

Explanatory Memorandum to the Representations Procedure (Wales) Regulations 2014

This Explanatory Memorandum has been prepared by the Department for Health and Social Services 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 Representations Procedure (Wales) Regulations 2014 and I am satisfied that the benefits outweigh any costs.

Deputy Minister for Social Services
7 July 2014

1. Description

1.1.1. The Representations Procedure (Wales) Regulations 2014 (“the Regulations”) and the Social Services Complaints Procedure (Wales) Regulations 2014 (“the Complaints Regulations”) prescribe a new procedure to bring the social services complaints and representations process in line with the *Model Concerns and Complaints Policy and Guidance* which has been adopted across public services. In particular, these Regulations and the Complaints Regulations make the social services complaints process consistent with the NHS complaints process.

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

1.2.1. None.

3. Legislative background

1.3.1. Section 26 of the Children Act 1989 provides Welsh Ministers with a regulation making power requiring cases of children who are looked after by a local authority to be reviewed. Section 26ZB of the Children Act 1989 provides a power to make regulations making further provision for the further consideration of representations that have been considered by a local authority in Wales under section 24D or 26 of the 1989 Act.

1.3.2. Section 7 of the Local Authority Social Services Act 1970 (“LASSA”) provides a power for Welsh Ministers to issue statutory guidance to local authorities about the exercise of their functions which local authorities must take into account.

1.3.3. This instrument is subject to the annulment procedure by the National Assembly for Wales (the negative procedure).

1.3.4. The Regulations will come into force on 1 August 2014.

4. Purpose & intended effect of the legislation

1.4.1. The purpose of the Regulations is to establish new procedures which Local Authorities must follow in the consideration of representations made to them about the discharge of specific functions under the Children Act 1989 and under the Adoption and Children Act 2002. The Regulations are wider in scope than the previous regulations. The new provisions will extend the application of the representations process to specific local authority functions / duties relating to adoption. Separate Regulations, which are being progressed in tandem – the Complaints Regulations – make provision for complaints to Local Authorities about the exercise of their social services functions. A separate EM/RIA has been produced for the Complaints Regulations. The two sets of Regulations have been made consistent, wherever possible, so that

procedures to deal with either complaints or representations are the same. Differences required by the Acts themselves have been retained.

1.4.2. A single piece of statutory guidance for Local Authorities has been produced to support the implementation of these and the Complaints Regulations.

1.4.3. The new procedure is based on the principles set out in the *Model Concerns and Complaints Policy and Guidance* that complaints processes should be:

- accessible and simple;
- fair and impartial;
- timely, effective and consistent;
- accountable; and
- deliver continuous improvement.

1.4.4. A previous consultation exercise entitled *Making Things Better* was undertaken in 2012 on the principle of aligning the Social Services Complaints model more closely with the *Model Concerns and Complaints Policy and Guidance*. That consultation identified that the existing arrangements were too complicated and supported the removal of the stage three independent panel and for the introduction a two stage process. Consequently, the Regulations provide for a simpler two stage process comprising an informal Local Resolution stage and, if this is not successful, a Formal Investigation stage. A complaint subject to a Formal Investigation must be investigated by an Independent Investigator. This requirement is in response to concerns raised in the 2012 consultation exercise about the independence of investigations under the existing arrangements. If issues have not been resolved by the local authority within the new two stage process, individuals will have recourse to the Public Services Ombudsman for Wales.

1.4.5. The new complaints and representations procedure will streamline and modernise the Social Services Complaints process. It emphasises that everyone who makes a complaint about social services in Wales has a right to be listened to properly and to have their concerns resolved quickly and effectively. It will benefit the service user by establishing a more straightforward and citizen-centred approach that is consistent with other public services. Local Authorities will be required to learn from concerns raised and to use that learning as a basis for improving services for all service users.

1.4.6. Local Authorities already have well developed complaints processes and procedures that reflect the current guidance on handling complaints and representations in local authority social services in Wales, entitled *Listening & Learning*, which they can refine and modernise to reflect this new process.

