

The Children's Homes Association  
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1 September 2022

Dear Deputy Minister for Social Services,

**RE: RESPONSE OF THE CHILDREN'S HOMES ASSOCIATION (CHA) TO  
THE POLICY TO 'ELIMINATE PROFIT' FROM THE CARE OF LOOKED  
AFTER CHILDREN**

**Introduction**

I have been in detailed discussions with my board and carried out extensive discussions with providers of residential childcare in Wales. It is agreed that I would write to you to express the views of the CHA and its Welsh members as you have provided the ministerial forward to the consultation document of 17<sup>th</sup> August and are the Senedd minister who has the responsibility for the above policy. You will see from the list at the end of this letter that it has also been sent to the whole Programme Board and a number of other organisations.

Our key concerns are as follows:

- The 'eliminate policy' presents serious risks to children looked after.
- There is no evidence to support any assertions to the contrary whether set out in the ministerial forward, chapter 1 of the consultation document issued on 17th August 2022 (Document WG45428) or elsewhere. In addition, the policy is inconsistent with Welsh, UK and international legislation.

- The policy is inconsistent with and contrary to the recommendations in the Study of the Children’s social care market study (Final report, 10 March 2022) published by the Competition and Markets Authority. The CMA recommended an enhanced and improved approach to commissioning external services for children looked after.

To recap the events of the last few months in brief. The Programme Board has agreed its terms of reference, a number of documents including the principles governing its approach, there have been several meetings of the board and the two Workstreams together with two workshops with providers on 18<sup>th</sup> and 25<sup>th</sup> July 2022. However, whilst there has been much activity and resource spent on these activities there have been few if any agreed outputs. The Senedd published its consultation document on 17<sup>th</sup> August with consultation on the ‘eliminate’ policy as the first item of several which the Senedd are consulting on. I am not aware of any discussion of this document at the Programme Board or the two Workstreams.

The CHA and its members remain of the view that the above policy raises the most serious risks for vulnerable children in Wales (and risks for the English children who are placed in Welsh residential care homes) and an existential risk to the majority of the providers who care for them. I set out in this letter and its appendices providers and CHA’s pressing concerns and why we have reached our views.

We also identify an alternative strategy which we consider should address the difficulties in the current market-place and reduce the risk of a reduction in supply (see Appendix 5). In Appendix 1 we set out our views and concerns about Part 1 of the consultation and in Appendix 4 we set out a number of pressing questions and issues which providers need to have answered as soon as possible in view of the increasing market-place fragility and so that they can make

informed decisions about their future.

It is essential to start with the CHA mission, the value and achievements of providers who deliver residential care in Wales.

## **The Mission of CHA and its achievement in Wales**

The mission of CHA and its members is:

*“A commitment to the delivery of Exemplary Residential Child Care driving excellence in residential childcare through innovation, collaboration & sector leadership”*

This means that our passion and those of our members, is the delivery of the best care and support that they can achieve for the vulnerable children whom they look after, always striving for greater quality and care. We disagree with the statement in the June communications plan that our members focus on finances not values. Values are key to our members ethos and commitment and we believe the Senedd, local authorities and providers all share the same values.

Our membership includes providers from the public, private and charity/voluntary sectors.

We passionately believe there is an effective alternative to the ‘eliminate’ policy. This is collaborative strategic commissioning and procurement delivered at local level in collaboration and partnership between the Senedd, local authorities, providers and all other relevant statutory and other bodies. This will deliver the high quality outcomes, value for money and market sufficiency that are needed by vulnerable children and their families in Wales. As identified by the CMA in its final report the eliminate strategy risks reducing supply and on the Senedd’s current approach and implementation timetable, the vast majority of

the current registered residential care provision will cease to exist in less than 5 years. There is already a significant shortage of supply (see Appendix 2). In the '4Cs' (a commissioning consortium of all 22 Welsh local authorities) response to the CMA, they say that:

*“We believe as commissioners that the conversation should be firmly rooted in where provision provides best quality, evidences best outcomes for children and young people, and, evidences value for money for the public purse....”*

CHA considers that the Senedd's commitment to eliminate profit from the care of looked after children is wholly misconceived in every respect (see Appendix 1 and in general in this pack). It will make it impossible for the Welsh local authorities to fulfil their duties towards vulnerable children and destroy the capability of CHA and its members to support the delivery of these duties especially the 'sufficiency' duty. The policy focusses on delivery models and their governance, not child focussed outcomes to support and protect vulnerable children and develop social value and increased prosperity.

### **The consultation (see Appendix 1 for our detailed response)**

CHA considers that the consultation should be withdrawn and the policy reversed as the flaws in both are incapable of remedy. There are a range of flaws in the consultation document as set out in the Appendices. The policy and therefore the document are based on a false assumption. This is set out in the Ministerial Foreword and suffuses chapter 1. It is that the proposed changes will '*improve the quality of experience for everyone who uses*' Welsh care services. They will not. They will do the reverse as demonstrated extensively in this pack.

## **The current market-place (see Appendix 2 for the detail)**

The information you have provided is that 85% of residential care places in Wales are currently provided by profit distributing organisations. As at 1<sup>st</sup> July 2022, you say in the consultation that only 160 of the available 1045 places in total in Wales are provided by the public/voluntary sector with the remainder by the private sector.

