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A New Law on Adult Social Care: A Challenge for Law Reform in Wales

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Introduction

The current state of adult social care law in England and Wales is confused. In its report, *Adult Social Care*, the Law Commission for England and Wales notes that the 'disparate range of legislative provision . . . reflects the differing policy imperatives and understandings that have been current at various times in the period since 1948'.[1] It is disturbing that one of the principal statutes for social care provision in England and Wales today is the National Assistance Act 1948 (NAA 1948). The NAA 1948 was part of the suite of legislation establishing the Welfare State; s.1 NAA 1948 repealed the then existing Poor Law, an indication of its archaism. A key part of the NAA 1948 is the definition of 'disabled', which adopts a language that is no longer appropriate for 21th century adult social care.[2] The NAA 1948 was criticized for its emphasis on residential care rather than home or domiciliary care.[3] It followed a report by the Nuffield Foundation in 1947 that painted a gloomy picture of public assistance institutions pointing out that many of them were 19th century buildings that were usually large and cheerless.[4] Townsend attributed the lack of development of domiciliary services to a belief that such institutions were important to regulate and confirm inequality

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1 Law Commission *Adult Social Care* (London: Law Commission, 2011). Law Com 326.

2 s 29(1) NAA 1948.

3 P Townsend 'The Structural Dependency of the Elderly: The Creation of Social Policy in the Twentieth Century' [1981]. *Ageing and Society* 1, 5–28.

4 B S Rowntree *Old People, Report of a Survey Committee on the Problems of Ageing and the Care of Older People* (London: OUP, 1947).

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in society and to regulate deviation from what were perceived to be departures from central social values.[5] Means and Smith suggest that a belief that residential care provided the most economic form of care for the 'most impaired' may have 'retarded the development of domiciliary services'.[6] This initial emphasis on residential care re-emerged in the 1980s when the use of social security funding led to an indiscriminate use of funded residential care based on financial rather than needs based assessment.[7]

It is interesting that legislation enacted in the immediate post-war period, which retained some of the thinking behind the Poor Law, remains a cornerstone of adult social care.[8] Of course, the NAA 1948 has been amended and some of its provisions are no longer used. For example, s.47 NAA 1948 allows for the removal of a person suffering from 'grave chronic disease or being aged, infirm, or physically incapacitated from insanitary conditions to a place of safety'. This was intended originally to deal with slum clearance in the 1920's. Its use today would breach the European Convention on Human Rights. In some respects, Parliament and the judiciary have adapted and ignored outdated law to meet modern day needs, in so far as that is possible.

This article discusses the process of reform of adult social care law within the context of the devolved legislative powers now available to the Welsh Assembly since the Government of Wales Act 2006 (GOWA 2006) and the referendum on law-making powers that led to the activation of the powers under Part IV. Adult social care has traditionally been the responsibility of the Westminster Parliament; although working within this constraint, Wales has developed a limited Welsh approach towards social care. However, the legacy legislation has largely dictated the broad pattern of provision. This legislation is recognized as being no longer appropriate for 21th century needs in either Wales or England. Reform is necessary and long overdue. In Wales, the reform of adult social care law is a legislative priority and features in the post referendum Government legislative programme.[9] The debate on reform in Wales has progressed at a faster pace than in England where a White Paper is awaited.

The Current Statutory Framework in England and Wales

The National Health Service and Community Care Act 1990 (NHSCCA1990) is often mistakenly considered to be adult social care's equivalent to the Children

5 See n 3 at 22.

6 R Means, H Morbey, R Smith *From Community Care to Market Care?* (Bristol: Policy Press 2002 at p. 210).

7 Department of Health and Department of Social Security *Caring for People: Community Care in the Next Decade and Beyond*. Cm.849. (London: HMSO 1989); R Griffiths *Community Care: An Agenda for Action* (London: HMSO 1988).

8 J Dow 'Putting Policy into Effect—The Government's Legislative Programme' [2011] *Journal of Integrated Care* 19, 12–15.

9 National Assembly for Wales, Cofnod y Trafodion, Dydd Mawrth, 12 Gorffennaf 2011 *The Record of Proceedings, Tuesday, 12 July 2011*.

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Act 1989 for child services. This is not the case. Whereas the Children Act 1989 provides a comprehensive law on children, including public law and private law matters, the NHSCCA 1990, although in one sense radical, masks legislative disarray. It changed the way in which social care services are funded, in particular it removed the perverse funding incentive to place people in residential care.[10] Significantly, it imposed a duty on local authorities to assess a person who may be in need of community care services.[11] However, funding and assessment take place in a statutory framework that did not change. Thus, the key definition of 'community care services' in s.46 (3) NHSCCA 1990 is based on services provided under other legislation:

> Community care services means services which a local authority may provide or arrange to be provided under any of the following provisions:
>
> a. Part III of the National Assistance Act 1948,
> b. section 45 of the Health Services and Public Health Act 1968,
> c. section 21 of and Schedule 8 to the National Health Service Act 1977, and
> d. section 117 of the Mental Health Act 1983 . . .

