

CONSULTATION RESPONSE

REGULATION AND INSPECTION OF SOCIAL CARE (WALES) ACT 2016: PHASE 3 IMPLEMENTATION – REGULATED ADVOCACY SERVICES

AUGUST 2018

Age Cymru is the leading charity working to improve the lives of all older people in Wales. We believe older people should be able to lead healthy and fulfilled lives, have adequate income, access to high quality services and the opportunity to shape their own future. We seek to provide a strong voice for all older people in Wales and to raise awareness of the issues of importance to them.

The Golden Thread Advocacy Programme (GTAP) has been funded by Welsh Government for three years to run alongside and support the implementation of Part 10 (Advocacy) of the Social Services and Well-being (Wales) Act 2014 in relation to adult advocacy. The programme is delivered by Age Cymru, in partnership with Age Connects and Diverse Cymru.

We are pleased to respond to Welsh Government's consultation on the Regulation and Inspection of Social Care (Wales) Act 2016: Phase 3 Implementation – Regulated Advocacy Services. Comments relating to the relevant questions in the consultation template are attached.

We have a number of concerns about the draft regulations and draft statutory guidance and their implications for advocacy services for older people. We would not wish to see them extended to cover advocacy services for adults as they currently stand. Whilst there are many similarities, and a shared set of principles, between children's and adults' advocacy, there are also substantial differences, including different power relations and rights frameworks. In addition, the National Approach to Statutory Advocacy Services for children includes a suite of commissioning tools which help key stakeholders to interpret terms within the regulations, such as "sufficient" numbers of staff, which are not available in the adult advocacy sector.

Our concerns are that, as currently drafted:

1. The regulations will compromise the fundamental independence of advocacy services, and therefore militate against the ability of older people's voices to be heard within the social care system.
- The Part 10 Code of Practice states that "Independent professional advocates must ensure individuals' views are accurately conveyed irrespective of the view of the advocate or others as to what is in the best interests of the individuals." It is therefore inappropriate for Regulation 10 to state that advocacy service providers must work to Social Care Wales

guidance on the professional duty of candour, as this would create conflicts of interest. We are very concerned about the requirement in Regulation 10(b) (Duty of Candour) for the service provider to act in an open and transparent way with any representatives of those individuals. The advocate may be under instruction from an adult not to reveal information to a representative. It is fundamental to the nature of adult advocacy that they should be free to do so, without conflict of interest. The duty of confidentiality in Regulation 19 therefore applies. We believe Regulation 10(b) should not be extended to cover adult advocacy.

- The draft guidance on the Statement of Purpose does not adequately convey what underpins the “care, competence and skill” required in Regulation 3. We believe that the Statement of Purpose should also include the vision and values of the provider, the levels of competence and skill of the advocates employed, how the service embeds Human Rights principles and other conventions, and how service users can be involved in the governance and the development of the service. Guidance on Regulation 5 should require the service to state how it includes the views and opinions of people who may use the service to ensure a truly co-productive approach to service monitoring and improvement.
- The statement in the introduction to Regulation 11 in the draft statutory guidance that the advocacy service should undertake ‘consultation with relevant persons and professionals’ before determining that the service is suitable to meet the individual’s need may not be appropriate in the advocacy context and, where the individual has capacity, could only be undertaken with the individual’s consent. The sixth bullet point in the same section of draft guidance states, ‘Where the individual lacks the mental capacity... their best interests should be established and acted upon in accordance with the Mental Capacity Act 2005.’ This is inappropriate. Advocates do not work in someone’s best interests. Even when the person lacks capacity, the advocate is there to gather evidence about the person’s wishes relating to the decision being made. Someone else then makes the decision about their best interests.
- Regulation 12 states that “the personal plan takes into account any care and support plan prepared by a local authority for the person under section 54 of the 2014 Act.” This is inappropriate, and compromises the advocacy service’s independence from the local authority. The only considerations in the personal plan for advocacy services should be the wishes of the individual.
- Regulation 20 requires the service provider to provide the service in a way which ensures that individuals are safe and are protected from abuse, neglect and improper treatment. We agree that this is appropriate at an organisational level, where it is a question of a service provider creating a situation which puts an individual at risk. However, adults with capacity are entitled to make their own decisions, and decide their own level of risk. It is not the advocate’s role to impose their own judgement about this or to act in the adult’s best interests. This is different from the situation with children. In relation to care leavers, the regulations should recognise the transition to adulthood and the acquisition of the right to make one’s own decisions.

