Concordat for Wales, therefore, the Welsh Government faced these challenges.

As an example, the extent to which the police are required to deal with problems that arise from a person's mental health is a difficult issue. All of the police forces in Wales report a steady increase in the number of mental health related calls that they have been required to attend to each year. They have formally raised concerns about this with NHS Wales and the Welsh Government, contending that dealing with what are essentially medical issues should not be their responsibility. This is of course a reasonable position. However, the term 'mental health' is being used by a number of agencies to define a broad spectrum of circumstances, which as well as including those with a diagnosable mental health disorder can refer to people in distress due to social or domestic issues and people who are intoxicated. There is a risk, therefore, of responding to what may not necessarily be an increase in cases of mental health problems by investing further in mental health services, instead of developing multi-agency support tailored to the needs of the individual.

Examples of collaborative working – and of complexity

1 Mental health

The Mental Health Crisis Care Concordat developed for Wales and led by the Welsh Government brings together the following partners (of which a majority are devolved but many are not):

- The Welsh Government
- Welsh Police forces
- Police Liaison Unit
- NHS Delivery Unit
- Welsh Ambulance Service NHS Trust
- Police and Crime Commissioners
- Local Health Boards
- Powys Teaching Health Board
- Royal College of Psychiatrists

- Royal College of Nursing
- Third Sector: Wales Alliance for Mental Health
- Public Health Wales
- College of Policing
- HM Prison and Probation Service
- Home Office
- Association of Directors of Social Services
- Youth Justice Board-Wales
- Healthcare Inspectorate Wales

All partners agree to work together to ensure that front line services most likely to come in to contact with people in mental health crisis are supported, either to provide care or to direct people to those who can provide the most appropriate care. The Welsh Concordat was launched in December 2015 along with a national multi-agency task and finish group to guide the development of the Concordat and local implementation plans across Wales.

In September 2017, an evaluation of the Concordat by Bangor University concluded that the task and finish group had achieved its immediate objectives, including reducing the use of police custody for those detained under section 136 of the Mental Health Act 1983. Following the evaluation, the group was reconstituted so that it would:

- have a dual role: a governance role, overseeing regional Mental Health Criminal Justice Partnerships, and a strategic leadership role, setting priorities of the regional partnerships and supporting the implementation of actions required under the concordat;
- have a longer term remit, with a broader focus on improving co-ordination and communication between the police, health services, social care services and the third sector when dealing with an individual's mental health crisis.

Whilst collaboration and partnership working both at national and regional level is good – there are tensions in the system. Developing an integrated response which is 'owned' across multiple agencies is complex, particularly when it includes devolved and non-devolved areas and where actions are designed by reference to which agency should be responsible as opposed to being focused on the needs of the individual.

The Mental Health Act 1983 and the Mental Capacity Act 2005 provide the legal framework (for Wales and for England) for health and social care provision for some of our most vulnerable citizens (including children and young people). But, as has been demonstrated elsewhere in the Welsh Government's evidence in relation to many other circumstances, the line between what is devolved and what is not in Wales is blurred.

The subject matter of the Mental Capacity Act 2005 is reserved (as the UK Government considers it to be a legal issue connected to the justice system, despite the importance of health and social services to those concerned), though the Welsh Ministers can exercise certain powers under that Act; while apart from matters relating to the detention of restricted patients, the Mental Health Act 1983 (and mental health more generally) is devolved. As part of these arrangements there is also a specific Mental Health Tribunal for Wales (one of the 'devolved' tribunals).

Operationally, also, the position is complex. As an example, making law about whether a person has mental capacity is reserved, though the decision itself is taken by health and social care experts in Wales, responsibility for whom is devolved. Similarly there isn't a clear legal line between detention on the one hand and treatment and care (needed to be provided in detention – or provided after detention) on the other. These are more examples of the Welsh devolution settlement's "jagged edge".

