

Explanatory Memorandum to the Mental Health (Secondary Mental Health Services) (Wales) Order 2012

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 (Secondary Mental Health Services) (Wales) Order 2012. I am satisfied that the benefits outweigh any costs.

Lesley Griffiths AM

Minister for Health and Social Services

1 May 2012

Description

1. The Mental Health (Secondary Mental Health Services) (Wales) Order 2012 makes provision which:
 - a. amends the existing definition of secondary mental health services provided at section 49 of the Measure so that services provided as local primary mental health support services (within the meaning of section 5 of the Mental Health (Wales) Measure 2010 ('the Measure')) in a local authority area are not regarded as secondary mental health services for the purposes of Parts 2 and 3 within that local authority area. This means that the requirements surrounding care coordination and care and treatment planning set out in Part 2 of the Measure do not apply to individuals who are only in receipt of what are regarded - within the local authority area in which those individuals are usually resident - as local primary mental health services. Also, individuals who have received only such services will not be eligible for assessment under Part 3 of the Measure.
 - b. extends the existing definition of secondary mental health services provided at section 49 of the Measure to include certain services provided in other parts of the UK for the purposes of sections 22 (entitlement to assessment) and 23 (assessments: the relevant discharge period) of the Measure. This enables adults who have received such services, but who are now usually resident in Wales, to request assessment under Part 3 of the Measure (provided that they satisfy the eligibility criteria provided in section 22 of the Measure).

Matters of special interest to the Constitutional and Legislative Affairs Committee

2. This Order contains articles which relate to Parts 1, 2 and 3 of the Measure. It is the second piece of subordinate legislation to be made relating to Part 2 of the Measure (the first being the Mental Health (Care coordination and Care and Treatment Planning) (Wales) Regulations 2011), and the second to be made relating to Part 3 (the first being the Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011)¹.

¹ The Mental Health (Primary Care Referrals and Eligibility to Conduct Primary Mental Health Assessments (Wales) Regulations 2012 (relating to Part 1 of the Measure) and the Mental Health (Regional Provision) (Wales) Regulations 2012 (relating to Parts 1 and 3 of the Measure) are both scheduled for consideration by the National Assembly for Wales in May 2012. If the Mental Health (Regional Provision) (Wales) Regulations 2012 are approved by the Assembly and made by the Welsh Ministers, references to 'local authority areas' in this Explanatory Memorandum and Regulatory Impact Assessment should be read as 'regions'.

Legislative background

3. This Order may be made in exercise of powers conferred on the Welsh Ministers by sections 49(4) and 52(2) of the Measure.
4. This Order is subject to the affirmative procedure.

Purpose and intended effect of the legislation

5. This Order affects Parts 2 and Part 3 of the Mental Health (Wales) Measure 2010 - although it uses the definition of Local Primary Mental Health Support Services under Part 1.

Part 1 Local Primary Mental Health Support Services

6. Part 1 of the Measure aims to strengthen the role of primary care in the delivery of mental health services by ensuring that throughout Wales there will be local primary care mental health support services. These will be delivered by Local Health Boards ('LHBs') and local authorities in partnership, and it is expected that these services will operate either within, or alongside, existing GP practices.

Part 2 – Coordination of and Care Planning for Secondary Mental Health Service Users

7. Part 2 of the Measure seeks to provide that all relevant patients (of any age) who have been accepted into secondary mental health services in Wales have a dedicated care coordinator and care and treatment plan, and that service providers (LHBs and local authorities) act in a coordinated manner to improve the effectiveness of the mental health services provided to an individual.

Part 3 – Assessments of Former Users of Secondary Mental Health Services

8. Part 3 of the Measure will enable eligible adults who have been discharged from secondary mental health services, but who subsequently believe that their mental health is deteriorating to such a point as to require such care and treatment again, to refer themselves back to secondary services directly, without necessarily needing to first go to their general practitioner or elsewhere for a referral.
9. To this end, Part 3 of the Measure requires 'local mental health partners' in each local authority area (i.e. the relevant LHB and local authority) to agree arrangements for dealing with requests from former users of secondary mental health services for assessment of their mental health.