- It is inappropriate: to require advocates to adhere to the same code of practice (Regulation 26) or code of conduct (Regulation 27) as social care workers, or to require Registered Individuals or managers of advocacy services to register as social care managers with Social Care Wales (Regulation 37). Advocates have a fundamentally different relationship to power in their work with clients from that of social care professionals. The Code of Professional Practice for Social Care states that it is for "*For all of those working in the social care profession*". However, advocates are not trained in any aspect of social care, other than having sufficient knowledge to know when it is appropriate or necessary to challenge social care professionals. The following examples point up some but not all of the instances where the Code of Professional Practice conflicts with the duties of an advocate:
 - Section 1.2 of the Code of Professional Practice refers to the social care worker *respecting and, where appropriate, promoting and upholding the rights, values, beliefs, views and wishes of both individuals and carers.*
 - However, sometimes advocates must uphold their client's rights over and above carers' rights. They should not be put in the position of trying to uphold both parties' rights.
 - Section 4 of the Code of Professional Practice contravenes the principle within the Advocacy Charter that advocacy services should be "person led". Section 4 states:
 - *You must respect the rights of individuals while seeking to ensure that their behaviour does not harm themselves or other people.*
 - *This includes:*
 - *4.1 working with individuals to balance rights, responsibilities and risks*
 - *4.2 following risk assessment policies and procedures to assess whether the behaviour of individuals presents a risk of harm to themselves or other people*
 - *4.3 taking necessary steps to minimise the risks of individuals' behaviour causing actual or potential harm to themselves or other people*
 - *4.4 ensuring that relevant colleagues and agencies are informed about the outcomes and implications of risk assessments.*
 - However, the "Person Led" principle of the Advocacy Charter states:
 - *The Advocacy provider and advocates will put the people they advocate for first, ensuring they are directed by their wishes and feelings. Advocates will be non-judgmental and respectful of people's needs, views, culture and experiences. Whereas social care professionals put the person in the centre of their best interests deliberations, independent advocates are directed by the person's views, wishes and feelings, regardless of best interests.*

- Sections 6.6 and 6.8 of the Code: *working openly and co-operatively with colleagues and treating them with respect and recognising and respecting the roles and expertise of other professionals and working in partnership with them* do not recognize that, when necessary, advocates may directly challenge and oppose the expertise of social care and other professionals.
 - All these examples and other provisions of the Code of Professional Practice fail to recognise the role of the advocate as a facilitator of an independent voice separate from the social care system regardless of someone's best interests, blurs a boundary between advocacy and the social care system which should be very distinct, and creates numerous conflicts of interest with the social care system, which is required to act in the individual's best interests. We understand that Social Care Wales intends to draft a new Code of Professional Practice for advocacy. We welcome this in principle.
 - There is no requirement for an advocate to register with Social Care Wales. This section of draft guidance on Regulation 28 should therefore be deleted.
2. The scope of the regulations, as defined in the regulations themselves and in the draft statutory guidance, is too broad, and risks imposing the burden of regulation on all forms of advocacy for older people, when this has never been the intention.
- It is our understanding, based on our dialogue with Welsh Government and other statutory bodies since the passage of the Act, that the regulatory regime for advocacy will apply only to Independent Professional Advocacy (IPA) as defined in the Part 10 Code of Practice, and not to other forms of advocacy. The Advocacy Technical Group produced a definition of advocacy services specific to IPA, linked to Paragraph 47 of the Part 10 Code of Practice. However, there is no cross-reference in the draft statutory guidance to the Part 10 Code of Practice, except in the 'Useful Links' section. It is essential that the statutory guidance and the Part 10 Code complement each other and that the implications of one for the other are explained clearly to those who have to implement them. For example, the statutory guidance should make the scope of regulations clear, and cross-refer to other elements of the Code of Practice as appropriate, not least in order to clarify which advocacy service providers will come within the scope of the regulatory regime. As the draft regulations and guidance currently stand, as far as we can see, the regulations would apply to all types of advocacy, including those delivered by volunteer advocates. This is contrary to the basis of the 2016 round of consultation on RISCA regulations and to the recommendations of the Advocacy Technical Group, which strongly advised that only advocacy services delivered by paid and trained independent professional advocates should be regulated;
 - The complexity of the regulatory regime and the offences and penalties listed in the regulation risk deterring people from becoming Responsible Individuals and service managers, and thus lead to a reduction in the already short supply of advocacy services available to older people. We are also concerned that the wording of offences for which a summary notice is an option is too vague and subject to interpretation, eg, "sufficient".