Both the Mental Health Act and the Mental Capacity Act are currently under review. Aside from the question of what is devolved or not, the complexity of the interface between both Acts is widely acknowledged. The UK Government commissioned an independent review of the Mental Health Act that reported in December 2018 and part of its remit is to consider this complexity. Not surprisingly given the legislative and operational context, in practice the focus of the review was on England. Its potential application to Wales is of itself a difficult question, as the final report of the review stated:

"We have been dealing with a review of the UK Government's responsibilities under the Mental Health Act in England and Wales. The UK Government is responsible for health policy in England and justice policy across England and Wales. The Welsh Government may be interested to follow similar reforms, but because of devolution questions, each set of proposals will have to be tested specifically for Welsh application and modified as necessary. The Mental Health Review Tribunal for Wales is, for historical reasons, organised differently, so it will be more difficult to assume the greater responsibilities for the Tribunals that we are recommending and some special arrangements will be needed.[3]"

Its specific section on Wales continued on a similar theme with the different tribunal system in particular causing particular issues:

"This is complicated because health policy is separated between the UK Government and the Welsh Government (where health is devolved), whereas justice (including criminal justice and Part III of the Act) is not. This means that our recommendations cover England for Health (although we have aligned them with Wales policy and practice wherever possible), but both England and Wales for justice.

We have learned during this Review that the Mental Health Review Tribunal for Wales (MHRTW) does not quite fit into either category. As the Law Commission has observed when announcing a new Welsh law reform project on tribunals, 'the rules and procedures governing Tribunals in Wales have developed piecemeal from a wide range of different legislation. Much of the legislation was developed outside the devolution process, resulting in gaps in the legislation'.

There are a number of differences between the English and Welsh Tribunals. Each has their own set of rules. Some of our recommendations rely on a Tribunal judges sitting on their own (for example to hear the appeal against treatment decisions). The rules in England specifically allow this to happen, whilst Welsh rules do not. And, because of the legislative anomalies mentioned above, it is not clear who is able to make this amendment to the Welsh rules.[4]"

[3] Page 31 of the final report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762206/MHA_reviewFINAL.pdf
[4] Page 211 of the Final Report.

Notable also is what the review describes as the "future direction of travel" and the potential benefits of merging the law on mental capacity and mental health. A debate is underway about the merits of the approach taken in the Mental Capacity Act (Northern Ireland) 2016, an Act described as "fusion" legislation – a generic law applicable across all medical specialties and social care where an intervention is proposed and an individual has impaired decision-making capacity. Whether this is the right approach is still being considered, but one thing that is clear is that this is not even an option in Wales. This is because as things stand the National Assembly for Wales, unlike the Northern Ireland Assembly (and the Scottish Parliament) would not have the competence to enact an integrated law of this sort.

Mental health law is also something that has been under consideration by the Law Commission. Following the Law Commission's report and recommendations for the reform of the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards in April 2017, the UK Parliament's Joint Committee on Human Rights also called for urgent legal reform in June 2018. The UK Government eventually introduced a Mental Capacity (Amendment) Bill in July 2018.

The recent activity considering reform of both the Mental Capacity Act 2005 and Mental Health Act 1983 is exposing some of the challenges of operating and changing this legislation in Wales. Examples of areas impacting on the justice system include:

- Delays in decision-making in relation to restricted patients (under Part 3 of the Mental Health Act 1983) when needing transfer from prison to hospital, authority to 'step-down' (from specialist inpatient services to other accommodation) or to move to a different hospital, or to be granted permission for discharge as part of a recovery and rehabilitation 'pathway'. These decisions have an impact on the capacity of the NHS and independent mental health system in Wales.
- Calls for reform of access to court proceedings to review detention under the Mental Health Act to fully reflect the differences in how the Mental Health Review Tribunal operates in Wales.
- Whether the appeal process for a person subject to deprivation of liberty safeguards under the Mental Capacity Act 2005 should be to the Tribunal rather than to the Court of Protection. The broader arguments were finely balanced when this was considered by the Law Commission, however the Commission noted the significance (as is alluded to above) of the devolved Mental Health Review Tribunal for Wales not being part of HM Courts and Tribunals Service. This would mean that creating tribunal jurisdiction over mental capacity in Wales would involve either setting up a First-Tier Tribunal jurisdiction separate from the existing Welsh Tribunal or expanding the jurisdiction of the Welsh tribunal.

