

Explanatory Memorandum to:

The Regulated Services (Penalty Notices) (Wales) Regulations 2019

This Explanatory Memorandum has been prepared by the Health and Social Services Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

The Regulated Services (Penalty Notices) (Wales) Regulations 2019

I am satisfied that the benefits justify the likely costs.

Julie Morgan
Deputy Minister for Health and Social Services

26 April 2019

Part 1 – OVERVIEW

1. Description

The Regulation and Inspection of Social Care (Wales) Act 2016 (“the 2016 Act”) reforms the regulation and inspection regime for social care in Wales and provides the statutory framework for the regulation and inspection of social care services and the social care workforce. It enables the Welsh Ministers to put in place a number of items of subordinate legislation through the making of regulations, the publication of guidance and the issuing of codes of practice.

This Explanatory Memorandum relates to *The Regulated Services (Penalty Notices) (Wales) Regulations 2019* (‘the 2019 Regulations’) which will come into force on 1 July 2019. These Regulations prescribe the details of a penalty notice system, whereby the regulator - the Care Inspectorate Wales (CIW) - may issue a penalty to providers and responsible individuals (RIs) of regulated services in lieu of prosecution, should certain regulatory breaches occur.

This Explanatory Memorandum and Regulatory Impact Assessment relate to penalty notices as may be issued to all services regulated under the 2016 Act. These are:

- Care home services;
- Secure accommodation services;
- Residential family centre services;
- Domiciliary support services;
- Adoption services;
- Fostering services;
- Advocacy services; and
- Adult placement services.

The 2019 Regulations will replace the current *Regulated Services (Penalty Notices) (Wales) Regulations 2017* which only apply to care home, secure accommodation, residential family centre and domiciliary support services.

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

No specific matters have been identified.

3. Legislative background

The powers enabling the 2019 Regulations to be made are contained in section 52 of the 2016 Act. Section 52 is a regulation making power to enable Welsh Ministers to prescribe offences in respect of which a penalty notice may be issued. Only offences committed under sections 47, 48 and 49 of the 2016 Act, and under Regulations made under sections 45 and 46 of the 2016 Act, may be so prescribed.

Further details about the relevant sections of the 2016 Act are set out below:

- section 47 - a person who knowingly makes false or materially misleading statements in relation to:
 - an application for registration as a service provider,
 - an application for variation or cancellation of registration,
 - an annual return,
 - responding to a requirement to provide information imposed by the Welsh Ministers;
- section 48 - failure of a service provider to submit an annual return in time;
- section 49 - failure to comply with a requirement to provide information imposed by the Welsh Ministers by:
 - a service provider;
 - a responsible individual;
 - a person employed by or otherwise working for a service provider; and
 - any person who has held any of these positions.
- Regulations made under section 45 of the 2016 Act detail which of the breaches of the requirements in regulations made under section 27 of the 2016 Act – requirements on regulated service providers – are criminal offences.
- Regulations under section 46 of the 2016 Act detail which of the breaches of the requirements in regulations made under section 28 of the 2016 Act - requirements on responsible individuals – are criminal offences.

A number of regulations made under section 45 and 46 of the 2016 Act provide that it is an offence to fail to comply with specified provisions of those regulations, including:

- *The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017,*
- *The Regulated Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019,*
- *The Regulated Advocacy Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019,*
- *The Adult Placement Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019 and*
- *The Regulated Adoption Services (Service Providers and Responsible Individuals) Regulations 2019.*

The 2019 Regulations made under section 52 of the 2016 Act, set out which of the offences listed in the above regulations may be discharged by the service provider or responsible individual (as applicable) by payment of a penalty.

The purpose of the penalty notice is to offer the recipient of the notice the opportunity to discharge any liability for the offence by paying the sum specified in the notice. If the

person pays the sum specified in the notice as required, the person cannot be prosecuted for the offence to which the notice relates.

The 2019 Regulations are being laid under the negative procedure.

4. Purpose & intended effect of the legislation

The purpose of the 2019 Regulations is to set out the details of a penalty notice system, enabling CIW to issue a penalty notice to providers and responsible individuals of all services regulated under the 2016 Act, should certain offences occur.

The intention is to create a more flexible system of regulation so that CIW has a full range of powers at its disposal to deal with a failure by service providers and responsible individuals to comply with the requirements imposed on them under the 2016 Act and associated regulations.

Section 52(6) of the 2016 Act states that Welsh Ministers may by regulations make provision –

- as to the form and content of the penalty notices;
- as to the sum payable under a penalty notice and the time within which it is to be paid (including provision permitting a different sum to be payable in relation to different offences and according to the time by which it is paid);
- determining the ways in which a sum may be paid;
- as to the records to be kept in relation to penalty notices;
- about the circumstances in which a penalty notice may be withdrawn, including provision about –
 - the repayment of any sum paid before a notice is withdrawn, and
 - the circumstances in which proceedings for an offence may not be brought despite the withdrawal of a notice.