1.4.7. The new Social Services Complaints Procedure addresses concerns raised by the Health and Social Care Committee during its Stage 1 scrutiny of the Social Services and Well-being (Wales) Act. In its report the Committee

raised particular concerns that the process for handling complaints when multiple agencies are involved should be simplified.

5. Consultation

1.5.1 Details of the consultation exercise are included in the RIA below.

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Background

2.1.1. The current social services complaints procedure can be summarised as follows:

1. Stage One - Local Resolution
2. Stage Two – Formal Consideration
3. Stage Three – The Independent Panel

2.1.2. Following these three stages, complainants have recourse to the Public Services Ombudsman for Wales

2.1.3. The above stages apply to both complaints and representations and are outlined in more detail within existing guidance¹.

2.1.4 To provide an order of magnitude for the analysis contained within this RIA, Table 1 presents the number of complaints and representations handled by Local Authorities in Wales at stages 2 and 3 of the current social services complaints process (see above) between 2009-10 and 2013-14.

Table 1. Number of Stage 2 and Stage 3 Complaints and Representations handled by Local Authorities in Wales, 2009-10 to 2013-14

Year	Stage 2 - Formal Consideration	Stage 3 - The Independent Panel ⁽¹⁾
2009-10	188	36
2010-11	179	31
2011-12	171	51
2012-13	150	42
2013-14	181	46
Total	869	206

(1) Figures represent the number of Panels requested

Source: Independent Complaints Secretariat

2.1.5 From Table 1 it can be estimated that Local Authorities have - over the past five years - handled on average 174 stage 2 complaints per annum. This equates to roughly 8 stage 2 complaints handled per Local Authority per annum. The number of requests for an independent stage 3 panel received

¹ Listening and Learning: A guide to handling complaints and representations in local authority social services in Wales. Welsh Government (2005)

across all Local Authorities over the past five years was on average 41 requests per annum (or approximately 2 requests per Local Authority per annum)². As far as the Welsh Government is aware, there are no data available (at the all Wales level at least) regarding the number of stage 1 complaints handled by Local Authorities in Wales. This is predominantly due to the fact that the process by its very nature is informal, and therefore monitored less closely. With regard to the number of stage 4 complaints that proceed to the Public Services Ombudsman for Wales (PSOW), the Welsh Government is aware that the PSOW received 177 complaints in 2013-14 that were specifically related to social services.

2.1.6. In light of the figures outlined above, this RIA has attempted to adopt a proportionate approach to the assessment of the costs and benefits of the options that are outlined below.

2. Options

2.2.1. The options considered by the Welsh Government in relation to the social services complaints procedure are as follows:

Option 1: Do nothing

2.2.2. Under the Do Nothing option, the existing arrangements for handling social services complaints will remain in place. These arrangements currently differ from those in use within the NHS³ and other public bodies in Wales⁴.

Option 2: Bring Regulations into Force

2.2.3. Under option 2, new Regulations will be introduced to align the social services complaints procedure with the complaints procedures in use in the NHS and other public bodies in Wales. The stages of the complaints process will be rationalised to the following:

1. Stage One - Local Resolution
2. Stage Two – Formal Investigation

2.2.4. If issues have not been resolved by the local authority within these two stages, individuals will have recourse to the Public Services Ombudsman for Wales.

2.2.5. The Welsh Government will introduce guidance to Local Authorities on how to implement the new complaints procedure proposed by the new Regulations⁵.

² The actual number of panels held is below the number requested. On average over the past five years, 34 panels have been held per annum across Local Authorities in Wales.

³ Putting Things Right: Guidance on dealing with concerns about the NHS from 1 April 2011. NHS Wales.

⁴ *Model Concerns and Complaints Policy* Guidance, July 2011

⁵ Draft guidance was consulted upon between 28 November 2013 and 20 February 2014.

