

Number: WG13632



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## Consultation – summary of responses

### Consultation response report in respect of the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

Date of issue: September 2011



# Consultation response report in respect of the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

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## **Part 1 – Background**

### **Background to independent advocacy in the Mental Health Act 1983**

1. The Mental Health Act 1983 (“the 1983 Act”) governs the compulsory treatment of certain people who have a mental disorder. The Mental Health Act 2007 amended the 1983 Act, and one of the key amendments was the introduction of independent mental health advocacy.
2. In Wales these new provisions began in November 2008, and from that date there has been a requirement for independent mental health advocacy services to be available to provide support for ‘qualifying patients’ who are receiving assessment or treatment under the 1983 Act.
3. The Mental Health (Wales) Measure 2010 (“the Measure”) has recently been passed by the National Assembly for Wales, and further amends the 1983 Act so as to provide for an expanded statutory scheme in Wales of independent mental health advocacy, both for patients subject to compulsion under the 1983 Act, and those in 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.
4. It is expected that this expanded advocacy scheme will come into force in two phases in Wales: the provisions relating to the expansion of the advocacy scheme to patients detained under sections 4 and 5(2) and 5(4) of the Mental Health Act 1983 will commence in January 2012, and the expansion of the advocacy scheme to informal inpatients will commence in April 2012.
5. The Welsh Ministers have the power to make certain regulations relating to independent mental health advocacy under the Mental Health Act 1983.

### **Background to consultation**

6. Welsh Government officials, on behalf of the Welsh Ministers, undertook a programme of consultation on the draft regulations relating to independent mental health advocacy. The consultation period ran from 21 February to 16 May 2011.
7. The consultation document was published on the Welsh Government’s Internet site. There were also 12 consultation events which took place during March and April on these regulations. The same events also considered the draft regulations relating to care co-ordination and care and treatment planning, and the assessment of former users of mental health services, under Parts 2 and 3 of the Measure.

### **Developing the Regulations for consultation**

8. Following the introduction of the Measure into the National Assembly for Wales, officials in the Welsh Government began developing the policy and content for the draft regulations. This took account of the changes to the Measure made when it was considered by the Assembly.

The draft policy for the regulations was developed in discussion with independent mental health advocacy planners within each Local Health Board, as well as independent mental health advocates and advocacy organisations.

## **Part 2 – The Consultation**

### **The consultation process**

9. The consultation document asked for feedback on the draft Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011, and accompanying draft Explanatory Memorandum and Regulatory Impact Assessment.

10. Respondents were invited to consider specific questions about the draft regulations and documents, and were also encouraged to make any other points relating to them that they considered necessary.

11. The consultation period ran for just over 12 weeks, during which time the Welsh Government secured the active participation of people working in the fields of mental health and learning disability care, of service users and service user representative bodies, the third sector, the private sector, and local government. In addition to encouraging written consultation responses, workshops, study days and consultation events were also held. Welsh Government officials have continued this dialogue since the consultation closed.

12. Welsh Government officials met with around 600 service users, carers, mental health professionals and others during the consultation period at a range of events and study days. Not all of these individuals commented directly on this consultation.

13. The Welsh Government promoted the consultation document via direct mailings to contacts within the NHS and Local Social Services Authorities, the third sector and independent sector, as well as individuals who had registered to receive information relating to the Measure. The consultation documents were also published on the Welsh Government's website.

### **Responses received**

14. Responses were received from the individuals who participated in the consultation events and study days (as above estimated to be around 600 people).

15. In addition, 92 written responses were also received from a variety of stakeholders, including advocacy providers, service user representative bodies, NHS organisations, local authorities and professional bodies. Many of these written responses were informed by workshops organised by those bodies and organisations and as such reflected the views of a number of stakeholders. A list of these respondents is given at Annex A.

### **Findings from consultation**

16. The Welsh Government's response to this consultation and its proposals for the regulations are set out in the following pages.

17. This report does not address any consultation responses which:
- a) Commented on the Mental Health (Wales) Measure 2010, the Mental Health Act 1983, or indeed wider issues relating to mental health care and treatment.
  - b) Were outside the scope of the regulations.
  - c) Referred to typographical errors that have been corrected in the final version.