The approach in the 2019 Regulations is to provide clarity to both the regulator and the recipient of the penalty notice as to the way in which the scheme will operate.

Penalty amounts vary depending on the nature of the offence committed, but are currently capped at a maximum of two and a half times level 4 on the standard scale (Level 4 is currently set at £2,500).

Prescribing the amounts by reference to the standard scale means the 2019 Regulations will not need to be amended should the level change as a result of amendments being made to the Criminal Justice Act 1982.

5. Consultation

The suite of Regulations made under the 2016 Act were developed in three overlapping phases. During phase two of implementation, *The Regulated Services (Penalty Notices) (Wales) Regulations 2017* established a penalty notice system for care home services, domiciliary support services, secure accommodation services and residential family centre services. Those regulations were consulted on between 2 May and 15 July 2017. A summary of the comments that were made and the Welsh Government's response to

these is set out in the consultation summary report¹ published on the Welsh Government website on 21 November 2017.

The proposal to extend the penalty notice system to phase three services (adoption, fostering, adult placement and advocacy services) was also highlighted within the consultation documents for each set of Regulations at phase three of implementation.

The consultations for the regulations in relation to regulated fostering, adult placement and regulated advocacy services were held between 24 May and 16 August 2018. The regulations in relation to regulated adoption services were consulted on between 4 September and 27 November 2018.

The consultation summary reports have been published on the Welsh Government website at <https://gov.wales/consultations>.

¹ <http://gov.wales/consultations/healthsocialcare/regulation-and-inspection-act/?lang=en>

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option one: do not implement a penalty notice scheme for the remaining regulated services under the 2016 Act²

Under this option there would not be a penalty notice scheme in relation to adoption, fostering, adult placement and advocacy services under the 2016 Act. However, there would be a penalty notice scheme for care home services, domiciliary support services, secure accommodation services and residential family centres, as set out in the *Regulated Services (Penalty Notices) (Wales) Regulations 2017*, which are already in force.

Option two: create regulations which provide detail about how the penalty notice scheme will operate in relation to all regulated services.

Under option two, the Welsh Government would establish a penalty notice scheme for all regulated services under the 2016 Act and Regulations would be created that set out:

- the offences that can be dealt with via a penalty notice;
- the amount that can be charged for each of the offences;
- the form the penalty notice must take and the information that must be included in it;
- the payment methods that can be used to pay the penalty;
- the records CIW must keep in relation to issuing penalty notices; and
- the circumstances in which a penalty notice can be withdrawn.

Costs

Option one: do not implement a penalty notice scheme for the remaining regulated services under the 2016 Act

Under option one there would be no additional costs to the regulator or sector in relation to adoption, fostering, advocacy or adult placement services. The costs in relation to care home services, domiciliary support services, secure accommodation services and residential family centre services are set out in the Regulatory Impact Assessment for *the Regulated Services (Penalty Notices) (Wales) Regulations 2017* which can be accessed here: <http://www.assembly.wales/laid%20documents/sub-ld11334-em/sub-ld11334-em-e.pdf>

Option two: create regulations which provide detail about how the penalty notice scheme will operate in relation to all regulated services

Under this option there would be obvious costs to providers and RIs that receive penalty notices as a result of non-compliance with certain requirements. The penalty amounts would be set out in the 2019 Regulations. Section 54 of the 2016 Act restricts

² These are adoption services, fostering services, advocacy services and adult placement services.

the amount of the sum payable to two and a half times level 4 on the standard scale. Level 4 on the standard scale is currently £2,500.

The penalties listed in the 2019 Regulations would range from one to two and a half times level 4 on the standard scale, which means the penalties would range from £2,500 to £6,250 at the moment.

The frequency of issuing such fines would depend on how CIW implements the scheme. The [Securing Improvement and Enforcement policy](#) sets out CIW's proportionate approach to enforcement. The issuing of penalty notices is one of a suite of enforcement actions that is available to CIW. However, the issuing of a penalty notice will depend on the particular circumstances of each case as to whether this is most appropriate or whether an alternative enforcement action would be more appropriate.

Therefore, CIW will continue to apply the principles of its existing inspection process that enables providers the opportunity to remedy any non-compliance identified during an inspection before enforcement action is taken. To gauge the number of fines that may be issued under the new system we have looked at the level of non-compliance for similar offences under the Care Standards Act 2000 ("the 2000 Act") in 2016-17.