Part 6 – Miscellaneous and Supplemental, section 49: Meaning of Secondary Mental Health Services

10. Section 49(1) of the Measure provides that secondary mental health services are:
 - (a) a service in the form of treatment for an individual's mental disorder which is provided under Part 1 of the National Health Service (Wales) Act 2006;
 - (b) a service provided under section 117 of the Mental Health Act 1983;
 - (c) a community care service the main purpose of which is to meet a need related to an adult's mental health;
 - (d) a service provided for a child under Part III of the Children Act 1989 the main purpose of which is to meet a need related to that child's mental health.

12. Section 49(2) goes on to provide that a service is not to be taken as being provided under Part 1 of the NHS (Wales) Act 2006 if that service is provided under:
 - (a) section 41 of that Act;
 - (b) a general medical services contract entered into by a Local Health Board under section 42 of that Act;
 - (c) arrangements for the provision of primary medical services entered into by a Local Health Board under section 50 of that Act;
 - (d) Schedule 1 to that Act.

13. The main effect of section 49(2) is to exclude services provided under a General Medical Services contract from being considered as a secondary mental health service for the purposes of the Measure.

14. The definition provided by section 49 means that, in effect, all services provided to an individual for the treatment of, or to meet needs related to, their mental health - except those which are delivered as part of the General Medical Services contract - are considered to be secondary mental health services. This includes services provided as part of local primary mental health support services.

15. This Order amends the definition of secondary mental health services at section 49 by providing that services and treatments made available and provided as part of a local primary mental health support service (within the meaning of section 5 of the Measure) in a particular local authority area are not to be considered as secondary mental health services for the purposes of Parts 2 and 3 of the Measure in that local authority area.

16. Separately, this Order also provides that services in England, Scotland and Northern Ireland that are the equivalent of secondary mental health services provided in Wales are to be regarded as secondary mental health services for the purposes of sections 22 (entitlement to assessment) and 23 (assessments: the relevant discharge period) in Part 3 of the Measure.

Effect of this Order: Exemption of Local Primary Mental Health Support Services from Meaning of Secondary Mental Health Services

17. This Order has the effect of excluding any service or treatment identified and made available as part of a local primary mental health support service in a local authority area under Part 1 of the Measure from the requirements of Parts 2 and 3 of the Measure in that local authority area. This is because Article 3 provides that any such services or treatment are not to be considered as a secondary mental health service for the purposes of Parts 2 and 3 of the Measure (schemes for the identification and provision of local primary mental health support services are agreed by a Local Health Board and local authority under section 2 of the Measure, or made under section 4 of the Measure).
18. In practice this means that the provisions of Parts 2 and 3 of the Measure are disapplied in respect of any service or treatment which is identified and made available as part of a local primary mental health support service in a local authority area under Part 1 of the Measure. Service providers (LHBs and local authorities) will not be required to appoint care coordinators or provide care and treatment plans for individuals accessing services or treatment which are regarded as local primary mental health support services within a local authority area. Similarly, where individuals have received services delivered as part of local primary mental health support services, they will not be entitled to seek reassessment within 3 years of being discharged from such a service.
19. This ensures that the requirements for care and treatment planning under part 2, which are intended to improve the coordination of mental health services for people with complex or enduring needs, do not apply to services delivered as part of local primary mental health support services, and that the entitlement to request assessment following discharge applies only to those individuals who have previously received mental health services for complex or enduring needs.
20. This approach clarifies the Welsh Government's policy intention, and removes ambiguity as to which services are to be considered as secondary mental health services for the purposes of Parts 2 and 3 of the Measure.

Effect of this Order: Extension

21. This order has the effect of ensuring that people who meet the eligibility criteria provided in section 22 of the Measure and who have previously received what are regarded as secondary mental health services in other parts of the United Kingdom, but who are currently resident in Wales, have the same entitlement to request an assessment as individuals who have previously received secondary mental health services delivered in Wales.