## **Part 3 – Response To Consultation Questions**

18. The consultation document asked eight specific questions on the regulations and Explanatory Memorandum, and two more general questions (see Annex B).

### **Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011**

19. These 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.

#### **Responsibility for provision of advocacy**

20. Since November 2008 Local Health Boards (LHBs) have been responsible for making arrangements for independent mental health advocacy. Question 1 of the consultation asked whether LHBs should continue to have this responsibility, Question 2 asked whether the arrangements set out in the regulations for making these arrangements were clear.

21. 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, and that the arrangements set out in the regulations were clear.

22. Amongst the views expressed by those who supported a continuation of the existing arrangements were that the current system seemed to be working successfully. Respondents in favour of continued LHB commissioning also felt that these bodies were most appropriate as they were aware of the characteristics and demography of their area and the particular issues to be taken into account in providing a service appropriate to the diverse needs of the local population. Several service providers and commissioners stated that experience to date had demonstrated that this existing arrangement had provided a robust, locally-accountable and operationally-independent advocacy service.

23. Several respondents who did not support a continuation of the existing arrangements expressed concern that there may be a perceived conflict of interest in LHBs commissioning an advocacy service which is intended to hold that service to account and, on occasions, to challenge it. Respondents felt it was important that the commissioning body should be seen to be completely independent of the organisation providing the advocacy service and that this independence may be perceived as compromised if the LHB were responsible for selecting, appointing and funding the advocacy service. Such a perception, it was felt, could in the worst case lead to a loss of confidence amongst clients in the independence or effectiveness of the advocacy service. A range of suggestions were proposed regarding organisations which might take on this role instead; these included local authorities, community health councils, or the Welsh Government itself.

## **Response**

24. As the majority of respondents wished to see a continuation of existing arrangements, whereby LHBs have responsibility for the provision of independent mental health advocacy services, the Welsh Government will not be amending the regulations in this regard. However, given the range of views expressed, particularly in relation to perceptions that a service commissioned by an LHB may not be truly independent of that body (a situation which current advocacy providers and service planners contend does not exist in practice), the Welsh Government will amend the guidance it provides to LHBs and advocacy providers to emphasise the importance of ensuring operational independence between the service provider and commissioner. The Welsh Government will also continue to monitor existing and future independent mental health advocacy provision arrangements and report on these as part of the review of the Measure which will be undertaken under section 48<sup>1</sup>.

## **Appointment requirements for independent mental health advocates**

25. The consultation sought stakeholders' views on whether they felt the appointment requirements for independent mental health advocates set out in the regulations were sufficiently robust. These requirements state that the individual must have appropriate training and/or experience and be of integrity and good character, as set out in any code or guidance which the Welsh Ministers may issue.

26. The majority of respondents felt that these requirements were appropriate; however a number of issues were raised in response to this question. 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).

27. Almost all consultees who responded to this question felt that the Welsh Government should make specific requirements in relation to training and qualifications for advocates – including specifying particular qualification(s), and timescales within which these should be attained. Some stakeholders also felt it was important that advocates had understanding of specific mental disorders, such as dementia.

## **Response**

28. In response to concerns raised in relation to the provision of Welsh-speaking advocates, the Welsh Government has amended regulation 3(4) to add linguistic requirements to those diverse needs that LHBs should take into consideration when

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<sup>1</sup> Section 48 places the Welsh Ministers under a duty to review the operation of the Measure for the purposes of publishing one or more reports. A report must be published within four years of the commencement of the principal provisions of Part 1, and also of Parts 2, and 3, and 4 of the Measure. A review preceding publication of a report may be commenced at any time, provided that the Welsh Ministers are satisfied that sufficient time has passed since the relevant Part or provision of the Measure has been commenced. A copy of a report must be laid before the National Assembly for Wales.

ensuring that independent mental health advocates are available to qualifying patients in their area.

29. As far as training and experience requirements are concerned; once the IMHA regulations have been agreed by the National Assembly, the Welsh Government will issue a revised version of its *Delivering the Independent Mental Health Advocacy Service in Wales* guidance to LHBs. This will set out specific training and qualification requirements for advocates, including a requirement that all individuals who are delivering the independent mental health advocacy scheme in Wales should have either attained, or be working towards, the City and Guilds National Advocacy Qualification Level 3 Certificate in Independent Advocacy. The guidance will also recommend that all independent mental health advocates should, as a minimum requirement, have successfully completed the IMHA specialist Level 4 unit of the Qualification, or have attained this unit within 18 months of their appointment as an IMHA. In addition, the guidance will require that independent mental health advocacy services who provide IMHAs on behalf of LHBs in Wales should also have either attained, or be working towards achieving, the Action for Advocacy Quality Performance Mark.