This is not the complete picture. Additional legislation has added to the confusion. In addition to the NHSCCA 1990, a person may access social care by way of the Chronically Sick and Disabled Persons Act 1970 (CSDPA 1970) and the Disabled Persons (Services, Consultation, and Representation) Act 1986 [DP (SCR) A 1986]. The CSDPA 1970 was hailed as a Magna Carta for disabled people. It was the first legislation to recognize and create rights for people with disabilities. This private members initiative sought to give people with disabilities an equal opportunity of a place in society, free from disadvantage. Regrettably, the House of Lords removed any advantage of using this legislation rather than the NHSCCA 1990 in the *Gloucestershire case*.[12] The case decided that financial resources could be taken into account in deciding whether it is necessary to arrange services for a person who is disabled. The claimants had unsuccessfully argued that the local authority should meet any identified need under the CSDPA 1970. The case demonstrates the lack of coherence in the legislation and disturbingly the extent to which the courts go to create consistency in the face of the clear wording of the statute.[13]

The failure of the pre-1990 statutory regime to be sufficiently flexible to meet the demands imposed upon it has led to an assemblage of legislation added on a seemingly ad hoc basis. This is an unsound basis for statute law development and reform. An example of the confusion is the law relating to carers. The

[10] See n7 and R Baggott *Health and Health Care in Britain* (London: Macmillan 1994), pp. 229–334.
[11] s 47 NHSCCA 1990.
[12] R v. Gloucestershire C C and the Secretary of State for Health. Ex parte Barry [1997] 2 All ER 1.
[13] A Brammer 'Community care assessment after Gloucestershire' *Tizard Learning Disability Review* (1997) 2(4) 32–35.

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Government White Paper that preceded the NHSCCA 1990 included the objective that service providers should make practical support for carers a priority.[14] However, no mention is made of carers in the NHSCCA 1990. Instead, three separate pieces of legislation have been enacted since the NHSCCA 1990—the Carers (Recognition and Services) Act 1995, the Carers and Disabled Children Act 2000, and the Carers (Equal Opportunities) Act 2004. In addition, s.8 DP (SCR) A 1986 refers to assessing the ability of a carer to provide care on a regular basis to a disabled person. A further complicating factor is the need to include the ability of a carer to care as part of the assessment of a potential service user under s.47 NHCCA 1990. Local authority social services departments must also ensure that their policies and procedures comply with generic legislation, such as the Human Rights Act 1998, the Equalities Act 2010, and the Data Protection Act 1998.

The interface between adult social care and health services has generated further legislation. Again, the Government White Paper identified the need to clarify the responsibilities between different agencies, thus making it easier to hold them to account.[15] Rarely are problems neatly categorized into health or social care. New Labour sought to address the 'Berlin Wall' between health and social care.[16] Legislation was introduced aimed at providing a seamless service—a very significant challenge given the structural, financial, and cultural differences between health and social services. An excellent example of this is the Community Care (Delayed Discharges) Act 2003 that seeks to address what is often regrettably referred to as 'bed blocking' owing to a lack of social care support being available upon discharge from hospital. The Act provides for a charge to be imposed by health on local authorities if a patient's discharge is delayed by their failure to arrange for community care services. Ironically, this legislation may have added to the complexity of discharge by imposing a bureaucracy that adds further delay.[17] Glasby *et al.* note that

> Despite a tendency to focus on structural "solutions", evidence and experience suggests a series of more important processes, approaches and concepts that might help to promote more effective inter-agency working—including a focus on outcomes, consideration of the depth and breadth of relationship required and the need to work together on different levels.[18]

Although the 2003 Act includes Wales, the Welsh Government has chosen not to adopt the charging policy. Instead, revised guidance was issued by the Welsh

[14] Department of Health *Caring for People: Community Care in the Next Decade and Beyond* (London: HMSO, 1989) para. 1.11.

[15] See n 14.

[16] J Glasby 'Bringing Down the" Berlin Wall": The Health and Social Care Divide' [2003] *British Journal of Social Work* 33, 969–975. See also A Petch *Health and Social Care: Establishing a joint future?* (Dunedin Academic Pr Ltd 2008).

[17] K Bryan [2010] 'Policies for Reducing Delayed Discharge from Hospital' *British medical bulletin* **95**, 33.

[18] J Glasby, H Dickinson, *et al.* 'Partnership Working in England—Where We Are Now and Where We've Come From'. International Journal of Integrated Care, **11** (Special 10th Anniversary Edition).

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Government on hospital discharge planning in Wales to reflect the new commissioning and partnership arrangements in place since 2003.[19]

Guidance Issued Under s.7 Local Authority Social Services Act 1970

One consequence of the confused state of adult social care legislation has been the plethora of guidance issued under s.7 Local Authority Social Services Act 1970 (LASSA 1970). This guidance complements the legislative and regulatory framework and binds local authorities other than in very exceptional cases.[20] All too often, it is used to make up for shortcomings in the legislative framework identified by the courts, practitioners, and service users. As noted above, the House of Lords in the *Gloucestershire* case said that resources could be taken into consideration in deciding whether a need existed under the CSDPA 1970. Resources are also relevant in deciding whether to meet a need under s.47 NHSCCA 1990. Lord Clyde in Gloucestershire said that,

> In deciding whether there is a necessity to meet the needs of the individual, some criteria have to be provided. Such criteria are required both to determine whether there is a necessity at all or only, for example, a desirability, and also to assess the degree of necessity.[21]

Initially, individual local authorities devised their own eligibility criteria.[22] However, this led to fragmentation and a postcode lottery for adult social care.[23] Section 7 LASSA 1970 guidance was issued by the Department of Health[24] and separate guidance by what was then the Welsh Assembly Government.[25] This is often referred to as the Fair Access to Care guidance (FACs). The definition in each document of whether needs are critical, substantial, moderate, or low is identical, although presented in different contexts.

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[19] The National Assembly for Wales, Hospital Discharge Planning Guidance (2005) WHC (2005) 035.