- The complexity of the regulatory regime is in stark contrast with the simplicity of the Care Act advocacy regulations. Older people would benefit most from a simple regulatory regime similar to that provided under the Care Act. The infrastructure to enable sole traders and small providers to form the kinds of peer review and mentoring arrangements to support understanding of compliance issues and consistent self-reflection found in other sectors (eg, counselling) do not yet exist in adult advocacy, and the wide geographical dispersal of advocacy services may make them impracticable. It is these smaller providers who are frequently the most skilled and effective advocates, with the best understanding of their clients' wishes and the local context. More work needs to be done to encourage appropriate modelling of peer support from other sectors within the advocacy sector.
3. The regulations do not reflect the current stage of development of advocacy as a profession and risk hindering the sector's own efforts to raise professional standards for the benefit of older people.
- The draft regulations contain several inaccurate assumptions, presumably transferred inappropriately from the Domiciliary Care Regulations. For example, there is no "professional regulator or other relevant body" for advocacy, contrary to the final bullet point of the draft statutory guidance on Regulation 10, and Regulation 24.7(b). There is no professional regulator of advocates (Regulation 10 draft guidance) and no professional code of practice (Regulation 24 draft guidance)
 - However, the advocacy movement has invested heavily in developing its own Quality Performance Mark, an Advocacy Charter and Code of Practice and an Advocacy Outcomes Framework & Toolkit, all of which are collected together at <https://qualityadvocacy.org.uk/resources/>. The regulations should recognise and underpin the advocacy profession's work to develop its own professional standards, independently of the care sector.
 - Under the Part 10 Code of Practice, only a paid and trained advocate can work as an Independent Professional Advocate. A volunteer cannot therefore act as an IPA, but may perhaps carry out other functions, eg, administration (Regulations 24, 25, 27 and 35).
4. For the regulations and the advocacy services market to work effectively for older people, Welsh Government needs to invest in the development of the advocacy sector.
- Regulations 24 and 25, draft guidance: Wales does not have a bank of agency staff who are ready and available to deliver advocacy work. Acquiring the qualifications, skills and knowledge of complex public sector systems required to become an advocate takes a long time. There is a shortage of appropriately trained and qualified adult advocates, and difficulty recruiting to advocacy roles. The adult advocacy sector workforce needs considerable investment in upskilling in order to bring it to the level where it is able to meet existing levels of demand.

- We are concerned that Welsh Government’s intention to extend these regulations to the adult advocacy services sector in due course, by amending the definition of advocacy in the regulations rather than by full and thorough consultation on a separate set of regulations for adult advocacy service providers, is not widely understood in the adult advocacy sector. Widening the definition will inevitably mean making other consequential amendments as well; for example, the proposed exceptions identified in Part 1 would presumably need to be amended to include the Older People’s Commissioner. The statutory guidance would also need to be amended, eg, the specific reference to children and young people in the guidance on Regulation 31, bullet point 3. As well as from the issues detailed above, the need for other amendments may arise as a result of the experience of implementing the regulations within the children’s advocacy sector.
- Finally, we are also concerned that the advocacy sector does not yet fully understand the interplay between these regulations, other legislation (eg human rights law), Charity Commission and Disclosure and Barring Service requirements about raising serious concerns (which should be cited in the statutory guidance on Regulation 20), and other key policies (eg, on safeguarding and co-production) and guidance documents relevant to the sector, including the Part 10 Code of Practice, the forthcoming National Framework for Commissioning Advocacy Services (funded by Welsh Government and produced by GTAP), the Quality Performance Mark, the Advocacy Charter and Code of Practice, and the Advocacy Outcomes Framework & Toolkit. In addition, in relation to the draft guidance on Regulation 6, it is our understanding that Social Care Wales has yet to develop its Practice Guidance and its implications for advocacy training and qualifications are as yet unknown. This is a lot for the advocacy sector to assimilate in a short space of time and is leading to confusion about how certain terms (such as “sufficient” in Regulation 3) within the regulations should be interpreted. This will take time, training and support to resolve.

We therefore urge Welsh government either to extend this consultation period to enable the adult advocacy sector to debate the issues fully, or to consult again at the time of amendment.

We look forward to discussing these concerns with Welsh Government and other statutory bodies at the next meeting of the Advocacy Technical Group.