A recent CHA survey of residential care homes providing services to children in Wales which 22 pan-Wales organisations responded to (out of about 44 in total) has identified the following.

- Only one expressed any interest in converting to ‘not for profit’ (to use the Senedd’s terminology).
- The closure of the 21 homes whose owners are unwilling to convert would mean the loss of 331 places.
- As 75% of these were occupied by Welsh children, 249 Welsh children would be affected. 4 respondents only took Welsh children at the date of the responses to the survey.
- Approximately 1431 staff would need to find new employment.

In the 6 years plus since implementation of the Social Services and Well-being (Wales) Act 2014, very few new non-profit-distributing organisations have been established. The legislation, guidance and grant support from the Senedd raised the expectation that local authorities and others would promote and achieve greater use of social enterprises, co-operatives and user led bodies for service delivery. We see only limited appetite for these structures and in his recent statement, Vaughan Gething has identified that there are currently only 38 charities and other non-profit-distributing organisations (NPDOs) across all sectors in Wales with a suggested doubling by 2026. The majority of these do

not provide services to children and as identified in Appendix 2 the potential number of new places to be provided by additional local authority provision if these places are thought by the Senedd to be instead of the current market-place (which we do not know) will be wholly inadequate to meet the shortfall.

To achieve the Senedd's objectives by 2026/7 would require an increase in current provision– to take account of existing need, the required identified growth in provision (especially for children with complex needs) and to reduce reliance on the unregulated sector.

We know of no evidence suggesting there is currently any significant level of preparatory activity taking place within Wales or otherwise ready to achieve the total number of residential care places which would be required if the 'eliminate' policy is implemented in full by 1 April 2027 or thereafter within the foreseeable future. Our members are not in discussion with authorities for the transfer of their homes to them. As identified in Appendix 2 the current growth initiatives may deliver around 220 new places in all but the timetable for this is unclear. If our members' homes cease to exist in 2027 or in the foreseeable future thereafter, there is likely to be a shortfall of several hundred residential care places for Welsh children plus a smaller shortfall for English children (still in three figures). A growth programme to remedy this would take many years to be achieved from its inception, if it is achievable, even taking into account the provision of all of the resources which are required.

We do not therefore, consider that a delay in implementation will provide the required exponential increase in the not for profit and public sectors. On a slightly different point, nor is it operationally realistic to split off high dependency service delivery and exclude this from the changes either in the short or longer term as our members include these services within some of their residential care provision.

## **What is happening and will happen because of the ‘eliminate’ strategy? (Appendix 2)**

Your proposed strategy is likely over time to diminish the availability of residential (and foster) care provision in Wales in the private sector for the vulnerable children who need this. This trend will likely increase especially as 2026 gets nearer (please see Appendix 2 for more details). This view is based on the survey of our Welsh members in May, feedback at and subsequent to the two workshops for providers that you held in July.

Mr Davey did not identify at these workshops that the Senedd had any alternative strategy to this option and nor have you done so at any other meeting which CHA has attended nor in the consultation. In addition to the loss of all of the residential care places in Wales currently provided by for profit organisations by 1<sup>st</sup> April 2027, with a massive impact on the children placed in those homes, up to 3,000 staff including many senior managers and owners (many of whom are saying they will retire) will leave their current employment and may leave the sector. We do not know what they will do. In a sector where there is a shortage of places and providers report severe challenges in recruiting and retaining staff, this could represent a major loss of people including an inevitable significant loss of senior level expertise and knowledge.

One of the CMA recommendations to Wales from their 2021/22 year-long study is the creation of increased market capacity, a need also identified by the 4Cs and others. As predicted by the CMA, the proposed ‘eliminate’ or ‘eradicate’ approach will do the reverse of this. The challenges faced by providers because of this approach is already reducing market confidence and has stopped their investment in new provision and growth of existing provision. As identified, between now and 2026/7 there is likely to be an escalation in this pattern. On the basis of the Senedd’s published eliminate timetable of ending profit in the

sector by 2026/7, providers have told us that they are beginning to have to consider their options for sector withdrawal

We have therefore identified severe and heightened risks as highlighted in our analysis of the Programme risk register (see Appendix 2) and request that this is revisited and that the Senedd commissions a comprehensive impact assessment as a matter of urgency and reports on the outcome of these.

#### **The issues and questions where providers need information (Appendix 4)**

There are many uncertainties in the proposed approach. Key questions include the following:

- The service rationale and the information/evidence which you relied on and led you to pursue a different route to current market-place and the approach taken by the CMA. The CMA carried out a thorough study over a significant period. We believe that as currently proposed, the Senedd's proposals are unique and untested in form or approach.
- The types of organisations which would be acceptable to you including an explanation of your definition of 'profit' and how you see your models working in practice. The two workshops mentioned above did not identify when the initial draft definition will be published nor the future timescale for decisions. Their work is incomplete. As you know, CHA and its advisors consider that it is impossible to define proscribed profit and you are fully aware of all of our concerns on these aspects. Though by implication the Senedd disagrees it has not provided definitions or an explanation so when you will you do so? There is no detailed timeline. From information received so far, CHA understands the policy to mean



that the Senedd intends to ‘eliminate’ or ‘eradicate’ (both terms are used) profit from the delivery of care for looked after vulnerable Welsh children who are placed in Wales. This may (or may not) include preventing care by organisations which include any for profit models within their governance or wider structures. Will it include multi-provider models which include for profit organisations and/or any profit on disposal of existing businesses or part of these? Would you also please clarify and provide details of the intended mechanics about how this will be implemented. For example, will it be an approach based on identifying what type of provision can be registered and if so, what will not be able to achieve registration or otherwise? How will this policy link to the ‘industry standard’ definitions of non-profit distributing organisation (which includes charities), the legislative structure for taxing profits, the retrospective nature of audited accounts and the public procurement regime? We are concerned that the definition of profit will be retrospective and affect future registration status on the basis of historic information. Please would you provide details of all of this and if not set out what is proposed in detail.