[20] R v. London Borough of Islington, ex parte Rixon [1997] ELR 66, at p. 71.

[21] See n 12 per Lord Clyde at p. 16.

[22] B Schwehr 'A study in fairness in the field of community care law (1997)' *Journal of Social Welfare and Family Law* **19**, 159–172.

[23] Modernising Social Services Promoting Independence, Improving Protection, Raising Standards, 1998:Cm.4169, para. 2.3.

[24] Department of Health Fair Access to Care Services—Guidance on Eligibility Criteria for Adult Social Care (2003) Available at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4019641.pdf(accessed 5/4/2012). This has now been superseded by prioritizing need in the context of Putting People First: a Whole System Approach to Eligibility for Social Care—Guidance on Eligibility Criteria for Adult Social Care, England 2010. Department of Health (2010) Available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113154 (accessed 5/4/2012).

[25] Creating a Unified and Fair System for Assessing and Managing Care, Welsh Assembly Government (2002) http://wales.gov.uk/pubs/circulars/2002/english/NAFWC09-02Guidance-e.pdf?lang=en (accessed 5/4/2012).

As with the legislative framework, so too with the guidance framework, developments are incremental and often contradictory. One particular tension in England is that between the FACs criteria and the personalization agenda that the Westminster Government is pursuing. A recent review of the FACs guidance in England noted the apparent incompatibility between FACs and personalization; FACs is primarily concerned with standardization and consistency, along with explicit decision making, whereas personalization is about self-assessment, individual choice, and control.[26]

Wales is less committed to the personalization agenda. It rejects the 'market-led model' that personalization in England promotes and adopts a model based on 'citizen control'. The Welsh Government stated that

> . . . the label "personalisation" has become too closely associated with a market-led model of consumer choice, but we are taken by the . . . approach [of] stronger citizen control.[27]

This resonates with Rhodri Morgan's (the second Labour Party First Minister) *Clear Red Water* speech to the National Centre for Public Policy in 2002, in which he outlined an approach to social welfare different from that in England.[28]

> Approaches which prioritise choice over equality of outcome rest, in the end, upon a market approach to public services, in which individual economic actors pursue their own best interests with little regard for wider considerations. The Assembly Government attaches a positive value both to diversity and innovation and to responsiveness to the needs of users of public services. We firmly believe, however, that such receptivity is best achieved through strengthening the collective voice of the citizen.'

Nevertheless, difficulties remain in reconciling the criteria in the Welsh FACs guidance with a citizen led model.

Identifying a Welsh Approach to Adult Social Care

Any divergence between the two nations is largely explained by the political composition of the respective governments, although at the time of Morgan's lecture, Labour was also in power in Westminster. Such divergence is not new, although post-devolution it is has increased in intensity. Pre-devolution the Secretary of State for Wales often had powers to place a Welsh identity on Westminster

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[26] Commission for Social Care Inspection Cutting the Cake Fairly CSCI Review of Eligibility Criteria for Social Care (2008) Available at http://collections.europarchive.org/tna/20081105165041/http:/www.csci.org.uk/pdf/FACS_2008_03.pdf (accessed 5/4/2012), at paras. 3.45–3.46.

[27] Sustainable Social Services for Wales A Framework for Action, Welsh Assembly Government (2011) WAG10-11086, para. 3.16.

[28] Rhodri Morgan, Clear Red Water. National Centre for Public Policy. Swansea. (2002) Available at http://www.sochealth.co.uk/Regions/Wales/redwater.htm (accessed 5/4/2012).

legislation. This provided a limited opportunity to move away from the 'for Wales see England' approach.[29] Some divergence occurred in adult social care, although it always had its origins in England and Wales legislation. Perhaps, the best examples of a distinctly Welsh approach are the Mental Illness and Mental Handicap strategies for Wales developed in the 1980s.[30] These were innovative and arguably the precursor to the community care changes more generally in England and Wales following the NHSCCA 1990. However, much of the legal framework in Wales pre-devolution closely followed the English model, albeit often jointly branded. In part, this was a consequence of limited law reform capacity within the Welsh Office rather than a slavish adherence to the Westminster model. As will be discussed below, law reform capacity remains an issue for the Welsh Government and the National Assembly.

The Government of Wales Act 1998 (GOWA 1998) provides for a much more modest form of devolution than the Scottish model. In large part, this reflected the political reality that there was less of an appetite for devolved government in Wales than Scotland—this was apparent from the close result in the referendum in Wales.[31] However, included in the powers transferred is social care and there has been a keenness on the part of the Welsh Government and Assembly to develop an alternative approach.

Steve Davies, writing in 2003 following the second Assembly elections, identified a clash of cultures between the New Labour's emphasis on the efficiency of the market economy approach and the importance of choice and that of Labour in Wales (following that election Labour was able to form a majority government and no longer depended upon Liberal Democrat support), which emphasized citizenship, equality of outcome, universality, and collaboration rather than competition, and favoured public rather than private.[32] This philosophy applies today within Wales and the presence of a Conservative led coalition government at Westminster accentuates the differences. This has a very significant impact on the nature of the legislative programme for the newly empowered National Assembly. However, it is not the only factor influencing the shape of Welsh legislation.