REGULATORY IMPACT ASSESSMENT

Options

22. This section of the Regulatory Impact Assessment (RIA) presents two different options in relation to the policy objectives of the proposed Order (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 RIA.

22. The options are:

- Option 1 - Do nothing;
- Option 2 - Deliver the policy objectives through the Order.

Option 1 – Do nothing

23. This option proposes not making the Order.

24. Failing to make Article 3 of this Order, which excludes services made available and provided under a joint scheme as part of the local primary mental health support services in a particular local authority area from the meaning of secondary mental health services in that local authority area, would mean that many local primary mental health support services would be subject to the requirements surrounding care coordination and care and treatment planning under Part 2 of the Measure. This was not the intended effect of Part 2 of the Measure. Services provided under Part 1 of the Measure are intended to strengthen primary care services through the functions set out in section 5 of the Measure and are expected to provide a bridge between General Practitioner services and secondary mental health services.

25. Local primary mental health support services are intended to increase capacity at primary care level to offer assessment, brief therapy interventions, onward referral, advice and information for people of all ages. If such services were subject to the requirements of Part 2, which are designed to improve care coordination and planning for people with severe and enduring mental health problems, this would increase the administrative processes to a level that is disproportionate for the effective delivery of these services.

26. Not excluding local primary mental health support services from Parts 2 and 3 by Order would not therefore prevent the overall operation of Part 2 or Part 3 of the measure, but it is likely to have a detrimental effect upon the operation of Part 1 which is undesirable.

27. In relation to Part 3 of the Measure, if services provided as part of local primary mental health support services are not excluded from being considered as

secondary mental health services for the purposes of Part 3, then the entitlement to request reassessment directly from secondary mental health services would extend to individuals who had received these services. Again, this was not the intended effect of this Part of the Measure, which was designed to ensure a direct route back to specialist services for those individuals with complex or enduring mental health problems.

28. Article 4 of the Order enables services provided in England, Scotland and Northern Ireland which are the equivalent of secondary mental health services provided in Wales to be regarded as secondary mental health services for certain purposes in Part 3 of the Measure. Failing to make Article 4, would mean that individuals who had previously received such secondary mental health services in another part of the UK, but who were now usually resident in Wales, would not be entitled to request reassessment directly from secondary mental health services.
30. Not providing for this in the Order would not therefore prevent the overall operation of Part 3 of the Measure. It would however leave a disparity in entitlement for people living in Wales based on where in the United Kingdom they had previously received secondary mental health services. This would also impact upon people from Wales who had been sent to a prison outside Wales and whilst in custody had received secondary mental health services. On their return to Wales such individuals would not have a right to request a reassessment of their mental health should they feel it was deteriorating.
31. The Welsh Government therefore considers that not making this Order would significantly undermine the operation and intentions of Parts 2 and 3 of the Measure.

Option 2 – Make Order

32. This option proposes making the Order.
33. Article 3 of the Order will ensure that there is certainty amongst service providers as to which services are to be considered as secondary mental health services, by clarifying that local primary mental health support services identified and made available in a local joint scheme agreed under Part 1 of the Measure are not to be considered as secondary mental health services for the purposes of Parts 2 and 3.
34. This approach will allow the local mental health partners responsible for providing local primary mental health services for an area to consider and determine the mental health services that will be included in their local joint scheme for local primary mental health support services in the knowledge that all other mental health services delivered in the area (other than under the General Medical Services Contract) will therefore be considered to be secondary mental health services. Any services which are not made available and provided under the joint scheme for local primary mental health support services will be subject to the requirements of Parts 2 and 3 of the Measure.