3. Costs & benefits

COSTS

Option 1: Do Nothing

2.3.1. There would be no additional costs associated with the Do Nothing option. Under this option the Welsh Government would continue to fund the Independent Complaints Secretariat to administer the stage 3 panels. In 2013-14 this was £151,000. However, the current arrangements are known to create difficulties and confusion for complainants and Local Authorities alike - particularly in cases where a complaint crosses the boundaries between health and social care services. In practice the existing arrangements also cause difficulties in achieving compliance with the existing Regulations for the NHS and other public bodies in Wales (see for instance the concerns raised by the Public Service Ombudsman for Wales in his Annual Report⁶). Furthermore, the Health and Social Care Committee has also raised concerns about the complexity of the current social complaints process during its Stage 1 Scrutiny of the Social Services and Well-being (Wales) Bill⁷.

Option 2: Bring Regulations into Force

2.3.2 Under this option, the Welsh Government considers that there would be minimal additional costs that fall to:

- (i) Local Authorities;
- (ii) Complainants;
- (iii) the Public Services Ombudsman for Wales;
- (iv) the Welsh Government.

These additional costs are discussed below.

(i) Local Authorities

One-off

2.3.3. It appears reasonable to assume that at least some additional one-off costs will be incurred by Local Authorities when it comes to adapting their existing complaints handling procedures in order to comply with the new Regulations proposed under option 2. The Welsh Government has consulted Local Authorities regarding proposals to change the social services complaints procedures in both 2012 and 2013⁸. Overall the responses received to those

⁶ Annual Report 2012-13, Public Service Ombudsman for Wales, page 23

⁷ Deputy Minister for Social Services, Written Statement: Social Services Complaints, 14 November 2013

⁸ *Making Things Better: Improving the ways we deal with complaints and concerns about social services in Wales*. Consultation Document. Welsh Government (2012); and *A guide to handling complaints and representations in local authority social services*. Consultation Document. Welsh Government (2012)

consultations did not highlight any significant additional costs in relation to the overall implementation of the proposed changes to the complaints procedure. This one-off additional cost is therefore assumed to be small. Local Authorities will also incur a small one-off cost (in terms of the opportunity cost of staff time) to attend a workshop event, which will be arranged by the Welsh Government to introduce the new guidance on the social services complaints handling process⁹.

Recurring

2.3.4. The new Regulations will continue to impose a requirement upon Local Authorities to appoint Independent Investigators for handling Stage 2 complaints. This is currently an existing requirement and is therefore not considered to impose an additional cost. However, under the new Regulations the Independent Investigator appointed by a Local Authority will no longer be able to be a member of staff from the Local Authority to whom the complaint has been made. Informal consultation with several Local Authorities via the Independent Complaints Secretariat has revealed that the Independent Investigator role is already procured externally for the large majority of stage 2 complaints handled, and that Independent Investigators are almost always procured externally for representations concerning children's social services¹⁰. This minor change to the Independent Investigator role proposed by the new Regulations is therefore not anticipated to impose any significant additional recurring costs upon Local Authorities in Wales.

(ii) Complainants

2.3.5. It is not anticipated that the new complaints process will place any additional costs on complainants. Previously commissioned research has demonstrated that there is confusion around the role and remit of the stage 3 independent panel amongst complainants, with dissatisfaction surrounding the process and its outcomes, as well as concerns about the potential for conflicts of interest in the ability of stage 3 panels to provide an independent judgement¹¹. It is intended that the new Regulations will simplify the current process for future complainants.

⁹ The opportunity cost of Local Authority staff time for attending a one day workshop is assumed to be small. E.g. using NJC Pay Scales for Local Government, plus on-costs (at 33%), the opportunity cost of 1 day (approximately 0.5% of annual time) of a P08 grade member of staff and 3 Senior Officers (1), is estimated at approximately £800 per Local Authority. This would equate to approximately £18,000 across all Local Authorities in Wales. There will also be minor Travel and Subsistence costs incurred for attending a workshop. A single Director of Social Services from one Local Authority will also be appointed to lead on complaints handling. The opportunity cost of his/her time for attending two workshops (North and South Wales) and one day in preparation - assuming a NJC Pay Scale point P012 - plus on-costs - is estimated at approximately £1,000. Overall therefore, these costs are not anticipated to be large.