Adult Social Care in Wales—Proposals for the Future

Another important driver of adult social care reform in England and Wales is the recent work by the Law Commission for England and Wales as part of its 10th Programme of Law Reform.[33] The review on adult social care began in 2008 long

[29] A reference in an early edition of the Encyclopaedia Britannica.
[30] Policy, Strategy and Operational Development of Mental Health Services in Wales. R Williams—Management for Psychiatrists, 2007—books.google.com
[31] In response to the question 'I agree that there should be a Welsh Assembly' 50.3% voted yes and 49.7% voted no. There was a majority of only 6721 in favour.
[32] S Davies Inside the Laboratory: the New Politics of Public Service in Wales.
[33] Law Com No 311.

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before the 2011 referendum on primary law-making powers. In its Scoping Report, the Commission committed itself to developing mechanisms to ensure that it was aware of developments both in England and in Wales. However, it '. . . considered that the differences are not currently significant enough to justify this being a joint project between the Department of Health and the Welsh Assembly Government'.[34] At first, this raises concerns about the operation of the law reform machinery within a devolved Wales. A lack of significant differences in the law assists the analysis of the existing framework; however, it does not mean that the reforms proposed should be the same for each of the two nations. Nevertheless, the review started on the footing that the reforms could or would be equally applicable to England and Wales. The lead Department in the Commission's review was the Department of Health. The reason for sole sponsorship by the Department of Health is that the Welsh Government elected not to jointly sponsor the review.[35]

The proposal for consultation was that there should be a single statute for England and Wales 'unless policy in Wales diverges enough to require a separate statute'.[36] The Department of Health in its response to the Consultation proposed that there should be separate statutes for England and for Wales, similar to the National Health Service (NHS) legislation.[37] The National Health Service (Wales) Act 2006 and the National Health Services Act 2006 recognized that health in Wales has the potential to develop differently from England and that separate legislation was required. Initially, the Welsh legislation was more or less a re-branding of its English counterpart, although providing opportunities for divergence. The Health and Social Care Act 2102, when implemented, will increase the differences between the two nations.

The majority of consultees to the Commission's Consultation Paper favoured a single statute for England and Wales. However, some supported a separate statute in recognition of already existing policy differences; this would better facilitate future development.[38] For the Commission, the result of the referendum on primary law making powers and the implementation of Part IV GOWA 2006 settled the matter.

> In our view, it would be constitutionally infelicitous to propose that the UK Parliament legislate for Welsh adult social care, whether in one UK bill covering both England and Wales, or in separate Westminster bills for each country. [39]

[34] Law Commission (2008) Adult Social Care: A Scoping Report, para. 1.27.

[35] R Percival (2010) 'Reforming Welsh Law'. Agenda **42** (Winter), 41–42.

[36] Law Commission (2010) Adult Social Care: A Consultation Paper, Law Com No 192, paras. 2.9–2.12.

[37] Department of Health (2010) The Government Response to Law Commission Consultation Paper 192. Available at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_119394.pdf, at p. 7 (accessed 5/4/2012).

[38] Law Com No 326 para. 3.5.

[39] Law Com No 326, para. 3.9.

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It recommended that the legislation for Wales should be by an Act of the National Assembly. The Commission did, however, think it desirable 'so far as is possible, to have consistent statutes in both countries'.[40] Consistent statutes may be helpful in, for example, cross border portability of care packages. Important though portability between England and Wales is to some individuals, regard must be had to the political realities of devolution and the priorities set by the democratically elected legislative bodies. Furthermore, initial consistency can be easily lost as in the case of the impact of the Health and Social Care Act 2012 on the Welsh and English NHS legislation. Consistency cannot be future proofed and is a merely a common starting point for further, probably divergent, developments. It is not inherently desirable rather it is at best a pragmatic basis for reform and at worst risks undermining the rationale behind devolution.

Wales has the option to adopt the Commission's proposals, making any consequential amendments to the statute to reflect policy divergence or devise its own approach *de novo* to meet Welsh aspirations. A third option is available, namely to follow broadly the pre-devolution model of having the same or similar legislation, but achieving divergence via secondary legislation and guidance. This option assumes that principled differences are implementable through technical regulations and guidance rather than on the face of the statute. One lesson from the current legislative framework is that a distinctly Welsh approach achieved through secondary legislation is possible, but it is far from elegant and often creates confusion.

The Welsh Government recently published its Consultation Paper on the future shape of adult social care in Wales, *Social Services (Wales) Bill: Our plans to change and improve social services in Wales.*[41] The Consultation Paper draws not only upon the Commission's work but also upon the number of Welsh initiatives, including the Independent Commission on Social Services,[42] the review of *In Safe Hands* [43](the s.7 LASSA 1970 guidance on safeguarding), and the Welsh Government's 2011 report *Sustainable Social Services for Wales*.[44] It is necessary to appreciate the context within which this was produced. Unlike the Department of Health, the policy and legal capacity of the Welsh Government are limited. On a related issue, the scrutiny capacity of the National Assembly is also limited. There are only 60 Assembly Members (AMs); once the payroll vote is removed, this leaves a comparatively small number available to scrutinize legislation compared to the bicameral Parliament in Westminster. It is also less than the 129

[40] Law Com No 326 at para. 3.10.

[41] Welsh Government (2012). Available at http://www.ssiacymru.org.uk/media/pdf/m/8/20120307_-_Social_Services_%28Wales%29_Bill_-_Consultation_Document_-_Full_-_English_-_Final_for_Print.pdf (accessed 5/4/12).

[42] (2010) *From Vision to Action: The Report of the Independent Commission on Social Services in Wales* (Cardiff: Independent Commission on Social Services in Wales).

[43] J Magill, V Yeates, *et al.* (2010) Review of In Safe Hands, Welsh Institute for Health and Social Care University of Glamorgan.