- Why the formal consultation does not include all of the information in the *Welsh Government Consultation Guidance for staff*, (January 2013 version, updated April 2014)?
- Full details of the proposed support to employees or any other organisations who may wish to purchase not for profit provision.
- The proposed plan to compulsorily purchase or to nationalise existing provision (if this is an option being considered) and the arrangements for compensation (see Article 14 and the Protocols, Article 1, Protection of

property of the Human Rights Act 1998). The policy will require proper compensation to be payable. If we knew the proposed compensation arrangements now this might support the continuation of existing profit-making organisations until 2026/7, rather than their lack of knowledge of this resulting in lack of current and future investment and service development in Wales with uncertain consequences for children and all others and the risk of unplanned closures. This information would give our members some confidence that they will receive proper compensation and allow for the early preparation of detailed protocols for properly planned service transfers. Compensation allied to a model of a nationalised service has not been mentioned in any documents which we have seen or in discussions though on our analysis this may be the only approach which enables existing private sector provision or possibly provision by voluntary/charitable sectors to remain available for children in care (please see Appendix 3). Please identify the proposals.

- Please will you also let CHA and providers have details of the future/continuing role of the Programme Board and the two Workstreams either in a response to this letter or via a report to the September Programme Board (see Appendix 4). We do not consider that these should have been circumvented by the issue of the consultation without any discussion at any of these three bodies and before the two Workstreams completed their tasks and were able to report back to the Board.

### **Appendix 3, the Law**

We consider your approach is inconsistent with UK and Welsh legislation, the Senedd's wider strategies towards vulnerable children and their families including the Programme's Programme Board Principles agreed Friday 17<sup>th</sup> June

2022.

Our concerns are identified in more detail in appendix 3 and are headlined below. They include potential inconsistencies with both UK wide general and more specific legislation and the general and specific legislation and guidance which is part of the Senedd's devolved functions, including:

- The principles and duties within the Social Care Social Services and Well-being (Wales) Act 2014 (including especially the 'sufficiency duty'), Well-Being of Future Generations (Wales) Act 2015 (including especially the goals of a prosperous, resilient, healthier, more equal Wales with cohesive communities, a vibrant culture and thriving Welsh language) and the expressed purpose of the Registration of Social Care Regulation and Inspection of Social Care (Wales) Act 2016 (including especially the objective 'to protect, promote and maintain the safety and well-being of people who use regulated services').
- Human Rights Act 1998 and EU convention on UN Rights of Children (which requires devotion to the best interests of the child) together with Article 14 and the Protocols, Article 1, Protection of property.
- The Welsh Language (Wales) Measure 2011 (which requires the promotion and facilitation of the Welsh language), and to ensure that the Welsh language is not treated less favourably than the English language in Wales.
- UK wide public procurement law (Public Contracts Regulations 2015, the Procurement Bill 2022) and potentially the Subsidy Control Act 2022.

We also believe that the 'eliminate' policy is inconsistent with the principles in your White Paper on the proposals to Rebalance care and support published in 2021, currently being considered by Welsh local authorities.

## **An effective approach**

As identified above and in the appendices, CHA members who responded, who attended the July workshops and responded to CHA's soundings comprehensively consider that this policy is misconceived and will create a significant shortfall in provision in Wales resulting in out of area/Wales placements wherever they are available with problems for vulnerable children, their families, the Welsh SMEs and their employees who care for them and of course for Welsh local authorities who will struggle to make appropriate or any suitable placements. It is also likely to drive an increase in risk unregulated placements as overall, there is no spare market place capacity in Wales or England.

We believe in the outcome focussed approach headlined above and explored in more detail in Part 2 of Appendix 5, namely development of effective strategic commissioning and procurement delivered at local level in collaboration and partnership between the Senedd, local authorities, our members and all relevant statutory and other bodies. We believe this can deliver the high quality outcomes and market sufficiency as needed by vulnerable children and their families in Wales. In a properly functioning market this approach, when fully implemented, will eliminate excessive profit (see Appendix 4).

I attach detailed supporting information for this letter in the appendices.

## Conclusion

We would value an early opportunity of discussing the alternative approach with you and your senior officers including how CHA and its members could work with you and Welsh local authorities to deliver this.

We look forward to early answers from you on the questions and issues raised in this pack and Appendix 4 in particular.

I wish to reiterate that providers continue to state that their preference remains applying their investment capital, entrepreneurship, assets and intellectual property to develop services in Wales. They would want to engage with commissioning approaches that seek to advance the sector from short-term spot contracting to more sophisticated and stable partnerships that represent social value and want to work with you and local authorities to achieve a resilient market place which better meets the needs of the vulnerable children needing care and support in Wales.

