

Explanatory Memorandum to the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) 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 National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011.

Lesley Griffiths AM
Minister for Health and Social Services

11 July 2011

1. Description

The effect of these Regulations is to delay the coming into force date of Part 7 of the NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (the Regulations) which deals with cross border arrangements, from 1 October 2011 to 1 April 2012, to allow the detailed operational arrangements to be agreed. A further amendment to regulation 52(5) also reflects this change.

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

There are no matters of special interest to highlight to the Committee.

3. Legislative background

The power to amend the Regulations is found in sections 1, 11(2)(d) and 11(3) of the NHS Redress (Wales) Measure 2008. These are powers of Welsh Ministers.

4. Purpose & intended effect of the legislation

The effect of these Regulations is to delaying the coming into force date of Part 7 of the NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (the Regulations) which deals with cross border arrangements, from 1 October 2011 to 1 April 2012 to allow the detailed operational arrangements to be agreed.

The reason for this change is to allow more time for this work to be completed since the initial assessment that a coming into force date of 1 October 2011 would be sufficient time to agree these arrangements, is not now achievable.

One of the tasks is to review the current contractual arrangements to include details about the operating arrangements cross-border and recovery of costs from English NHS bodies, to support the arrangements in the Regulations. It is proposed to establish a virtual working group of representatives from Wales and England with planning and contract experience to scope out what is required within existing and new contracts to facilitate the process of offering redress. This work will also need to take account of the use of sub-contractors by English NHS bodies for delivering a package of care or aspects of care, such as physiotherapy, and the subsequent indemnity arrangements where there is a qualifying liability in tort.

The aim is to develop model clauses for insertion into commissioning contracts. This would ensure there is a consistent approach to dealing with these matters and will ensure, for the mutual protection and benefit of contracting parties and, ultimately, Welsh patients that all relevant matters are covered in commissioning contracts.

It is necessary to support staff in Welsh NHS bodies and English NHS bodies in understanding and applying the cross-border redress arrangements. In conjunction with the Department of Health and NHSLA it is proposed to develop detailed operational guidance for Welsh and English NHS bodies to effectively implement and operate the cross border arrangements. This will outline how the process will work and provide guidance on the day-to-day management of cases. Similar guidance will need to be developed by Welsh Government officials to assist LHBs on the rare occasions when they may enter into an arrangement with an NHS body in Scotland or Northern Ireland.

A further amendment to regulation 52(5) of the Regulations reflects the new coming into force date for Part 7 of the Regulations and makes it clear that the cross border arrangements in part 7 will not apply to **services** provided by English NHS bodies, Scottish NHS bodies or Northern Irish NHS bodies on behalf of Welsh NHS bodies before 1 April 2012.

The current regulation 52(5) provides that complaints about services provided by such bodies on behalf of Welsh NHS bodies before 1 October 2011 will not be considered under Part 7.

The change is considered necessary as patients can have up to a year to bring a complaint (sometimes longer), therefore, under the provision as currently drafted it would be possible for a complaint to be reported about a service that was provided before the new contractual arrangements were in place. Whilst it is possible to draft the contracts to take this into consideration, this is not ideal as it would involve the contracts having an element of retrospectivity which would be particularly difficult where a body with whom a Welsh NHS body contracts for the provision of a service in turn sub-contracts for the provision of that service to a third party. It would also, if the provision remains as drafted, cause difficulty if a complaint was made about a service provided a year earlier under a contract that had expired as there would be nothing to amend to insert the relevant provisions relating to recovery etc. that are needed to implement redress.

If the legislation is annulled and the original coming into force date of 1 October 2011 remains unchanged, then this could cause considerable difficulties in setting up a workable process in good time. It would be better to spend more time in detailing the requirements, as this will ultimately benefit patients.

5. Consultation

The Welsh Government is already in discussion with the Department of Health and the NHS Litigation Authority in relation to these requirements. In terms of formal consultation, there have been two previous consultations on the principles behind the main Regulations. This change (a delay in the coming into force date) is administrative in nature, is required to ensure the best possible arrangements are put in place for the benefit of patients, and will be taken forward with the involvement of NHS colleagues on both sides of the border. It has therefore been concluded that it is not necessary to carry out further consultation on this occasion.

6. Regulatory Impact Assessment (RIA)

It is considered that no RIA is required to accompany this amending legislation since a full RIA was carried out on the main Regulations which were made earlier in the year and that document did not specifically cover the cross border implications - the likelihood of any impact in these situations being insignificant. This amending legislation has no impact on the statutory duties (sections 77 -79 GOWA 06) or statutory partners (sections 72-75 GOWA 06).