The 2000 Act was the legislative framework previously in operation. The table below shows the provisions creating penalties under the 2016 Act against the closest corresponding regulations in the 2000 Act and the number of non-compliance notices issued against these regulations in 2016-17. The services highlighted in bold relate to the additional regulated services to be included in the scope of the penalty notices scheme:

<i>General nature of the offence</i>	<i>Amount of penalty</i>	<i>Existing closest corresponding Regulation under the 2000 Act</i>	<i>No. of non-compliance notices issued in 2016-17</i>	<i>No. of non-compliance persisting over 12 months</i>	<i>Amount, if penalty notice issued</i>
Making false statements	An amount corresponding to two and a half times level 4 on the standard scale(1)	Adult care homes: regulation 7 Children's homes: regulation 6 Domiciliary support services: regulation 8 Fostering services: 8	None	None	£0
Failure to submit an annual return	An amount corresponding to level 4 on the standard scale	N/A as this is a new offence	N/A as this is a new offence	N/A	£0

Failure to provide information	An amount corresponding to level 4 on the standard scale	Adult care homes: regulations 11, 38, 39,40 Children's homes: regulations 10, 29, 36, 37 Domiciliary support services: regulations 12, 26, 27, 28 Fostering services: 9, 43, 45, 46.	4 for adult care homes	1 for adult care homes	£2500
Contravention of, or failure to comply with, requirements in relation to the statement of purpose	An amount corresponding to two and a half times level 4 on the standard scale	Adult care homes: regulation 4 Children's homes: regulation 4 Domiciliary support services: regulation 4 Fostering services: 3	1 for adult care homes 2 for children's homes 2 for domiciliary support services	1 for adult care homes 1 for domiciliary support services	£12,500
Contravention of, or failure to comply with, requirements in relation to the financial position of the service	An amount corresponding to level 4 on the standard scale	Adult care homes: regulation 26(2) Children's homes: regulation 35 Domiciliary support services: regulation 25 Fostering services: 44	None	None	£0
Contravention of, or failure to comply with, requirements to have in place specified	An amount corresponding to level 4 on the standard scale	Adult care homes: regulation 13(2), 23(1)	3 for adult care homes: 2 for children's homes	None	£0

policies and procedures		Children's homes: regulation 17, 11 Fostering services: 44			
Contravention of, or failure to comply with, requirements in relation to the provision of information about the service	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 5 Children's homes: regulation 4 Domiciliary support services: regulation 5 Fostering services: 4	None	None	£0
Contravention of, or failure to comply with, requirements in relation to the provision of a service agreement	An amount corresponding to level 4 on the standard scale	Adult care homes: regulation 5(1)(c) Children's homes: regulation 4 Domiciliary support services: regulation 5 Fostering services: 4	None	None	£0
Contravention of, or failure to comply with, requirements in relation to the fitness of staff	An amount corresponding to two and a half times level 4 on the standard scale	Adult care homes: regulation 19 Children's homes: regulation 26 Domiciliary support services: regulation 15 Fostering services: 20	6 for adult care homes 6 for domiciliary support services	None	£0

Contravention of, or failure to comply with, requirements in relation to the provision of information for staff	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 18(4) Children's homes: regulation 27 Domiciliary support services: regulation 16 Fostering services: 21	None	None	£0
Contravention of, or failure to comply with, requirements in relation to the making and maintenance of records	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 17 Children's homes: regulation 28 Domiciliary support services: regulation 20 Fostering services: 22	1 for adult care homes	None	£5000
Contravention of, or failure to comply with, requirements in relation to notifications to the service regulator	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulations 11, 38, 39,40 Children's homes: regulations 10, 29, 36, 37 Domiciliary support services: regulations 12, 26, 27, 28 Fostering services: 9, 43, 45, 46	None	None	£0
Contravention of, or failure to comply with, requirements in relation to	An amount corresponding to two and a half times level 4 on the	N/A as this is a new offence	N/A as this is a new offence	N/A	unknown

the duty of a responsible individual to appoint a manager	standard scale				
Contravention of, or failure to comply with, requirements in relation to the duty of a responsible individual to report the adequacy of resources	An amount corresponding to two times level 4 on the standard scale	N/A as this is a new offence	N/A as this is a new offence	N/A	unknown
Contravention of, or failure to comply with, requirements in relation to the making by a responsible individual of other reports to the service provider	An amount corresponding to two times level 4 on the standard scale				
Contravention of, or failure to comply with, requirements in relation to the preparation by a responsible individual of a report in respect of a quality of care review	An amount corresponding to two times level 4 on the standard scale	[this is applicable currently to the registered person] Adult care homes: regulation 25 Children's homes: regulation 33 Domiciliary support services: regulation 23 Fostering services: 42	[this is applicable currently to the registered person] 9 for adult care homes 3 for children's homes	None	£0
Contravention of, or failure to comply with, requirements in relation to the preparation by a responsible individual of a statement of	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 27 Children's homes: regulation 32 Domiciliary	11 for adult care homes	1 for adult care homes	£5000