[44] Welsh Assembly Government (2011) Sustainable Social Services for Wales: A Framework for Action. WAG10-11086.

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Members of the Scottish Parliament and the 108 members of the Northern Ireland Assembly. Yet, the importance of adult social care law on service users is the same whether they live in Llandudno, Ballycastle, or Erskine. Unfashionable though it may be, there is an argument in favour of increasing the number of AMs to 80 to enhance the capacity of the Assembly to scrutinize complex legislation such as the Social Services Bill to be introduced in 2012.[45] The quality of the legislation emanating from the Assembly is dependent upon each component of the law-making process being fit for purpose.

Law Reform in Wales—Lessons From the Adult Social Care Review

The background to the Law Commission's excellent work on adult social care raises questions about future law reform in relation to devolved matters. If in 20 years time the Welsh Social Services Act 2013 requires reforming, will it be appropriate that the Law Commission for England and Wales undertakes the review? Alternatively, would it make sense for a review to be undertaken by a Welsh based law reform body? It would appear anomalous if a body other than one with a distinct Welsh identity conducted a review of a law that had operated solely within Wales for 20 or more years. At that point, a joint review of both systems of law by a combined commission would be difficult to undertake as there would not be the common starting point and probably no common finishing point.

This is not to be seen as critical of the work of the existing Commission. As part of the consultation exercise, the Commission held an event in Wales in conjunction with the Older People's Commissioner for Wales and Age Cymru.[46] Indeed, the Commission may fairly point out that Wales is not very forthcoming in responding to consultations. Instead, it is a matter of law reform mechanisms keeping pace with the new constitutional framework within the United Kingdom. Ron Davies' statement that devolution is a process and not an event, applies equally to law reform as it does to the development of a Welsh jurisdiction and the law making process itself.[47]

Law reform has a long pedigree. Francis Bacon warned in 1597 that the

> . . . heaping up of laws without digesting them maketh but a chaos and confusion and turneth the laws many times to become but snares for the people.[48]

[45] For a useful discussion on scrutiny of legislation in the National Assembly see All Wales Convention Report (2009). Available at http://wales.gov.uk/docs/awc/publications/091118thereporten.pdf (accessed 5/4/2012) at paras. 3.6.1–3.6.34.

[46] See n 35 p. 41.

[47] BBC News 4 February 1999—Available at http://news.bbc.co.uk/1/hi/uk_politics/272015.stmn (accessed 5/4/2012).

[48] J Spedding, R Ellis, *et al.*, Eds. The Works of Francis Bacon (Cambridge Libary Collection 1872, p. 59).

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Gerald Gardiner, who was largely responsible for establishing the Law Commission for England and Wales, and the Scottish Law Commission, noted that

> The governmental machinery for law reform is not geared to steady, planned and co-ordinated operation. Whenever there is need for urgency . . . the preparation of reforming measures is entrusted to *ad hoc* committees which operate in isolation and with their attention focused on one particular anomaly or group of anomalies.[49]

Whereas an ad hoc approach is necessary on occasions, it is not the basis upon which to develop coherent law having at least some chance of longevity and internal consistency. In 1965, a White Paper on the creation of a Law Commission for England and Wales and for Scotland identified the case for a standing body on law reform

> One of the hallmarks of an advanced society is that its laws should not only be just but also that they should be kept up to-date and be readily accessible to all who are affected by them.[50]

This debate has relevance in Wales today following the acquisition of primary law-making powers. Adult social care law in Wales certainly fails the White Paper's advanced society test.

The decision to establish a separate Scottish Commission was not without controversy. The *Scots Law Times* in 1965 felt compelled to warn all Scottish lawyers about 'what is proposed to be done' considering the proposal to be part of 'a campaign waged almost exclusively by English organizations and individuals based in the main in London'. [51] No more damming an indictment could there be! The rationale for a separate commission for Scotland is found in the impressively brief White Paper, *Proposals for English and Scottish Law Commissions*.[52] Curiously, Wales did not feature in the title. The White Paper notes that because the origins of the law of Scotland were different and that the two jurisdictions were distinct a separate commission was justified. Although this was a tenable position in 1965 and remains so for Scotland, the origin of the law and the need for a separate jurisdiction arguments must not inhibit current debate on the case for a separate Welsh law reform body. What is important is that Wales is developing its own body of law and is an emerging jurisdiction, albeit still part of the unified jurisdiction of England and Wales.[53] The review of adult social care is a case study that identifies a need to redesign this component of law reform to meet the new constitutional arrangements.

Devolution within the United Kingdom offers an opportunity for all four nations to learn from each other and must provide an irritant to complacency

49 G Gardiner, A Martin, Eds. Law Reform Now (London: Victor Gollancz Ltd. 1963), p. 6.
50 Proposals for English and Scottish Law Commissions (1965) Cmnd 2573.
51 Scots Law Times (1965) Obiter dicta, p. 29.
52 See n 50.
53 J Williams (2010) 'The Emerging Need for a Welsh Jurisdiction'. Agenda **42** (Winter), 41–43.

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and national insularism. There is already some evidence of cross-fertilization, for example the offices of Children's Commissioner and Commissioner for Older People. As with the administration of justice in Wales, the mechanisms of law reform must keep pace with the process of political and judicial devolution. The prize of primary legislative powers brings with it the responsibility of devising properly constructed legislative proposals and the development of sound law. To what extent does the Welsh Government's consultation paper identify a distinct Welsh law on adult social care? A number of specific recommendations will be considered.