¹⁰ An Independent Person is also appointed for representations concerning children's social services (in addition to the Independent Investigation Officer role), but this is an existing requirement and will not change under the new Regulations.

¹¹ *Further Development of the Social Services Complaints Process in Wales* Eskridge Social Research (2009).

(iii) Public Services Ombudsman for Wales (PSOW)

2.3.6. The removal of the existing stage 3 independent panel as part of the new Regulations may, at least initially, impose an additional cost upon the Public Services Ombudsman for Wales¹². This is an indirect effect of the new Regulations and the exact magnitude of this additional cost is currently unknown. The Welsh Government is aware that the PSOW received 177 complaints relating to social services in Wales during 2013-14. The PSOW does not apportion costs on a per case basis, and therefore has not been able to provide an average cost for handling a complaint. It has therefore not been possible to place a potential value on this additional cost.¹³

(iv) Welsh Government

2.3.7. The new Regulations will be accompanied by new guidance to Local Authorities on the handling of social services complaints. At the time of writing, draft guidance has already been consulted upon and refined in light of consultation responses prior to its introduction. A post consultation draft has also already been shared with Directors of Social Services. The cost of producing the new guidance has therefore been treated as a sunk cost for the purposes of this RIA¹⁴.

2.3.8. The Welsh Government will seek to hold two workshops to introduce the guidance associated with the new Regulations. Existing Welsh Government venues will be used at no additional cost (bar the opportunity cost of occupying the venues for a day each). The opportunity cost of the Welsh Government staff time required to organise and then run the workshops is estimated at approximately £2,000¹⁵. There may also be some minor costs incurred for travel and subsistence.

2.3.9. There will be minor costs associated with type setting and finalising the new complaints guidance for publication by the Welsh Government. Printing costs will however be kept to a minimum and electronic publication where possible will be preferred.

¹² This appears to be the case in Scotland and as identified in review by the National Audit Office of complaints handling in health and social care in England:

- *Impact Assessment of the reformed complaints regulations for health and social care*. Department of Health (2009), page 8; and
- *Feeding back? Learning from complaints handling in health and social care*. Report by the Comptroller and Auditor General / HC 853 Session 2007-2008, 10 October 2008, see Appendix 2, page 47.

¹³ See for example:

- Annual Accounts 2012/13, Financial Statements for the year ended 31 March 2013. Public Service Ombudsman for Wales (2013), page 12; and
- Three Year Strategic Plan, 2012/13 to 2014/15 – Update Year 3. Public Service Ombudsman for Wales (2014), pages 5, 8 and 9.

¹⁴ The costs of goods and services that have already been incurred and are irrevocable should be ignored in an economic appraisal within central government. They are 'sunk costs'. What matters are costs about which decisions can still be made.

¹⁵ One Grade 7 member of staff (3 days in total, including attendance plus preparation), One Higher Executive Officer (3 days in total, including attendance plus preparation) and one Team Support member of staff (5 days in total, including 2 days attendance, 1 day preparation and 2 days organisation).

BENEFITS

Option 1: Do Nothing

2.3.10. In the short term, doing nothing will avoid the one-off transitional costs of reforming the social services complaints procedure and also the need for Local Authorities and other stakeholders to familiarise themselves with the new Regulations.

Option 2: Bring Regulations into Force

2.3.11. Under this option, the Welsh Government considers that there would be additional benefits that fall to:

- (i) Local Authorities;
- (ii) complainants; and the
- (iii) Welsh Government

(i) Local Authorities

2.3.12. It is anticipated that there will be some recurring savings to Local Authorities due to the removal of the independent panel at stage 3. Under current arrangements, Local Authorities have to pay Independent Investigation Officers (if externally procured) to attend a stage 3 panel if they are requested to do so by the independent panel (this is not always the case however).. In the case of a representation concerning children's social services, the fee normally incurred by Local Authorities in providing an Independent Person - should they be requested to attend a stage 3 panel meeting - will now also be saved. Furthermore, there will be a time savings to social services officers as well as other Local Authority members of staff in terms of the time required to prepare for stage 3 panel meetings. Previous research by Eskrigge suggests that up to 9 working days in preparation and attendance of a stage 3 panel meeting is required across those Local Authority staff involved in the process under the current complaints procedure¹⁶. Under the new Regulations proposed, this time would be saved.

