

CONSULTATION NOTE

Text in square brackets “[]” is included as a marker, and will be replaced with the necessary details in the final version.



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Explanatory Memorandum and Regulatory Impact Assessment

The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

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Explanatory Memorandum to the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

This Explanatory Memorandum has been prepared by the Health and Social Services Directorate General and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

Edwina Hart MBE OStJ AM

Minister for Health and Social Services

[Date]

PART 1 – EXPLANATORY MEMORANDUM

1. Description

1. The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011 (“the Regulations”) make provision as to the arrangements for the appointment of Independent Mental Health Advocates (“IMHAs”). They contain provisions about who may be appointed as an IMHA (including requirements about independence), and persons who may be visited and interviewed by an IMHA for the purposes of providing help to a Welsh qualifying patient.

2. Matters of special interest to the Subordinate Legislation Committee

2. These Regulations revoke and replace the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008 [SI 2008/2437 (W210)], which were made under section 130A of the Mental Health Act 1983 (“the 1983 Act”) and sections 12 and 204 of the National Health Service (Wales) Act 2006.
3. These Regulations are the first set of Regulations to be made relating to independent mental health advocacy under the 1983 Act, since that Act was amended by Part 4 of the Mental Health (Wales) Measure 2010 (“the Measure”),
4. One of the amendments to the 1983 Act made by the Measure was to provide that the first regulations (alone or with other provisions) to be made under sections 130E, 130F, 130G or 130H of the 1983 Act, are made subject to the approval of the National Assembly for Wales. The regulations made within this statutory instrument are therefore made subject to approval.
5. These Regulations contain provisions to allow for a split commencement date. This split commencement is necessary to reflect the staggered commencement of the two different components of the statutory advocacy scheme:
 - a. the scheme for patients subject to compulsory powers will come into force on [actual date to be confirmed, but expected to be October 2011];
 - b. the scheme for informal or voluntary patients in hospital will come into force on [actual date to be confirmed, but expected to be January 2012].

3. Legislative background

6. These Regulations may be made in exercise of powers conferred on the Welsh Ministers by sections 130E(2), (3)(a) and (b), (4)(b), (5)(b), (7) and 130H(1)(b) of the Mental Health Act 1983, and also by sections 12 and 204 of the National Health Service (Wales) Act 2006.
7. These Regulations are made subject to the approval of the National Assembly for Wales, as noted previously.

4. Purpose and intended effect of the legislation

8. The 1983 Act governs the compulsory treatment of certain people who have a mental disorder. The 1983 Act was amended by the Mental Health Act 2007, and one of the key amendments was the introduction of independent mental health advocacy.
9. In Wales these new provisions began in November 2008, and from that date there has been a requirement for such services to be available to provide support for 'qualifying patients' who are receiving assessment or treatment under the 1983 Act. Services are provided by independent advocacy providers through contracts with LHBs.
10. The Measure has further amended the 1983 Act, so as to provide for an expanded statutory scheme of independent mental health advocacy, both for patients subject to compulsion under the Mental Health Act 1983, and those in hospital informally (ie not under compulsion).
11. The expansion of statutory advocacy services to ensure that access is available to the majority of inpatients receiving treatment for mental ill-health, whether subject to compulsion or not, will help to ensure that the rights of this often vulnerable group of patients are safeguarded. Statutory advocacy will assist inpatients in making informed decisions about their care and treatment, and support them in getting their voices heard.
12. These Regulations support the operation of the independent mental health advocacy scheme and the intended policy effect by:
 - a. ensuring that LHBs make arrangements for IMHAs to be available to help Welsh qualifying patients;
 - b. establishing an approval scheme for IMHAs, so that, as is currently the case, IMHAs will be required to satisfy certain appointment requirements before being appointed;
 - c. providing operational detail of the nature of the independence of IMHAs (ie who the IMHAs must be independent from);
 - d. providing additional persons (in relation to patients detained under section 4 of the 1983 Act) that the IMHA may visit and interview, over

and above those professionally concerned with the patient's medical treatment.

5. Consultation

13. Details of the consultation undertaken are included in the regulatory impact assessment which has been completed for these Regulations, and is set out in Part 2 of this document.

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

14. This section of the RIA presents two different options in relation to the policy objectives of the proposed Regulations (see Section 4 of Part 1 of this document). Both of the options are analysed in terms of how far they would achieve the Government's objectives, along with the risks associated with each. The costs and benefits of each option are set out in Section 7 of this Regulatory Impact Assessment.
15. The options are:
- Option 1 – Revoke current Regulations only
 - Option 2 – Revoke the current Regulations and replace with new Regulations

Option 1 – Revoke current Regulations only

16. In 2008 the Welsh Ministers made Regulations regarding independent mental health advocacy in exercise of powers conferred on them by sections 130A of the Mental Health Act 1983, and also by sections 12 and 204 of the National Health Service (Wales) Act 2006.
17. Part 4 of the Measure has amended the 1983 Act so as to expand the existing scheme of advocacy within that Act in relation to Wales. This has been done by separating the elements of the 1983 Act dealing with independent mental health advocacy in Wales from the related elements dealing with arrangements in England. This has required the amendment of certain existing sections of the 1983 Act so that they apply in relation to England-only, and the addition of a number of new sections that deal solely with arrangements in relation to Wales. Section 130A therefore only now applies in relation to England, and, as such, the powers currently available to the Welsh Ministers fall away and are replaced by new powers within sections 130E, 130F, 130G and 130H.
18. It is necessary therefore to revoke the Regulations made in 2008.
19. This option proposes only making the necessary revocation of existing Regulations, but not replacing those Regulations with new Regulations. This option would mean the Welsh Ministers are required to make IMHA services available to patients in Wales, without the necessary operational detail (such as appointment and approval arrangements) in place to ensure that trained and experienced advocates are appointed.
20. This option would also fail to realise the operational detail of the nature of independence of advocates from certain persons professionally concerned with the patient's medical treatment or from other persons connected to the patient