We consider that you should be able to let ICHA and providers have all of the definition of 'profit', the acceptable governance models, and the details of the mechanisms to be used to implement and to enforce the policy before the next scheduled Board meeting on 14<sup>th</sup> September so that this and the implications of the consultation can be discussed at the Board (if you see the Board as having any continuing role in view of the consultation process). Your senior officers have indicated for some weeks now that the definition of 'profit' is nearly ready and a definition of acceptable models is an intrinsic part of this aspect to your policy. Please will you also let CHA and providers have the written and detailed time line promised to the June Programme Board as Mr. Davey only reported orally and in outline and whilst I received a written document on 25<sup>th</sup> August this is incomplete.

We look forward to hearing from you.

Yours sincerely

Peter Sandiford

Chief Executive Children's Homes Association

Cc: Programme Board, Counsel General for Wales, Permanent Chief Legal Advisor, Chair of All Wales Heads of Children's Services, Welsh LGA, , Audit Wales, National Audit Office, Association of Directors of Children's Services Ltd, Department for Education, Local Government Association

## **APPENDICES**

**APPENDIX 1: CHA'S INITIAL RESPONSE TO THE CONSULTATION  
PUBLISHED ON 17TH AUGUST 2022 (Page 16)**

**APPENDIX 2: THE CURRENT MARKET-PLACE AND THE IMPLICATIONS  
OF THE 'ELIMINATE' STRATEGY (Page 39)**

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**APPENDIX 4: ISSUES, SOME KEY QUESTIONS AND UNCERTAINTIES  
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**APPENDIX 5: THE VIEWS OF THE COMPETITION AND MARKETS  
AUTHORITY (CMA) AND CHA'S VISION OF A BETTER FUTURE (Page 86)**

### **Introduction to the Appendices**

The appendices have been drafted by the CHA team.

## **APPENDIX 1**

### **CHA'S INITIAL RESPONSE TO THE CONSULTATION PUBLISHED ON 17<sup>TH</sup> AUGUST 2022**

#### **INTRODUCTION**

1. In this Appendix CHA sets out its initial high level view of the consultation document published by the Senedd on 17<sup>th</sup> August 2022. We are only commenting on the Ministerial Forward and Chapter 1 at this stage.
  
2. These are initial comments and CHA reserves its position with regards to all of its future actions.
  
3. CHA has split its comments into two parts as follows:
  - 3.1. Our comments on the process set out in the consultation document and why we consider that it is a materially flawed consultation process and should be withdrawn; and
  - 3.2. Why CHA considers that in any event, the proposed strategy will inevitably result in the Welsh local authorities being unable to meet their 'sufficiency' duties and, that there are a number of substantive legal and commercial issues arising from the policy and consultation because this is an ill-thought out and flawed policy. In our opinion the policy is incapable of being achievable in a manner which meets the Senedd's



expressed intentions or being legally sound. This strategic overview of the consultation should be read in conjunction with the remainder of the attached pack.

4. One difficulty we have had in commenting on the consultation document is that the Programme Board (see below) and its discussions are expressed as being confidential. Whilst the CHA does not accept that any of its contents are confidential or fall within an exemption from disclosure under the Freedom of Information Act or any other legislation, to the extent that they do, any disclosure is essential for us to respond to the consultation document and/or we have a public interest exemption will apply to our comments. Nevertheless as we envisage that our response may be published we have only identified information which it is claimed is confidential to the extent that it is necessary to respond to this consultation.

## **PART 1**

### **OUR COMMENTS WITH AND FLAWS WITH THE CONSULTATION PROCESS**

#### **Introduction**

1. In this part of our response, we consider whether the consultation document and process follow a safe and proper consultation process
2. We have found and used a document called Welsh Government, Consultation

Guidance for staff (January 2013 version, updated April 2014). I wrote to Albert. Heaney, Chief Social Worker asking whether this was the latest version. As he is on holiday, one of his colleagues responded with: 'Thank you for your email of yesterday's date below, which has been passed to me to respond on Albert's behalf. Unfortunately due to the absence of relevant colleagues I have been unable to establish the position with regard to the document you attached. Although in my experience we would not routinely publish such internal guidance, I hope to be able to respond to you next week more fully to confirm the position. In the meantime, however, you might like to see Making Good Decisions (Making good decisions: guidance for public authorities | GOV.WALES) for information on the approach the Welsh Government recommends for consultation. We have not specifically used or referred to this at this stage but may do so later.'

3. We have also considered a UK government publication, Code of Practice on Consultation (dated 2008) which was updated in 2018 with a document, Consultation principles: guidance.
4. We have also taken legal advice on the requirements for a proper consultation process.
5. Together these provide comprehensive information on what is required to achieve a proper consultation process.

### **When should the Senedd have consulted on the policy?**

6. Consultation should take place when proposals are at a formative stage i.e.

before a decision has been taken and the outcome should be evaluated in a fair and equitable manner, with an open mind about the outcome of the consultation. The proposal to 'eliminate' profit from the delivery of these specific services for children (some services but not) all is so strategically important it should have been consulted upon and views obtained on whether this is a sensible, viable policy, all of the implications for children, their families, the employees within the sector affected by the policy, any consequential impact for other sectors, the equalities impact and the impact on people with protected characteristics, local authorities, schools and education providers, health boards and others, whether it is commercially and legally viable and will provide value for money/best value and is affordable, the cost and full implications of delivery. In other words a comprehensive and open minded impact assessment. This should have been carried out before the 'eliminate' policy was agreed. Instead the Senedd have consulted only on its implementation and not on whether it ought to be implemented at all.