compliance with the requirements as to standards of care and support		support services: regulation 23 Fostering services: 42			
Contravention of, or failure to comply with requirements in relation to the responsible individual's duty to make notifications to the service regulator	An amount corresponding to two times level 4 on the standard scale	N/A as this is a new offence	N/A as this is a new offence	N/A	
			Total = 50		£25,000

The table shows that the total amount for fines for all services³ over a year would be £25,000, if CIW focussed on non-compliance that persisted over 12 months. However, these fines relate to services which are already included in *The Regulated Services (Penalty Notices) (Wales) Regulations 2017*, which are already in force.

In relation to the additional services to be included in *The Regulated Services (Penalty Notices) (Wales) Regulations 2019*, there were no breaches which might have led to the issuing of a penalty notice. However, this table does not take into account some of the new offences under the 2016 Act or the offences that could be brought against Advocacy services which are a newly regulated service under the 2016 Act. As there are currently only two advocacy service providers that are likely to be required to register under the 2016 Act however, costs are likely to be minimal. Due to the lack of data it is not possible to estimate the level of non-compliance against these requirements.

Benefits

Option one: Do not implement a penalty notice scheme for the remaining regulated services under the 2016 Act

For some providers there would be cost savings in not having to pay fines for non-compliance of certain requirements. For CIW, there would be a small saving in terms of staff time, as the regulator would be able to focus their efforts more strongly on inspecting services and spend less time on administering a penalty notice system. However, implementing a penalty notice scheme could arguably reduce the number of prosecutions brought forward, as providers may opt to pay the penalty rather than go through the lengthy process of criminal proceedings.

³ All services except Advocacy services which are a new type of regulated service and were not previously regulated under the Care Standards Act 2000.

Option two: create regulations which provide detail about how the penalty notice scheme will operate in relation to all regulated services

Establishing a penalty notice scheme for all regulated services is in keeping with the policy intention of ensuring consistency across the range of regulated services. A penalty notice scheme provides CIW with a more flexible and proportionate system of regulation so that the regulator has a full range of powers at its disposal to deal with regulatory breaches. Sometimes there may be a need for prosecution as an alternative to civil enforcement, to deal with more serious offences under the 2016 Act. At other times there may not be an overriding desire to pursue prosecution which is expensive and consumes valuable time and resources in preparing for prosecution. In these circumstances, the regulator can opt to issue a penalty notice which sends a clear message to providers and RIs who are failing to comply with their duties; this goes further than the issuing of a non-compliance notice under civil enforcement powers. Creating regulations about penalty notices would add clarity about the way in which the penalty notice system would operate. It would benefit both CIW and service providers who would have a better understanding of the circumstances in which it would be appropriate to issue a penalty notice, the amount that can be charged, the time limit within which to pay the penalty and the information the notice should contain.

Risks

Option one: Do not implement a penalty notice scheme for the remaining regulated services under the 2016 Act

Without a penalty notice scheme for the remaining regulated services there is a risk that unscrupulous providers who continually fail to comply with the regulations will not make the necessary improvements because the current enforcement mechanisms do not act as a sufficient deterrent to non-compliance. There is also a risk of not fulfilling the policy intention of the Regulation and Inspection of Social Care (Wales) Act 2016 to ensure a consistent approach across all regulated services.

Option two: create regulations which provide detail about how the penalty notice scheme will operate in relation to all regulated services.

There is a risk that providers could challenge the penalty notices issued which would result in CIW having to take forward criminal proceedings, which is costly and time-consuming. The risk has been mitigated by developing the [Securing Improvement and Enforcement policy](#) which sets out CIW's proportionate approach to enforcement, of which the issuing of penalty notices is a part. Service Providers and Responsible Individuals are likely to be given notice and time to address non-compliance before penalty notices are issued.

Conclusion

The preferred option is option two in all cases.

The competition filter test

Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	Yes*
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	Yes*
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	Yes*
Q4: Would the costs of the regulation affect some firms substantially more than others?	Yes
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector categorised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

*only in relation to advocacy services.

The filter test shows that it is not likely that the regulation will have any detrimental effect on competition; therefore a detailed assessment has not been conducted.

Post implementation review

CIW will monitor the implementation of these Regulations following their coming-into-force date of July 2019.