(such as the patient's carer). Finally this option would also mean that the additional persons who may be interviewed by an advocate (as set out in Regulation 6 currently) are not included.

Option 2 – Revoke the current Regulations and replace with new Regulations

21. This option proposes that the existing Regulations are revoked (for the reasons outlined above), and replaced with new Regulations.

7. Costs and benefits

Costs and benefits of Option 1 (revoke existing Regulations only)

22. The financial costs for the Welsh Assembly Government or Local Health Boards of adopting this option are likely to be no different from those of the preferred option (option 2), as the Welsh Assembly Government is committed to providing LHBs with both one-off and also ongoing annual additional funding to support the expanded IMHA scheme in future.
23. However, it is possible that in the absence of requirements being set out in regulations, the procuring and operation of the service could be subject to a range of differing approaches and practices, resulting in variability in the quality or delivery of IMHA services across Wales.
24. Further, this approach is unlikely to deliver any benefits to service users or the health and social care organisations providing services. On the contrary, it is considered that there would be considerable disadvantages in terms of engagement, effectiveness of service delivery, and patients' rights with this option, as again, local services would be commissioned and delivered according to local arrangements and preferences, rather than requirements set out in regulations.

Costs and benefits of Option 2 (revoke and make new regulations)

25. The costs associated with implementing an expanded form of statutory advocacy under the 1983 Act are set out in the Explanatory Memorandum to the Measure¹. These Regulations neither expand nor reduce those costs.
26. In summary, the costs associated with independent mental health advocacy services in Wales are:

| | Cost per annum |
|---|-----------------------|
| Existing funding since services began | £0.6m |
| Costs for expanding service in relation to patients subject to compulsion | £0.4m |

¹ Available for access at <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-mhs-2.htm> or from the Mental Health Legislation Team of the Welsh Assembly Government (see Annex A to this document)

| | |
|---|--------------|
| Costs for expanding service in relation to informal or voluntary patients in hospital | £1.0m |
| Total costs (when fully operational) | £2.0m |

27. The benefits associated with making these Regulations are that the independent mental health advocacy scheme in Wales will continue to be underpinned by clear and binding legislative requirements that ensure that services are delivered by suitably approved and appropriately qualified independent advocates. The Regulations will also ensure that the service is commissioned and delivered in a way which maintains the independence of the service and clear requirements in relation to the IMHA's powers to visit and interview those concerned with patients' care and treatment.

Summary

28. **Option 2 (revoke and make new regulations)** best meets the Government's objectives.

8. Consultation

29. [Note: this information will be included in the final draft of this Explanatory Memorandum, and will include information on who has been consulted; why those organisations/individuals were consulted; how long the consultation lasted (ie from 21 February 2011 to 16 May 2011); a summary of the outcome of the consultation; and whether any changes or amendments were made to the legislation as a result of consultation.]

9. Competition assessment

30. Given that independent mental health advocacy services in Wales are delivered (in the main) by third sector organisations, the competition filter was applied to Part 4 of the Mental Health (Wales) Measure in relation to mental health advocacy.
31. The filter test at that time has shown that the amendment of the 1983 Act is unlikely to have a significant detrimental effect on competition within the advocacy sector. These Regulations are required as a result of the changes made to the 1983 Act, and therefore the findings of the competition filter in relation to the Measure also apply here. Further information can be found in the Explanatory Memorandum to the Measure².
32. Whilst those organisations which are contracted to provide existing statutory services could be perceived as enjoying an advantageous position in the sector, all current contracts are due for renewal within the next 12 months. LHBs have been issued with revised guidance from the Welsh Assembly

² Available for access at <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-mhs-2.htm> or from the Mental Health Legislation Team of the Welsh Assembly Government (see Annex A to this document)

Government³ which provides advice on planning, tendering, contracting and service level arrangements in relation to the expansion of statutory services, aimed at ensuring that equitable and transparent processes are employed in the selection, appointment and delivery arrangements for future advocacy provision.

10. Post implementation review

33. Section 48 of the Measure places the Welsh Ministers under a duty to review the operation of the independent mental health advocacy provisions contained in Part 4 of the Measure, and to publish a report of the findings of the review. The report must be published no later than four years after the commencement of the duties contained within section 130E(1) of the 1983 Act (as inserted by section 31 of the Measure).
34. It is intended that the review relating to Part 4, will take account of these Regulations.
35. The report of the review must be placed before the National Assembly for Wales, in accordance with section 48(9) of the Measure.

³ Welsh Assembly Government (2011) *'Delivering the Independent Mental Health Advocacy Service in Wales'*

Annex A – Contact information

For further information in relation to this document, please contact:

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