35. This will provide local mental health partners with flexibility to build upon the primary care-based services which are already being provided (except those delivered under the General Medical Services Contract), and to design appropriate pathways as part of a continuum of mental health service provision.
36. This approach will also serve to avoid unnecessary or excessive bureaucracy associated with service delivery within local primary mental health support services.
37. This Order is considered central to the operation of the Measure, but there are some limited risks associated with making it: local determination of what will be included in the local mental health partners' joint scheme for the delivery of local primary mental health support services, and therefore locally determining what will be considered secondary mental health services, could lead to variation between different parts of Wales.
38. It could also be the case that an intervention offered as a treatment in relation to a person's mental health is delivered as part of a Part 1 local primary mental health support service in one area of Wales, but in another area it is not and is therefore delivered as a secondary mental health service. This would mean that in one area the requirements for the appointment of a care coordinator and production of a care plan would apply, along with the right to request assessment under part 3 when discharged from the service, and in the other it would not.
39. However, it is considered unlikely that local mental health partners would agree that the cornerstones of community mental health services for people with severe and enduring mental health problems would be delivered through a Part 1 scheme, and it is such specialist services that the requirements of Parts 2 and 3 are intended to support.
40. To further mitigate any risk the Welsh Government will issue further guidance to service providers in relation to this matter.
41. Article 4 of this Order will ensure that people who have previously received services which are the equivalent of secondary mental health services provided in Wales in other parts of the United Kingdom, but who are currently resident in Wales, receive the same right to request an assessment as individuals who have previously received secondary mental health services delivered in Wales. Examples may include individuals who have travelled to other parts of the United Kingdom for employment or on holiday and have required treatment from a community mental health team, or admission to a psychiatric hospital, or prisoners who have been in prison outside of Wales and whilst in custody have received secondary mental health services, such as Prison Inreach, or have needed to be admitted to a psychiatric hospital.
42. This Article also ensures that where an individual has moved to reside in Wales, having previously been resident elsewhere in the United Kingdom and having received services in that place which are the equivalent of secondary mental health services provided in Wales, they have the same right to request an

assessment as a former recipient of Welsh secondary mental health services. This Article will ensure equity of access for such individuals.

Costs and benefits

43. The costs associated with developing and delivering local primary mental health support services under Part 1 of the Measure, care and treatment planning under Part 2 and assessments of former users of secondary mental health services under Part 3 are set out in the Explanatory Memorandum to the Measure². This Order will not impact on the costs set out in that document.

Costs and benefits of Option 1 (do nothing)

44. The potential costs to LHBs and local authorities in *not* making this Order arise from their being required to implement the care and treatment planning duties of Part 2 for local primary mental health support services. This would be likely to increase the time required for care and treatment planning, which would have the effect of reducing time and available resources for delivering interventions. Such a possible effect runs counter to the principle of proportionality for care and treatment planning as set out in the Code of Practice to Parts 2 and 3 of the Measure.

45. In relation to Part 3, costs may also arise if service providers are required to conduct assessments of individuals who have previously received services delivered as part of local primary mental health support services. Other potential costs relate to the inability of people who, whilst now living in Wales, have previously received secondary mental health services elsewhere in the United Kingdom: lack of entitlement to assessment could result in the possibility of potential for intervention being delayed, with more intensive and costly interventions perhaps being required if the individual's condition were to further deteriorate as a result of their not being able to access prompt assessment under the Part 3 provisions.

46. There are no discernable benefits in not making the Order.

Costs and benefits of Option 2 (make Order)

47. It is not anticipated that any additional costs beyond those set out in relation to Parts 1, 2 and 3 in the Explanatory Memorandum which accompanied the Measure would be incurred by local authorities or LHBs as a result of this Order.

48. The intended effect of the Measure is that the requirements of Part 2 should ensure effective coordination and planning of care for people with severe mental health problems whose complex care needs could not be met in a primary care setting, and that access to assessment under Part 3 would be available to

² <http://www.assemblywales.org/bus-home/bus-legislation/bus-legmeasures/business-legislation-measures-mhs-2.htm>

individuals who had received specialist services for severe or enduring mental health problems.

49. Providing entitlement to request an assessment to individuals currently resident in Wales who previously received secondary mental health services elsewhere in the United Kingdom is not expected to introduce a significant additional burden upon services.