### **Independence requirements for IMHAs**

30. Stakeholders were asked whether they agreed with the independence requirements set out in draft regulation 5, which stated that the IMHA must be independent of any person concerned with the medical treatment of the patient, or any person who has made the request for an advocate.

31. 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.

### **Response**

32. 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. To address this, an additional provision has been added to the appointment requirements at regulation 4(1)(c) to make it clear that LHBs may not appoint a member of their own staff (i.e. who is appointed under a contract of service) as an IMHA.

### **IMHAs powers to visit and interview**

33. The consultation sought the views of consultees on whether they agreed that in relation to patients detained under section 4 of the Mental Health Act 1983, 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. In addition, stakeholders were also asked

whether they thought that the IMHA should be able to visit and interview any persons other than those professionally concerned with the medical treatment of the patient.

34. 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. As for others the IMHA should be able to visit and interview; many stakeholders felt that the advocate should have a legal power to visit and interview the patient's relatives or 'significant others' (e.g., carers, friends); any individuals who had provided care or support to the patient from a third sector body (such as a mental health charity or service user organisation); the patient's GP; any members of the emergency services where a patient was admitted following contact with them; any person named in an advanced directive, and the patient's care coordinator where appropriate.

### **Response**

35. The Welsh Government is satisfied that the arrangements for those persons whom the IMHA may visit and interview are appropriate and do not require amendment following consultation. It was apparent from the responses received that stakeholders took the view that a wider range of people than those professionally involved in the patient's medical treatment should be included in the legislation. However, the wording of the question did not make it clear that the legal power vested in the IMHA in relation to those medically involved with the patient is a safeguard designed to ensure that the advocate is able to visit and interview any professional involved in their treatment where they may be experiencing difficulty in gaining access to, or cooperation from, any such person. 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. Had the question been phrased in a way which made it clearer that the IMHA is not limited to visiting and interviewing those professionally involved in the patient's medical treatment, but in practice is able to visit and interview any other person they believe to be appropriate (although such persons cannot be compelled to speak with the IMHA if they do not wish to), the responses received may have been different. The Welsh Government therefore intends to clarify the guidance it issues in relation to the expanded IMHA scheme, to make it clear that IMHAs may, and in practice do, visit and interview a range of persons beyond those professionally concerned with the patient's medical treatment.

### **Explanatory Memorandum and Regulatory Impact Assessment**

36. The Standing Orders of the National Assembly for Wales require that an Explanatory Memorandum be laid before the Assembly to accompany Regulations; in some cases the Explanatory Memorandum must include a regulatory impact assessment (RIA). Amongst other matters an RIA will include an option appraisal, setting out the costs, benefits and risks of making the proposed legislation.

37. A draft Explanatory Memorandum (including an RIA) was prepared for the consultation, and views were sought as to whether –

- a) There was sufficient information in the Explanatory Memorandum to understand the purpose and effect of the Regulations.
- b) Respondents agreed with the preferred option in the RIA (i.e. Option 2, making the regulations).
- c) Respondents were content with the estimated costs/benefits regarding the implementation of the Regulations.

38. Almost all respondents confirmed that they 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.

39. Of the small number of comments which were received in relation to these questions, almost all related to the costs set out in the RIA; several consultees sought assurance that the Welsh Government funding to support the scheme would be ring fenced, another expressed concern that rural areas should not be disadvantaged in any funding mechanism, whilst one respondent asked whether any funding would be available to support the training of IMHAs.

### **Response**

40. The Explanatory Memorandum and Regulatory Impact Assessment have been amended post-consultation to reflect the revisions which have been made to the regulations in response to those issues raised by stakeholders. Information on the consultation process itself, along with a summary of the outcomes of this process has also been included in the amended RIA. The EM and RIA have also been amended to include a further item of interest for the constitutional and legislative affairs committee (namely, the commencement arrangements for the regulations), and to add further detail by way of explaining the purpose and effect of the regulations.

