

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 Department for Health, Social Services and Children and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

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.

Lesley Griffiths AM
Minister for Health and Social Services

19 September 2011

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 who has been admitted under section 4 of the Mental Health Act 1983.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2. These Regulations revoke and replace the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008 [SI 2008/2437 (W.210)], 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(2), 130E(4)(b), 130E(5)(b), 130F(2)(d), 130G(2)(c) or 130H(1)(b)(ii) 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 3 January 2012;
 - b. the scheme for informal or voluntary patients in hospital will come into force on 2 April 2012.
6. It is proposed that these Regulations are made before the commencement of the main provisions in the Mental Health Act 1983 relating to independent mental health advocacy in Wales, which were inserted into that Act by Part 4 of the Measure. However, the powers to make these Regulations have

commenced in accordance with section 55(1) and (2)(b) of the Measure, and all of the remaining provisions relating to independent mental health advocacy in Wales in the Mental Health Act 1983 will be commenced prior to the coming into force date of these Regulations.

3. Legislative background

7. 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, 203 and 204 of the National Health Service (Wales) Act 2006.
8. 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

9. 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.
10. 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.
11. 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 a hospital or a registered establishment informally (i.e. not under compulsion) and who are receiving treatment for, or assessment in relation to, a mental disorder.
12. 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.
13. 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

- 14. 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

15. 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 Welsh 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.
16. 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

17. 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.
18. 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 will 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 will only apply in relation to England, and, as such, the powers currently available to the Welsh Ministers will fall away and be replaced by new powers within sections 130E, 130F, 130G and 130H.
19. It is necessary therefore to revoke the Regulations made in 2008.
20. 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.
21. 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 persons who request an Independent

Mental Health Advocate for the patient. Finally this option would also mean that the additional persons who may be interviewed by an advocate for the purposes of providing help to a patient who is admitted under section 4 of the Mental health Act 1983 (as set out in Regulation 6 currently) are not included.

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

22. 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)

23. The financial costs for the Welsh 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 Government is committed to providing LHBs with both one-off and also ongoing annual additional funding to support the expanded IMHA scheme in future.
24. 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.
25. 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)

26. 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.
27. In summary, the costs associated with independent mental health advocacy services in Wales are:

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)

	Cost per annum
Existing funding since services began	£0.6m
Costs for expanding service in relation to patients subject to compulsion	£0.4m
Costs for expanding service in relation to informal or voluntary patients in hospital	£1.0m
Total costs (when fully operational)	£2.0m

28. 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

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

8. Consultation

30. Welsh Government officials undertook a programme of consultation on the draft regulations relating to independent mental health advocacy. 92 written responses were received from a variety of stakeholders, including advocacy providers, service user representative bodies, NHS organisations, local authorities and professional bodies.
31. A detailed consultation response report has been published on the Welsh Government's website, but the views received and any amendments made to the regulations as a result of the consultation are summarised in the following paragraphs.

General matters

32. Almost all respondents were satisfied that the Explanatory Memorandum and Regulatory Impact Assessment provided them with enough information to understand the purpose and effect of the regulations. All but one agreed with the preferred option set out in the RIA, and a large majority were content that the cost/benefit analysis was appropriate.

Responsibility for the provision of advocacy

33. A majority of respondents were of the view that LHBs should continue to be responsible for making arrangements for independent mental health advocacy in their area, the Welsh Government will therefore not be amending the

regulations in this regard.

Appointment requirements for independent mental health advocates

34. The majority of respondents felt that these requirements were appropriate, however, some stakeholders felt that there should be a more explicit requirement to ensure that advocacy support was culturally and linguistically appropriate for the clientele it served (several respondents felt this was particularly important for individuals whose first language/language of need was Welsh). The Welsh Government has therefore amended regulation 3(4) to add linguistic requirements to those diverse needs that LHBs should take into consideration when ensuring that independent mental health advocates are available to qualifying patients in their area.

Independence requirements for IMHAs

35. A large majority of respondents agreed that the independence requirements in this regulation were appropriate. However, a number of consultees noted that the draft regulations did not include any requirement for the advocacy service, or the advocate themselves, to be independent from the body which commissions the advocacy service, and sought clarification as to whether this meant that in practice, an LHB could appoint its own employees as IMHAs.
36. The Welsh Government agrees that the omission of any requirement for operational independence between the advocacy service provider and the commissioning body was a weakness in the regulations as drafted. An additional provision has therefore been added at regulation 4(1)(c) to make it clear that LHBs may not appoint a member of their own staff as an IMHA.

IMHAs powers to visit and interview

37. All respondents agreed that the IMHA should be able to visit and interview the approved mental health professional or nearest relative who made the application for the admission, and the doctor who provided the medical recommendation under section 4. Many stakeholders also felt that the advocate should have a legal power to visit and interview others including the patient's relatives or 'significant others' (e.g., carers, friends).
38. The Welsh Government's view is that it would not be appropriate to provide IMHAs with the power to compel any person not involved with the medical care of the patient, such as carers or relatives, to be interviewed if they did not wish to be. The Welsh Government is therefore satisfied that the arrangements for those persons whom the IMHA may visit and interview are appropriate and do not require amendment following consultation.

9. Competition assessment

39. 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.
40. 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.
41. 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 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

42. 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).
43. It is intended that the review relating to Part 4, will take account of these Regulations.
44. The report of the review must be placed before the National Assembly for Wales, in accordance with section 48(9) of the Measure.

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)

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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