7. The consultation document is based on a flawed assumption that the 'eliminate' decision has been properly taken and that as a follow up from this, that the proposed legislation will assist the delivery of this wider vision. We challenge all of this and set out our high level concerns in this pack.
  
8. As far as we can establish, there is no decision of the Senedd to do this. If we are wrong, we ask to be provided with this. The only 'decision' is in the manifesto of the Labour party and a political decision by Plaid Cymru to support this. There is a very short item in the manifesto with none of the detail set out. As identified in the appendices to this pack and below, this policy is inconsistent with the views of the Competition and Markets

Authority. The views of children (given at one survey with unknown provenance) is the only purported evidence for this. This is not accepted as supporting evidence or analysis for this 'decision'. The impact on the ability of the Welsh local authorities to achieve their functions and duties have not been properly considered. As identified, there is no comprehensive impact assessment. The proposals have not been costed and there is no reference to the required compensation scheme for the for profit providers whose businesses will be rendered worthless by this policy. In view of all of this, the consultation is fundamentally flawed. The flaws in this consultation are incapable of being remedied without a fully refreshed consultation document, if indeed they are capable of remedy (which we do not accept).

## **Detailed comments**

### **Who is the target audience and how will this consultation reach them?**

9. There is no identified target audience and no identified way that those who do not have a computer can see the consultation, so it is not accessible to these groups. There is no publication of the list of organisations being consulted and list of stakeholders (whoever they are). We consider that the target audience includes children and young people, their families, employees, schools, health boards and health in general and others directly affected as well as the statutory and other professional organisations. Children and their families are much harder to engage with than professional groups as they may have special needs, may not have access to computers and may need to have a simple explanation of what this is about and how it will affect them. There is none of this for example, there are no proposed explanatory, simpler document, no proposed public meetings or workshops,

open days or anything like this (see paragraph 9.5 of the consultation guidance for staff), neither CHA nor the providers who look after children in residential care and employ around 3,000 people in all knew in advance that this document was about to be published.

10. It is unclear whether or not the representative organisations of Welsh local government and individual authorities are being separately notified or consulted about the service impact, financial issues, specific planning and preparation for 'eliminate' policy, whether or not Westminster/DfE and English authorities are being separately notified or consulted on the impact on English authorities or implications in view of the knock on impact on the care sector in England, Procurement Bill currently going through Parliament or any of the wider implications for England.

### **Are the questions comprehensible to the target audience and others?**

11. The questions asked are technical and there are 12 of them with no explanation of any of the terms used. The language ought to be plain English. It is not plain English. We could give many examples of this but just two examples will suffice for this high level response. Firstly, what is a 'not-for-profit provider (see Q.1.1)? This is not a recognised term and even we do not understand what it is as the relevant Workstream (see below) failed to define it. Is it intended to be the same as non-profit-distributing organisations, a recognised expression for organisations such as charities and others which do not distribute profit to their members or shareholders? Q. 1.11, asks how those being consulted 'believe that the legislative changes .... could be formulated or changed...' This is a wholly technical question and the

use of the word 'formulated' is additionally technical.

12. We have also identified an important omission. One of the foreseeable consequences for children of the policy, the resulting lack of place near to their homes in Wales, will mean that children are placed further from their home, in England or in unregulated placements and we consider that consultees should be asked for their comments on whether this would be an acceptable consequence of the proposed policy. This outcome has been identified in the risk register presented to the Programme Board.

### **Has sufficient time been allowed for the consultation?**

13. We would question whether a little over three months, commencing in the middle of August is sufficient for something so important. We consider that this is insufficient.

### **What happens once the consultation has closed?**

14. This is unclear. The consultation document ought to have included full details about this.
15. To be more specific by way of a few examples only, the consultation document ought to have identified that a summary of the responses would be published.
16. How, by whom is it envisaged the responses be evaluated and what is the

timetable for this? It is intended to publish a summary report of the responses and the Senedd's response on each of these?

17. What is it intended will happen next because there is no detailed timescale? The only timescale identifies the end dates that new organisations will need to have 'not-for-profit' status to register from 1<sup>st</sup> April 2026 and there will be full implementation from 1<sup>st</sup> April 2027 but between 7<sup>th</sup> November 2022, the proposed closing date of this consultation and these dates there is no information about what will happen.

## CONCLUSION

18. The above is an overview, it does not deal with the detail and there is much more we could say. We reserve our right to add to this summary. The vast majority of the above questions and comments above on the consultation approach, are taken from the Consultation guidance for staff, a 16 page document.
19. Together the comments demonstrate that this is a materially unsafe consultation and any reliance on it for legislation or otherwise will be fundamentally flawed.

## PART 2

### SUBSTANTIVE FLAWS WITH THE CONSULTATION

#### Introduction

20. Our comments are chronological and we have gone through and commented on Part 1 of the consultation document from the beginning. They are not in order of importance as all are important.