### **Equality Impact Assessment**

41. The Welsh Government is committed to making sure that as policies, strategies, action plans and legislation are developed, every effort is made to actively contribute to an environment that is free from discrimination. Part of this is about assessing the impact that policies and actions may have on the people of Wales, to make sure that the Welsh Government does not discriminate but takes every opportunity to promote equality and good relations.

42. As part of the consultation on these Regulations, views were sought on the potential impact of the proposed legislation on:

- a) Disability.
- b) Race

- c) Gender and gender reassignment.
- d) Age.
- e) Religion and belief and non-belief.
- f) Sexual orientation.
- g) Human Rights.

43. From April 2011, the equality impact assessment process must also consider the protected characteristics of pregnancy and maternity and civil partnerships.

44. Amongst the issues raised by stakeholders in response to this question, the availability of Welsh-speaking advocates was the most prominent. A number of respondents felt it was important to ensure that Welsh-speaking advocates were available to support those clients whose language of choice or need was Welsh. Several consultees also mentioned the importance of ensuring that individuals with other communication requirements (including British Sign Language) were not disadvantaged, and one respondent suggested that individuals should be able to request an advocate who they felt was culturally or ethnically appropriate for them.

45. In relation to the provision of Welsh-speaking advocates, the Welsh Government agrees that this is an important issue and, as stated in paragraph 29 above, has amended regulation 3(4) to add language 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.

46. These regulations will be supported by the Welsh Government's *Delivering the Independent Mental Health Advocacy Service in Wales* guidance which is issued to LHBs and advocacy providers to advise them on how independent mental health advocacy services should be planned and provided. This document already sets out clear guidance in relation to the provision of services to Welsh-speaking individuals, including recommending that in commissioning and providing IMHA services, LHBs and advocacy providers should make every reasonable effort to 'appoint a staff team that reflects the ethnic diversity, cultural make up or language requirements of the qualifying patient population'. The guidance also recommends that, when recruiting staff, the advocacy service provider should ensure that it takes into account the range of communication skills and abilities of the patient population, and where necessary have access to signers and language interpreters, and provide information in forms other than just written Welsh and English, with a view to ensuring that no patient is excluded from accessing the advocacy service on grounds of language or communication needs.

47. This guidance will be revised and reissued once the IMHA regulations have been agreed by the National Assembly for Wales.

### **Additional matters**

48. The Welsh Government welcomed comments and views on the draft Regulations over and above the specific consultation questions or points on particular aspects of the Regulations.

49. Only a small number of comments were received from stakeholders in relation to this question. Among the issues raised were concerns that the amendments made to the advocacy provisions of the Mental Health Act 1983 Act by the Measure and regulations did not introduce a form of statutory advocacy for individuals receiving mental health services outside of hospital settings (i.e. within the community). Several consultees also felt it was important that information be provided to qualifying patients to inform them of the availability of the service, and to help them understand the type of support provided.

### ***Response***

50. Whilst the Welsh Government agrees that the provision of community advocacy is extremely important, and emphasises the importance of providing such services as part of wider, integrated mental health advocacy in the guidance it issues to service planners and providers, it has never been the Government's position that statutory community advocacy services would be introduced via the current legislation. The Welsh Government will continue to monitor the provision of mental health advocacy services, both statutory and non-statutory over the coming years, and report on its findings as part of the review of the operation of Part 4 of the Measure that will take place under section 48 of the Measure.

51. Regarding the provision of information to qualifying patients; the legislation already requires that qualifying patients be informed of their entitlement to an IMHA both verbally and in writing. This requirement is reinforced in the guidance the Welsh Government issues to service providers and planners. In addition, the Welsh Government has recently issued pre-implementation funding to LHBs to enable their IMHA providers to conduct awareness-raising sessions with ward staff in hospitals across Wales in relation to the forthcoming expansion of the mental health advocacy scheme, designed to ensure that they understand which patients will be entitled to support, and their role in informing patients of this entitlement.