The Structure of the Legal Framework

As noted above, the current law is composed of legislation, secondary legislation, and guidance. To this must be added Direction issued by the Secretary of State under s.7A LASSA 1970. This provides that local authorities 'shall exercise their social services functions in accordance with such directions as may be given to them under this section . . .' Directions may be general or specific. The Commission recommended that s.7A LASSA 1970 should not apply to the proposed adult social care legislation. It argued that the retention of the power to make directions 'could lead to duplication and excessive layers of law, which is what our new legal framework is trying to avoid'.[54]

The Law Commission proposed a three-level model—a single statute, secondary legislation, and a statutory Code of Practice. The statute should set out the core duties and powers of local authorities. These could be expanded upon in the regulations when necessary.[55] Consultees welcomed the idea of a single Code of Practice, although a small number stressed the importance of consolidated guidance, whether in a single document or a consolidated series of documents. The drafting of current guidance attracted criticism. Some thought that the language used to be too vague to be of any value. Guidance is intended to clarify and not to obfuscate. The Mental Capacity Act 2005 Code of Practice[56] is an example of how a clearly drafted code can be of value to practitioners and service users. The Commission recommended that both governments should publish and from time to time revise statutory codes of practice on adult social care law. The codes would be issued under the English and the Welsh adult social care legislation rather than s.7 LASSA 1970. Generally, s.7 guidance is not subject to any Parliamentary or National Assembly scrutiny. Under the Commission's proposal, the codes would be subject to negative resolutions in Parliament or the National Assembly. This follows the model in s.42 Mental Capacity Act 2005 and s.118 Mental Health Act 1983. The statutes should make it clear that practitioners

[54] Law Com No 326 at para. 3.16.
[55] Paras. 3.11–3.20.
[56] Department for Constitutional Affairs, Mental Capacity Act 2005, Code of Practice (2007) The Stationary Office.

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can only deviate from the code where there are good reasons for doing so—this should include the freedom to take a substantially different course of action. The Commission recommends that s.7 LASSA 1970 should be repealed in so far as it relates to the proposals and be replaced by a statutory code.[57]

The Welsh Government's consultation supports the idea of a statutory Code of Practice that will be subject to the National Assembly's negative resolution procedure. It anticipates single, comprehensive and consolidated guidance; however, this will be achieved on a phased basis. The Welsh Government are consulting on whether the Welsh Ministers should retain their powers under s.7 and 7A LASSA 1970. It is difficult to ascertain whether these powers should be retained pending the publication of the Code or if the question about their retention is whether that would be desirable as a matter of principle.[58]

Statutory Principles

The Law Commission's Consultation Paper on Adult Social Care discussed the case for a set of statutory principles to be included in new legislation.[59] This follows the model of the Mental Capacity Act 2005 and the Children Act 1989. For those who will be directly affected by the legislation, the existence of clear statutory principles helps ensure greater consistency of treatment and provides a framework within which decisions can be explained or, if necessary, contested. The alternative approach is for such principles to be contained in a code or in guidance. Views were sought on whether a set of statutory principles should address the following:

1. decision makers must maximize the choice and control of service users,
2. person-centred planning,
3. a person's needs should be viewed broadly,
4. the need to remove or reduce future need,
5. the concept of independent living,
6. an assumption of home-based living,
7. dignity in care, and
8. the need to safeguard adults at risk from abuse and neglect.

Predictably, the majority of consultees favoured the concept of statutory principles, although there was a variety of views on the merits and demerits of each of the principles. Additional principles were also proposed.[60] In the final report, the Commission revised its thinking. It proposed that there should be single unifying and overarching statutory well-being principle. The principle

[57] Paras. 3.22–3.32.
[58] See n 41 paras. 3.2.3–3.2.4.
[59] Part 3 Law Com Consultation Paper 192.
[60] Law Com 326, paras. 4.4–4.14.

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would state that 'adult social care must promote or contribute to the well-being of the individual'.[61] No definition of 'well-being' is offered, but a checklist of factors is intended to help inform decision making. The checklist would require practitioners to,

- assume that the person is the best judge of their own well-being, except in cases where they lack capacity to make the relevant decision;
- follow the individual's views, wishes, and feelings wherever practicable and appropriate;
- ensure that decisions are based upon the individual circumstances of the person and not merely on the person's age or appearance or a condition or aspect of their behaviour which might lead others to make unjustified assumptions;
- give individuals the opportunity to be involved, as far as is practicable in the circumstances, in assessments, planning, developing, and reviewing their care and support;
- achieve a balance with the well-being of others, if this is relevant and practicable;
- safeguard adults wherever practicable from abuse and neglect; and
- use the least restrictive solution where it is necessary to interfere with the individual's rights and freedom of action wherever that is practicable.

The Welsh Government Consultation paper takes a radically different approach. It agrees that there should be a general duty to 'maintain and enhance' the well-being of 'people in need'. The expression 'in need' is a familiar one in children's services.[62] The proposed use of it in the context of adult social care is deliberate. What the Government proposes is to achieve an integrated approach for social services for adults and children. Unlike the Commission, the Welsh Government proposes building on the definition of well-being in s.10 Children Act 2004.

The list of relevant factors in the Children Act 2004 is,

- physical and mental health and emotional well-being;
- protection from harm and neglect;
- education, training, and recreation;
- the contribution made by them to society; and
- social and economic well-being.