Summary

50. **Option 2 (make Order)** best meets the Government's objectives.

Consultation

51. In winter 2011/12 the Welsh Government undertook a formal 12 week consultation on the Order. 36 written responses were received, including from Local Health Boards in Wales.
52. A detailed consultation report has been published on the Welsh Government's website, but a summary of the views received is set out in the following paragraphs.
53. Stakeholder opinion was divided in regard to whether the Order provided certainty about what would be considered secondary mental health services, with 50% of those who responded to the question believing that it would, and 50% disagreeing. Many respondents observed that such certainty would only be provided when local primary mental health support schemes had been agreed by LHBs and local authorities. Several respondents suggested that unless the Welsh Government issued clear guidance regarding those services it considered as appropriate for delivery as local primary mental health support services and those which it considered should more appropriately be delivered within secondary services, a 'postcode lottery' may emerge, with different services being provided in primary or secondary care in different areas.
54. By contrast, several stakeholders argued that it was correct that service providers should be able to determine for themselves those services which would be delivered within primary or secondary care. These respondents felt that local service planners and providers would be best-placed to understand the demographics, characteristics and demands of local populations and draw up local primary mental health support service schemes which were appropriate to those circumstances. A number of stakeholders also felt that service providers should not include services within their primary care scheme simply to avoid the care coordination and care and treatment planning requirements of Part 2 of the Measure. Several asked that the Welsh Government include a clear statement on this matter in its forthcoming guidance on primary/secondary mental health services.

55. The Welsh Government agrees that, ultimately, certainty as to which mental health services are to be delivered within secondary mental health services and which as part of local primary mental health support services will only be provided when local primary mental health support service joint schemes have been agreed for each LHB region by LHBs and local authorities. However, the Welsh Government is content that the approach proposed in the Order provides a workable mechanism whereby mental health service providers are able to determine at a local level which of the services they deliver are to be considered as secondary mental health services, and as such subject to the provisions of Parts 2 and 3 of the Measure. Consultation responses indicate that this approach has adequate support in principle, and recognises that many of the issues raised by respondents relate to uncertainty at the time of consultation as to which services might be subsequently be delivered with primary or secondary care in local areas under such arrangements.
56. On 20 March 2012, the Welsh Government published *Policy Implementation Guidance on Local Primary Mental health Support Services and Secondary mental Health Services for the Purposes of the Mental Health (Wales) Measure 2010 and Related Subordinate legislation*³. This document provides guidance to LHBs and local authorities as to what is meant by 'local primary mental health support services' and 'secondary mental health services' for the purposes of the Measure, and the subordinate legislation which underpins it; the principles which informed the development of the Measure and the aims the legislation is seeking to achieve, and examples of the types of services the Welsh Government would consider to be most appropriately delivered, and conditions which might most appropriately be managed, within primary and secondary care settings under Parts 1, 2 and 3 of the Measure.
57. Given that this guidance addresses many of the concerns raised by some stakeholders in their consultation responses, providing greater clarity and illustrative examples around primary and secondary services, and in the light of the fact that there was no majority against introducing the legislation (and that over 90% of respondents believed that the Order should be made), officials believe it is appropriate to lay the Order before the National Assembly for Wales for its consideration.

Competition assessment

58. The competition filter is required to be completed if the subordinate legislation affects business, charities and/or the voluntary sector. The filter is therefore not required in respect of this Order.

Post implementation review

59. Section 48 of the Measure places the Welsh Ministers under a duty to the review the operation of Measure, and to publish a report of the findings of the review.

³ <http://wales.gov.uk/topics/health/publications/health/guidance/measure/?lang=en>

60. The report must be published no later than four years after the commencement of the principal provisions of Parts 1, 2, 3 and 4 of the Measure.
61. It is intended that the review relating to Parts 1, 2 and 3, will take account of this Order.
62. The reports of such reviews must be placed before the National Assembly for Wales, in accordance with section 48(9) of the Measure.