## **Annex A – List of respondents**

Abertawe Bro Morgannwg Mental Health Forum  
Abertawe Bro Morgannwg University Health Board  
Age Cymru  
All Wales Forum of Parents and Carers of People with a Learning Disability  
All Wales Mental Health Occupational Therapy Network  
All Wales Senior Nurse Advisory Group (Mental Health)  
Alzheimer's Society  
Aneurin Bevan Health Board  
AWETU  
Val Barcroft  
Betsi Cadwaladr Community Health Council  
Betsi Cadwaladr University Health Board  
Blaenau Gwent County Borough Council  
Board of community Health Councils in Wales  
Joanna Bogacz  
Dave Bowles  
Pam Bradley Rushton  
Bridgend County Borough Council  
The British Association and College of Occupational Therapists  
Brynmair Clinic  
Ceredigion Social Services  
Chartered Society of Physiotherapy  
City and County of Swansea  
Cardiff and Vale University Health Board  
Combat Stress  
Connect Caer Las Cymru  
Conwy Social Services  
Denbighshire Voluntary Services Council  
Dyfed Powys Police

Philip Fairclough  
Gofal  
Hafal  
Steve and Elizabeth Hails  
Sheridan Hayward  
Healthcare Inspectorate Wales  
Hywel Dda Health Board  
Llanelli Community Mental Health Team  
Llanfair Surgery, Llandovery  
Ludlow Street Healthcare  
Fiona McEwen  
MDF Bipolar Organisation Cymru  
Mental Health Advocacy Providers  
Mental Health Advocacy Scheme  
Mental Health Foundation  
Alan Meudell  
Mind Cymru  
Ministerial Task and Finish Group on Welsh Language and Mental Health Issues  
Monmouthshire County Council  
The National Autistic Society Cymru  
National Youth Advocacy Service  
Older People's Advisory Group Cymru  
OPAG Cymru (Older Persons Advisory Group Cymru)  
Lesley Parker  
Powys Association of Voluntary Organisations  
Powys County Council  
Powys Independent Mental Health Advocacy Service  
Powys Teaching Health Board  
Mark Priscott  
Rhondda Cynon Taf Carers and Interlink

Veryan Richards

Royal College of General Practitioners

Royal College of Nursing Wales

Service User Recovery Forum

South Wales Mental Health Advocacy

South Wales Police

Swansea City and County Council, community mental health team

Swansea Network User Group

Rhiannon Lyn Thomas

Torfaen County Borough Council

Unllais

Eric Ware

Welsh Language Board

Welsh Refugee Council

Anna Weir

Wrexham County Borough Council

11 respondents also submitted written evidence, but did not wish their names/contact details to be published.

3 responses were received anonymously.

## **Annex B – Consultation questions**

### **Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011**

In relation to the draft Regulations –

- (1) Do you agree that Local Health Boards should be responsible for making arrangements for independent mental health advocacy? If not, who do you think ought to be given this responsibility, and what are the reasons for your views?
- (2) Are the arrangements set out in Regulation 3(1) and 3(2) clear, so that LHBs may make comprehensive provision for independent mental health advocacy for qualifying patients in their area?
- (3) Are the appointment requirements set out in Regulation 4 sufficiently robust? Should IMHAs have to meet different or further requirements?
- (4) Regulation 5 sets out the independence requirements for IMHAs; are these practical and appropriate? Should further requirements be made?
- (5) Do you agree that the IMHA should be able to visit and interview the persons set out in Regulation 6?
- (6) Are there any other persons, over and above those professionally concerned with the medical treatment of patient (as set out in the 1983 Act) and those in Regulation 6, which the IMHA should be able to visit and interview?

In relation to the draft Explanatory Memorandum –

- (7) Is there sufficient information in the Explanatory Memorandum to understand the purpose and effect of these Regulations?
- (8) Do you agree with the preferred option in the Regulatory Impact Assessment (option 2 – make regulations)? If not, please provide further details.
- (9) Are you content with the estimated costs/benefits regarding the implementation of these Regulations? If not, please supply evidence to support your views.

General questions –

- (10) We would welcome your views on the potential impact of the proposed legislation on:
  - i) Disability.
  - ii) Race.
  - iii) Gender and gender reassignment.

- iv) Age.
- v) Religion and belief and non-belief.
- vi) Sexual orientation.
- vii) Human Rights.

(11) We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

## **Annex C – Contact information**

For further information in relation to this document, please contact:

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