Thus, the Commission propose a statutory principle that 'adult social care must promote or contribute to the well-being of the individual', whereas the Welsh Government propose a 'general duty to maintain and enhance the well-being of people in need'. Putting aside for immediate purposes the integrated approach to adult and child social care proposed by the Welsh Government, the

[61] Rec 5.
[62] s 17(10) Children Act 1989.

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two sets of proposal adopt a significantly different approach to how well-being as a shared central concept will operate within each country.

Children and Adult Social Care

Both the Commission and the Welsh Government recognize that the transition from childhood to adulthood is fraught will difficulties for those who rely on social care and their families.[63] The proposed statute in the Commission's proposals will apply to those who are 18 years and over. However, the Commission recommend that there should be an enhanced duty to co-operate between relevant organizations when a young person is moving from children to adult services and that there should be a power enabling 16 and 17 year olds to be assessed under the adult social care legislation. A refusal to assess would have to be supported by reasons from the local authority. A young person may make the request or their parent or carer may make it if the young person lacks mental capacity and it is in their best interests.[64] These proposals will ease what is often a difficult transition from a very clear and understandable legal framework under the Children Act 1989 into the more complex adult framework.

The Welsh Government offers a much more radical approach. In making the case for change the Consultation Paper states

> The Social Services (Wales) Bill will support the delivery of services in an integrated way to people of all ages, not in separate ways to children and to adults. There will of course be different implications for children, who do not have the same autonomy as most adults, and we have been clear about the particular services they need.[65]

For children, the definition of 'in need' is found in s.17 (10) CA 1989; there is no corresponding definition for adults. By extending, with necessary adaptations, the definition to adults and introducing the idea of 'person in need', Wales intends to create an holistic approach to the delivery of social care which will lead to an easier and better planned transition from childhood to adulthood. It adopts the following definition of person in need:

A person will be considered to be 'in need' if:

(i) they are unlikely to achieve or maintain or have the opportunity of achieving or maintaining a reasonable standard of health or well-being, (and, in the case of a child, development) without the provision for them of social care services;

[63] B Beresford (2004) 'On the Road to Nowhere? Young Disabled People and Transition'. Child: Care, Health and Development **30**, 581–587.

[64] Paras. 11.44–11.60.

[65] At p. 6.

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(ii) their health, well-being (and, in the case of a child, their development) is likely to be significantly impaired, or further impaired, without the provision for them of social care services;
(iii) they are a disabled child;
(iv) they are in need of safeguarding or protection. If they are an adult, they are an adult in need who has been harmed or is at risk of harm by virtue of that need.[66]

The rationale behind this proposal is coherent and addresses the longstanding problem of transition. The integration approach goes beyond the provision of social care. In its proposals on safeguarding and protection, the Consultation Paper proposes a National Independent Safeguarding Board covering both the protection of adults at risk and children.[67] The present intention is that a unified Board is a longer term aspiration and that initially a single adult board will sit alongside the children equivalent. One risk with a single board is that insufficient consideration will be given to some of the basic differences between the approaches to adult and child abuse and neglect.

The greater integration of child and adult social care under the proposed Welsh model has much to commend it. Inevitably, there are risks, not least the need to ensure that the differences between children and adults are recognized and respected in practice. It marks a potential divergence between the proposals within each of the two nations and illustrates the impact of devolution on law reform.

Adult Protection

The case for a law on adult protection for England and Wales similar to Scotland's Adult Support and Protection (Scotland) Act 2007 is discussed in Part 9 of the Commission's Report. Adult protection laws are controversial and require the careful balancing of right to autonomy and right to protection. An over reliance on a child protection model is undesirable and risks infantilizing adults at risk.[68] At present, adult protection in England and Wales relies predominately on s.7 LASSA 1970 guidance. In England, it is the Department of Health's *No Secrets* and in Wales, it is *In Safe Hands*.[69] Recent reviews of both documents concluded

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[66] Para. 1.1.8–1.1.9.

[67] Para. 4.1.1–4.14.

[68] J Williams (2002) 'Public Law Protection of Vulnerable Adults'. *Journal of Social Work* **2**, 293. J Williams (2008) State Responsibility and the Abuse of Vulnerable Older People: Is There a Case for a Public Law to Protect Vulnerable Older People from Abuse? Responsibility, Law and Family. J Bridgeman, C Lind and H Keating. (London: Ashgate) 81–201.

[69] Department of Health 2000 No Secrets: Guidance on Developing and Implementing Multi-agency Policies and Procedures to Protect Vulnerable Adults from Abuse (London: Department of Health) and Social Services Inspectorate for Wales 2000, In Safe Hands (Cardiff: Welsh National Assembly).

that they were no longer appropriate.[70] Rather like adult social care in general, adult protection law in England and Wales had developed haphazardly to the point where it is underused and inadequate.[71] The Commission's report made a number of proposals for a new law on adult protection. It recommended that local authorities should have lead responsibility for co-ordinating responsibility for safeguarding and a duty to investigate adult protection cases or facilitate an investigation by another agency where appropriate. This would be within a regulatory framework.[72] The law would apply to 'adults at risk' and the proposed definition applies to people who,

(1) have health or social care needs, including carers (irrespective of whether or not those needs are being met by services);
(2) are at risk of harm; and
(3) are unable to safeguard themselves as a result of their health or social care needs.[73]