#### Ministerial Forward

21. This is written by you. The first paragraph says that the Senedd's intention is to 'continue to improve the quality of experience for everyone who uses' the Welsh social services and says that the proposed changes to primary legislation will contribute to this. The second paragraph identifies that part of this is to eliminate profit from the care of looked after children which you say will help deliver the Senedd's wider vision and support which is available to families and children.

22. As set out the other appendices to the pack, cover letter and for the reasons in these, CHA considers that the proposed policy will do the reverse of these aspirations and will result in a very significant reduction in the availability of care services for Welsh children in every respect making it impossible for the Welsh local authorities to meet their sufficiency and other duties toward vulnerable children and their families.



23. The assertions you make are unsupported by any relevant information or evidence and as such are irrational.

### **What is this consultation about?**

#### **Paragraphs 1 & 2**

24. We respect the Senedd's ambition for whole system change and the desire for more families to stay together with their children but in our view as identified in this pack these are aspirational and unsupported by any evidence.

25. We do not consider that there is any evidence that the proposed changes will achieve this. All of the evidence and information which we have seen and which is set out in this pack suggests the reverse will happen. On behalf of CHA Mr Sandiford has repeatedly expressed this view to Mr. Heaney and Alistair Davey, Deputy Director, Enabling People in correspondence with them, at the Programme Board and otherwise and CHA have not been provided with any such information, simply being told that the 'eliminate' policy is a key policy of the Senedd.

#### **Paragraph 4**

26. The only information that we have seen which suggests this is in a report from Voices from Care. This is undated. We asked Albert Heaney, Chief Social Worker for Wales for supporting information for this at the beginning of July in a detailed email. However, he responded that he would not

address CHA's questions 'as the query you raise concerns the Welsh Labour party manifesto and that is entirely a matter for Welsh Labour'. The role of the Programme Board is to deliver on the programme for government commitment'. However, as these statements are repeated in the consultation document as though they are factual we consider that the Senedd are now obliged to respond and to provide the information we originally sought namely which is attached in the exchange of emails with Mr. Heaney.

27. In any event, it is the responsibility of parents (whether natural or corporate) to take rational and evidence based decisions on behalf of their children. Children in care are a particularly vulnerable group. Even if there were to be evidence to support the statements by children, it does not follow that the policy is sound because there are so many other considerations which must be taken into account (see the information in this pack including below).
28. Please provide full evidence to support your assertions in this sub-section of the consultation document.

### **What is the current position?**

29. The legal analysis and factual statements in paragraphs 7 - 17 of this sub-section is in line with our own information and views (to the extent that we are able to confirm their accuracy) though we do not agree with the conclusion. In particular, we would draw attention to paragraphs 15 and 16. We agree that matching is becoming more challenging and that there is a shortage of suitable or indeed any registered places. We are concerned that

this is already driving growth in unregulated placements i.e. placements which are outside the safeguards provided by the statutory registration requirements, in many instances wholly unsatisfactory and arguably, a breach of the local authority's duties, rather than increased use of private sector providers. We would also draw attention to paragraph 16 as in our view this and the preceding paragraph identifies very clearly why now is not the time for the Senedd to be de-stabilising the market and materially reducing supply, both of which we consider will be the outcome of the 'eliminate' policy. Now is the time for the Senedd and local authorities to address the issue of supply and in the manner identified by the Competition and Markets Authority (CMA) and as they say in their report (see Part 1 of Appendix 5). We would also draw your attention to the limited information which they obtained on the issue of profit in Wales as identified in the CMA report (see Part 1 of Appendix 5).

30. The statements in paragraph 18 which link detrimental outcomes to profit are not borne out by any evidence we have seen. In fact, In fact, as quoted in the CiW annual report 2019/20: 'In general, we found services provide good quality care with positive outcomes for children and young people' We believe that all sectors are comparable in quality and as the CMA also say the evidence does not support any assertion that the private sector is more expensive. (see Part 1 of Appendix 5). Please provide the evidence for your statement in this paragraph.

31. Competition, paragraph 18, first sub-paragraph. This is a directly misleading paragraph for the reasons set out above and also because although the CMA identify that the profit levels made by some providers are not consistent with a well-functioning market, their evidence was limited. Most of the

residential care providers in Wales are small to medium owner managed and run organisations. The CMA did not claim to have information provision about these. On the basis of their report, as they identify, that there is no evidence that private care provision is more expensive eliminating this sector will not free up any money to be re-invested in children's services. Please provide the evidence that the Senedd used to make these comments.

32. Availability and Competition amongst foster care providers paragraph 18, second and third sub-paragraphs. This is outside the purview of the CHA.

33. Placement Moves, paragraph 18, fourth sub-paragraph. We agree with this, which is why it is so odd that the Senedd is pursuing the 'eliminate' policy which will do the reverse. The most effective approach to developing and expanding the available selection and numbers of available places is via effective commissioning and procurement (see Part 2 of Appendix 5).

## **Paragraph 19**

34. As identified we consider that the 'eliminate' policy will not achieve these aspirations, quite the reverse, it will make them far more difficult to achieve.