2 Prison health

Whilst HM Prison and Probation Service (HMPSS) has responsibility for prisons in Wales, health services in public sector prisons are devolved and are the responsibility of local health boards. The Welsh Government works collaboratively with HMPPS and prison health services, which are overseen by jointly chaired Prison Health Partnership Boards. Offenders held in the secure estate will generally have higher health needs than the general population, with higher prevalence of mental health and substance misuse issues.

Whilst partnership working is (in general) good, there are challenges in delivering a devolved service in a non-devolved estate. In particular, environmental factors which have a significant impact on the health and wellbeing of people in prisons are beyond the control of the health boards.

Recent inspection reports on HM Prison Swansea and HM Prison Cardiff have been highly critical of their environment, describing conditions that would have a significant negative impact on the health and well-being of men in prisons, particularly their mental health and potential for substance misuse.

3 All Wales Schools Liaison Programme

The All Wales Schools Liaison Core Programme has been running nationally since 2004 and has evolved considerably since its inception. A partnership between the Welsh Government, schools and the police, this provides pupils with opportunities to enhance their understanding of matters such as substance misuse, social behaviour and community and personal safety. The core element of the programme is jointly funded by the Welsh Government (from the Substance Misuse Action Fund) and the police. Welsh Government officials work closely with the police and programme co-ordinators to monitor the work being undertaken, to ensure that the programme remains focused on the current issues facing children and young people.

4 Substance misuse

Area Planning Boards for the commissioning and delivery of substance misuse services are established across Wales (covering the same areas as the seven Local Health Boards). Both operational police officers and representatives of the local Police and Crime Commissioners are members of each Area Planning Board. They take responsibility on behalf of local authority community safety partnerships for assessing the needs of those suffering from substance misuse and subsequently commission needs led, evidence based, interventions.

This is achieved with significant emphasis on collaborative funding. This involves use of devolved health care funding and non devolved funding to address criminal justice issues. Whilst Police and Crime Commissioners and operational forces participate in Area Planning Boards ultimately they are able to make their own decisions on areas of funding and practice within the criminal justice system. In consequence they can commission services separately, which can lead potentially to duplication or poor alignment. In some cases decisions have been made, in particular in relation to support of opioid users, without discussion with wider partners. This leads to unexpected demands and pressures on other services.

The supply of 'Take Home Naloxone' was initiated in 2009 to prevent fatal opioid poisonings (naloxone is an opioid overdose reversal drug). Following release from prison, opioid users are at increased risk of fatal and non-fatal drug poisoning. Since implementation in Wales in 2009, naloxone has been supplied (by health services) within a custodial setting either for the first time or as a re-supply on 2,437 occasions.

5 Welsh Government Out of Work Scheme

The Welsh Government set up the Out of Work Scheme in 2016 to support unemployed people with a history of substance misuse or mental ill-health to enter employment or education. The scheme aims to help over 14,000 of the most vulnerable and hard-to-reach members of society in their recovery by the summer of 2020. The interplay between the scheme and the criminal justice system is now developing. For example, support has been received from experts in the justice system to provide advice on offender rehabilitation to support the scheme's objectives. In addition, there is regular engagement with HMPPS to discuss a range of issues including, for example, the development of guidance about the scheme for Probation Officers.

An issue of concern that affects the success of the scheme, however, is number of individuals released from prison back into communities in Wales with no fixed abode. This is because a secure housing environment is generally a prerequisite for employment. This issue will be the focus of joint working between the Welsh Government and HMPPS in response to a study into the effectiveness of housing and homelessness services provided to adults leaving prison undertaken by Glyndŵr University.

Conclusion

This paper provides additional evidence that real life problems and the action needed to tackle them are complex and multi-dimensional, and this can be hindered by the devolution settlement. Many factors can impact upon a person's health such as education, employment prospects and feeling safe in the community. In order to address these wider determinants of health, and reach vulnerable people outside of traditional health services, health professionals must engage with others – from schools and fire and rescue services, to employers and the police. Cross agency care and support is a positive development but there is a danger that those in need of it can to be let down by failures in communication, co-operation and collaboration; all of which is made more difficult by Wales' current constitutional arrangements.