The Commission did not make any recommendation as to whether any powers of intervention or compulsion should be included saying that this was a matter for the respective governments. This is a cautious response but understandable given the complexities involved in devising an adult protection law. The Scottish legislation was based upon a report by the Scottish Law Commission that provided a review of the case for reform along with a draft Vulnerable Adults Bill.[74] It is reported that the Westminster government will reject in part the Commission's proposal and refer to 'significant harm' rather that 'harm'. If so, this risks placing a higher threshold for triggering adult protection services in England than in Scotland and what is proposed for Wales.[75]

The Welsh Consultation Paper proposes a more comprehensive law on adult protection, albeit falling short of recommending powers of intervention and compulsion found in the Scottish legislation. In identifying those who would come within its proposals, it looked to the existing *In Safe Hands Guidance* as well as the *Wales Interim Policy and Procedures for the Protection of Vulnerable Adults from Abuse*.[76] The Bill will apply to 'adults at risk'. This will include people who have learning disabilities, mental health problems, older people with support or care needs, physically frail or have chronic illness, have a physical or sensory disability, misuse drugs or alcohol, have social or emotional problems, or have an

70 J Magill, V Yeates, *et al.* (2010). Review of In Safe Hands, Welsh Institute for Health and Social Care University of Glamorgan, and Department Health (2009) Safeguarding Adults: a Consultation on the Review of the 'No Secrets' Guidance.

71 Commission for Social Care Inspection *Raising Voices: Views on Safeguarding Adults* (2008) para. 2.1.

72 Law Com 326 9.9–9.19.

73 Law Com 326 rec 40.

74 Scottish Law Commission Report on Vulnerable Adults (1997), Scot Law Com No 158.

75 M Samuel Safeguarding Thresholds Risks Leaving Adults Unprotected (London: Communkity Care 2012).

76 This was commissioned by the four Adult Protection Fora in Wales and can be found at http://www.cardiffandvaleuhb.wales.nhs.uk/sitesplus/documents/864/SafegaurdingAdults.pdf (accessed 5/4/2012).

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autistic spectrum disorder. Harm is defined as physical, sexual, abuse, financial, emotional and psychological, and neglect.[77] The Consultation Paper seeks views on whether a third component is required in order to be considered an adult at risk. It seeks views on whether the definition should also include the circumstances in which the abuse has taken place or its location?[78]

A number of duties will apply in relation to an adult at risk. A clear and unambiguous duty to investigate and take appropriate action will be imposed on all agencies within the statutory framework once they are alerted to suspected abuse. Local authorities will be under a duty to co-ordinate the investigation. In addition, it is proposed that there will be an enhanced duty to co-operate imposed upon agencies within the scope of the legislation. Social services will be empowered to request other agencies to provide assistance.[79]

In recognition that whistle blowing procedures under the Public Interest Disclosure Act 1998 are ineffective, the Consultation Paper proposes imposing a duty on staff working with adults at risk to report suspected cases of abuse to social services. Clearly, this is controversial and some may feel that it is unworkable and will lead to large numbers of what turn out to be unsubstantiated suspicions. Who would be subject to the duty and in what circumstances would it arise? What would the penalty be for an individual who is in breach of this duty?[80]

Finally, the Welsh Government leaves open the question whether the Welsh legislation should include a power to intervene and protect.

Conclusions

This article has discussed the reform of the law on adult social care in the context of the new constitutional structure of the United Kingdom. Adult social care is the first major law reform project undertaken by the Welsh Government and the National Assembly. The case for reform is established and there is little if any disagreement with the analysis of the current state of the law in England and Wales. In some respects, Wales has developed its own approach to aspects of adult social care. However, devolution and more recently primary law-making powers have increased the pace. There now appears to be some fundamental differences of approach between the two nations. Central to the reform debate has been the work of the Law Commission for England and Wales. Its report provides a skilful analysis and a framework around which new legislation can be drafted. The role of a standing law reform body is invaluable in undertaking comprehensive reviews of the law. The current commissions have made an invaluable

[77] Para. 4.3.7–4.3.8.
[78] Para. 4.3.9.
[79] Para. 4.3.12–4.3.13.
[80] Para. 4.3.15–4.3.16.

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contribution to law reform since their establishment in 1965. Sir Terence Etherton in his 2007 Sir Williams Dale Lecture expressed great confidence in the future of the Commission stating that it will 'continue to play a vital role in the constitutional life of this country, and [to] be a beacon to other democracies throughout the world'.[81] However, the role of the Commission must adapt to the new constitutional model. As discussed above, England and Wales have increasingly different approaches to adult social care law that require different solutions. Sometimes, the differences are matters of detail; at other times, they are matters of principle and approach. With the acquisition of primary law-making powers, a standing body in Wales with responsibility for developing a programme of law reform is highly desirable. The divergence by Wales from some of the Commission's proposals has been achieved through a range of factors. These have included political and government initiatives, input by the third sector, consultation exercises, pressure groups, and ad hoc working groups. Whether this is sustainable once the legislative programme gets fully underway is questionable. It is therefore time to consider a Welsh Law Reform body that will have responsibilities similar to those of the Law Commission for England and Wales and the Scottish Law Commission. This does not signal the end of the England and Wales Commission. Non-devolved matters and matters such as railway crossings that transcend all four nations will remain with the combined commission. In addition, it is important that the diversity across the four nations is exploited and that law all law reform bodies work closely together.

Gerald Gardiner's warning noted above about the dangers of ad hoc law reform applies to the newly emerging Welsh jurisdiction. The creation of a Welsh law reform body will enhance Welsh law making capacity and ensure that law is accessible, coherent, and just.

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[81] T Etherton Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision? (2008) 10 Eur J.L Reform, pp. 134–149 at p. 149.