## **Why are we proposing legislative change?**

35. We dispute whether the proposed legislative change as identified in paragraph 27 or otherwise can provide a statutory or other basis to eliminate private profit from the care of children or will develop local services as set

out in this paragraph. This paragraph is unsupported by any evidence and indeed, as we have identified, the available evidence that we have seen suggests that there will be material reduction in provision in Wales because the majority of (or probably even all) of the private registered care providers in Wales will not ‘transition’ to a not for profit (whatever this means) governance model as suggested later in the consultation document, and will cease trading in Wales (see appendix 2 to the Pack). Therefore, to the extent that registered places are available for Welsh children they will be further away from home, not in a Welsh speaking setting and there will be no savings released (see part 1 of appendix 5). In our view, the cost to the Senedd and to the local authorities will far outweigh any saving, if indeed there is any (see appendices to the pack). Please provide the evidence for your statements in this paragraph as we are not aware of any such.

## **What are we proposing?**

### **Paragraph 21**

36. This is a materially misleading paragraph because it gives the impression that the consultation is a continuation of the work which of the Programme Board and other work whereas as a member of the Programme Board, I was not aware that the consultation would be published at this time. The terms of reference of the Programme Board are only in draft, they have never been finalised. They are 7 pages in length and it is not appropriate to quote them in full. The first paragraph is:

*“The purpose of the Programme Board is to work collectively to consider evidence and develop proposals for implementing the Programme for*

*Government commitment to ‘Eliminate private profit from the care of looked*

*after children’.*

37. The Board was presented with these. It was not asked to approve them. These are supported by a number of principles, which were notionally produced for discussion at the Board in June, though we spent only a short time on them as Mr. Heaney, the chair, did not allocate any longer for discussion. The principles are one page long and CHA agrees with their sentiments. However, these are not met by this consultation process. Principle 1 is:

*‘All Board and Workstream members have a shared commitment to lead change that avoids placement disruption for children and delivers placement sufficiency, against the context of the current shortage of placements in Wales able to meet children’s needs.’*

38. There are two Workstreams, whose purposes are:

*Building public/not-for-profit provision including building sufficiency and managing the transition to new models of provision.*

*Workstream 2 - Defining ‘profit’ and developing outline legislation including in relation to competition law.*

39. Each of the two Workstreams have met on a number of occasions, though neither of the Workstreams have put forward any final recommendations to the Programme Board or otherwise. We dispute the accuracy of the Workstream 2 Update for Programme Board 16th June 2022 which was dated 16th June but only circulated on 25th August, for example, Andrew Rome

clearly stated that in his professional opinion the approach is seriously flawed and cannot work. He followed up his comment in writing to the Chair.

**a) A definition of ‘not-for profit for the care of children looked after**

40. Whilst Workstream 2 received a number of papers and presentations about the not-for-profit option, it has not agreed a definition for consideration by the Board.

41. It is necessary to define profit to be able to define not for profit. Andrew Rome, a Fellow of the Institute of Chartered Accountants in England and Wales and a recognised specialist in children’s services, together with Dr Mark Kerr, the CHA Deputy Chief Executive, who also has extensive sector experience as a long established researcher with a PHD in Social Policy and Administration with a thesis title of ‘Evidence Based Policy: The Case of Looked after Children’ have both repeatedly said at Workstream 2 that a definition of profit is impossible.

42. At the Board meeting on 16<sup>th</sup> June Mr. Davey said that a Senedd lawyer was working on the definition of not-for-profit and would provide one in the near future. This was repeated in the two July workshops held with providers. According to the invitation their purpose was *‘to share the menu of models that are being explored to provide a solution fit for purpose for Wales’*, Providers and CHA came to the workshops and were expecting to make progress on this. Unfortunately, no new information or recommendations were presented by the Senedd via its representative Mr. Davey and no progress was therefore able to be made. The key message on behalf of the

Senedd remained that for profit providers were expected to transition to a not-for-profit model, though this was not further defined and nor was there any mention of whether compensation would be payable.. Providers comprehensively rejected this option and unanimously made this clear to Mr. Davey. No minutes of either of these two workshops have been provided and despite being asked, Mr. Davey has not confirmed whether any will be provided and if so, when.

43. As we have said, it is our view that the reason this definition has not been provided is because it is impossible to define profit or to define excessive profit (see paragraph 29 (ii) of the consultation document) and the Workstream update referred to above.

## **b) Securing the elimination of private profit through provision that only allows ‘not-for-profit’ providers to register with Care Inspectorate Wales**

44. We consider that there are many legal difficulties with this proposal. Mr Rome had previously expressed his concern to workstream 2 and in meetings with officials that such an approach was a breach of the public procurement regime. In view of this CHA commissioned its legal advisor, Léonie Cowen, who is also a nationally recognised sector expert to consider this issue. She agrees with Mr. Rome and in view of the importance of this issue, on 5th May 2022 I sent Alistair Davey an overview of her advice to CHA. Mr. Sandiford, Miss Cowen and Mr. Rome held a short Teams meeting with Mr. Davey on 6th May to discuss this and we all expressed the view that the Senedd needed to obtain advice on this or commission Miss Cowen and Mr Rome to provide



joint legal and commercial advice with the CHA on the implications of the proposed approach. This is something Mr. Davey had expressed an interest in because we were all seeking to work together to provide agreed solutions and this is a straight legal and commercial point. Mr. Davey said he would talk to the Senedd's lawyers. There is no outcome to this issue and our views and we do not know if legal advice was ever obtained.