(ii) Complainants

2.3.13. Complainants will benefit from a more straightforward and citizen-centred approach that is consistent with other public services. The guidance emphasises that everyone who makes a complaint about social services in Wales has a right to be listened to properly and to have their concerns resolved quickly and effectively. Local Authorities will be required to learn from concerns raised and to use that learning as a basis for improving services for all service users.

¹⁶ *Further Development of the Social Services Complaints Process in Wales* Eskrigge Social Research (2009). Annex 4, page 68.

(iii) Welsh Government

2.3.14. Under the existing system the Welsh Government allocates an annual budget to the Independent Complaints Secretariat, In 2013-14 this amounted to £151,000. Under Option 2 there would be a recurring saving of £151,000 per annum as Welsh Government will no longer fund the stage 3 independent panels once transitional arrangements are completed.

Summary and Preferred Option

2.3.15. The preferred option is Option 2 – bring the Regulations into force. This option will modernise and steam-line the social services complaints process without placing an unnecessary burden on a particular sector. Option 2 will benefit the service user by establishing a more straightforward and citizen-centred approach that is consistent with other public services.

Consultation

2.3.16. A public consultation on the draft Social Services Complaints Procedure (Wales) Regulations 2014 and the draft Representations Procedure (Wales) Regulations 2013 and accompanying draft guidance took place between 28 November 2013 and 20 February 2014. The documents can be found at: <http://wales.gov.uk/consultations/healthsocialcare/complaintrepresentation/?lang=en>. There were 32 responses to the consultation from local authorities, one local health board, the Welsh Language Commissioner, the Children’s Commissioner, the Older People’s Commissioner, former Stage 3 Panel members and members of the public. The response was generally positive. In response to the consultation the guidance has been reduced in length and several areas have been clarified. In particular, a number of changes have been made to strengthen the guidance and regulations including:

- Requiring the Director of Social Services to sign the local authority’s response to a Formal Investigation to demonstrate to complainants that their complaint has been considered at a sufficiently senior level in the organisation;
- Explicitly setting out the expectation of the Welsh Government that local authorities should promote the informal *Local Resolution* stage as an effective approach to resolving the majority of complaints.
- The inclusion of a flow-chart in the guidance to further clarify the process and timings; and
- Expanding the sections of the guidance dealing with complaints in the Welsh Language to ensure compliance with the strategic framework “*More than just words*” in line with comments received from the Welsh Language Commissioner.

2.3.17. Several correspondents raised concerns about the practicalities of implementing the new arrangements by 1 June 2014, as was originally

proposed. To address these we have sent all Directors of Social Services in Wales a copy of the post-consultation working draft of the guidance to enable them to begin planning for implementation. We also now intend that the coming into force date of these regulations will be 1 August 2014 to allow further time to prepare for implementation.

2.3.18. The Welsh Government also intends to hold a number of workshops across Wales on the new complaints process in advance of 1 August 2014.

2.3.19. A summary of the outcome of the consultation that sets out the main issues raised and whether they have been accepted or rejected can be accessed through this link:

<http://wales.gov.uk/consultations/healthsocialcare/complaintrepresentation/?status=closed&lang=en>

Post Implementation Review

2.3.20 There will be an early opportunity for assessing the change when regulations are re-laid as part of the delivery of subordination legislation under the Social Services and Well-being (Wales) Act 2014. The details and scope of this work have not yet been finalised.

Competition Assessment

2.3.21 The Competition Assessment Filter Test has been completed. There are no detrimental effects on competition. None of the competition filter test criteria apply.