45. Miss Cowen sets out a high level description of the strategic purpose of the Registration and Inspection of Social Care (Wales) Act 2016 in appendix 3). In our view, to seek to use this Act to regulate governance models rather than whether an organisation is a fit and suitable body to be registered is a misuse of the Act. By way of an example of the consequence of this misuse of registration legislation, an organisation registered on one day as suitable is the next day de-registered without its quality of care changing.

46. In conclusion on a) and b), none of the above is mentioned in the consultation document or have been resolved by the Senedd. To invite consultees to comment on these aspects of the consultation document without any reference to the history and in any event, when we consider that the approaches are wholly misconceived and impossible to define is unacceptable and unrealistic. Consultees cannot properly respond in view of the lack of information from the Senedd and because of the technical complexity of these issues.

47. We do not consider that Welsh Ministers should be able to amend any definition which is ultimately achieved through subordinate legislation because to do so gives rise to a significant risk that the consequences could

be changes to the definition with an unfair and potentially retrospective impact on providers, for example an impact on the registration status of organisations which has a significant and potentially disadvantageous commercial impact.

### **c) Timelines and Transitional Period**

48. The support in the first bullet of paragraph 26 does not deliver any new provision.

49. With regard to the second and third bullets of paragraph 26, we have dealt with this in detail in the other appendices to the pack. We seek full details of the outcome of this support and encouragement. In addition, we are concerned that any such support could be a breach of the Subsidy Control Act 2022. We consider these two bullets are no more than aspirational, may never achieve any tangible output and certainly no substantial output.

50. As for the last bullet, the Senedd is fully aware that this is wholly unachievable. Full details of why this is so is set out in the pack. In brief, providers have said unequivocally that they will not transition. We presume that compensation will be offered on the basis of an open market valuation with an appeal process for providers as this is the usual approach. So far, this has not been stated, and the compensation arrangements for providers for the loss of their businesses have not been identified. These businesses have been built up over many years and the majority of Welsh providers are SMEs with the owner heavily involved in running the business, which is his/her livelihood. As identified elsewhere a failure to compensate properly

is a breach of international and therefore national law.

51. If implemented, the timetable in paragraph 27 will inevitably result in the majority of residential provision in Wales ceasing to exist. Hundreds of Welsh and a substantial number of English children will have to move in 2027. There is no spare capacity in the UK. The outcome will be that the Welsh local authorities will be unable to meet their sufficiency duty, There will be a significant knock on effect on the whole fragile UK market place as there is already insufficient provision. Please see the remainder of the pack for more analysis.

#### **d) Supporting Guidance**

52. This is noted without comment.

#### **e) Additional areas for comment**

53. (i): we have a question in relation to this, how does the Senedd expect local authorities to meet their statutory duties, if there is no available provision?

54. (ii): as identified by CHA's advisors (see above) it is impossible to define profit and therefore impossible to design any of this. Please see also the other appendices in the pack and comments of the CMA in their final report (see Part 1 of appendix 5). To ask consultees to respond on this without reference to the CMA report, these comments or the failure of Workstream 2 to define this is wholly misleading.

## What outcomes do we expect

55. As identified above, we challenge the Senedd's assertions in this section of the consultation document.

56. Paragraphs 30 and 31 will not result in these outcomes.

57. Paragraph 33: as identified above and in the CMA report, there will be no savings. In fact, taking into account the compensation payable to providers, transaction costs and costs of achieving placements in the unregulated market, we envisage that the overall cost of residential provision for Welsh authorities will increase substantially.

58. Paragraph 34: please provide full details of the work being carried out with local authorities and its current and anticipated outcomes by 2026/7.

59. Paragraph 35: as identified above and in other appendices of the pack, we are not aware of any substantial outputs so far or envisaged in the near future or at all. Please provide full details of current and anticipated outcomes by 2026/7. We are very concerned to note that as identified above and in other parts of the pack there is no mention of compensation to for profit providers in this paragraph. As identified, please confirm full open market compensation will be provided and provide full details of the proposed scheme (see appendices 3 and 4).

60. Paragraph 36: we agree with the first sentence and challenge the second

sentence (see appendix 4) so please provide the evidence for this statement. As identified, we consider the consequence of this policy will not achieve the goals identified in the second half of this paragraph.

61. Paragraph 37: we consider that the consequence will be quite the reverse, children will be placed further away from their homes, often in England.

62. Paragraph 38: this is wholly challenged.

63. Paragraph 39: noted, this is too late though. The Senedd ought to be provided with full and expert legal advice at this stage to avoid a slow and increasing reduction in availability and likely provider failure arising from the prospective policy. Please see above and the other appendices in the pack for our views on the matters in this consultation document.

### **Questions on chapter 1**

64. We reserve CHA's position on a response to the questions and hope that it is not necessary to answer these.

### **CONCLUSION**

65. CHA considers that this consultation should be withdrawn and the 'eliminate' policy reconsidered as it is a materially flawed consultation document and policy. We have identified the flaws in the consultation at high level only within this appendix. However, this is not a standalone document, it must

be read in conjunction with the remainder of the pack. We consider that the key reasons the consultation is materially flawed are not only that the process and approach are inconsistent with the extensive guidance (in case law and otherwise) on consultation but also that it is substantively flawed because the policy is unsound for so many reasons (as set out). We therefore see no value in suggesting that the policy should be further discussed at the Programme Board and Workstreams because it is not possible for this flawed policy to be amended even if a proper, open minded and evidence based approach is adopted.