

The Regulated Services (Service Providers and Responsible Individuals) (Wales) (Amendment) (Coronavirus) Regulations 2020 - Consultation Statement

Background

In the 4 Nations Coronavirus Action Plan published on 3 March 2020¹, the Welsh Government committed that any necessary changes to legislation are taken forward as quickly as possible. This was followed by the Coronavirus Act 2020, which came into force on 1 April, enabling key changes to be made in the provision of care and support for adults and adult carers in Wales.

On 3 April we wrote to members of the Covid-19 Social Care Planning & Response Group, the Older People's Commissioner for Wales, Health Inspectorate Wales, Directors of Social Services and Chief Executives of Local Health Boards in Wales to urgently seek their view on proposed changes to regulations under the Regulation and Inspection of Social Care (Wales) Act 2016² ('the 2016 Act'). These changes were identified in partnership with the service regulator, Care Inspectorate Wales ('CIW').

We asked for an urgent response, by 17 April, and 11 were received. A list of the respondents is included at the end of this document.

This statement has been compiled to summarise the overall feedback received about the proposed changes, in particular, those made under section 27(1) of the 2016 Act. Due to the necessity for rapid consultation, the text of the regulations themselves was not consulted upon. This statement is laid before Senedd Cymru, in accordance with section 27(5) of the 2016 Act.

Purpose of changes

The rationale and intent behind these changes are detailed within the Explanatory Memorandum for The Regulated Services (Service Providers and Responsible Individuals) (Wales) (Amendment) (Coronavirus) Regulations 2020 ('the Coronavirus Regulations') and so are not replicated here. The Explanatory Memorandum can be accessed, alongside the draft regulations, on the 'documents laid' page of the Senedd Cymru website³.

In summary, and in light of the current pressures on social care providers due to the Covid-19 pandemic, these changes aim to support the provision of emergency social care for adults and to simplify the pre-employment checks required for new residential and domiciliary care workers.

The principal intention is twofold:

Firstly, to **exempt** certain emergency care and support services for adults, set up to respond to Covid-19, from registration with CIW.

Secondly, to **relax** requirements on service providers to undertake pre-employment checks on employees in residential and domiciliary care.

¹ <https://www.gov.uk/government/publications/coronavirus-action-plan>

² <http://www.legislation.gov.uk/anaw/2016/2/contents>

³ <https://www.assembly.wales/en/bus-home/Pages/Plenary.aspx?assembly=5&category=Laid%20Document>

Feedback on Proposals

1. Exempting emergency care and support services set up to respond to CV-19 from registration with CIW (adult services only)

This exemption is made, through an amendment to The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017⁴ ('the Regulated Services Regulations'), using powers in section 2(3) of the 2016 Act.

Responses received

Most respondents agreed that exemption of these services – to be operated by providers who are already registered with CIW or the Care Quality Commission, for a period of up to nine months – from the requirement to be registered with CIW, is necessary and proportionate in these exceptional circumstances. It will add capacity in the system and reduce pressure on existing services *[to support new individuals who may be infectious but not symptomatic with Covid-19]*.

Most respondents were content that CIW determine whether registration of these new services is necessary on a case by case basis and would support the relaxation of requirements on shared rooms. These were thought pragmatic and sensible. Clarification was sought on the procedure for notifying CIW of intentions to repurpose space within existing residential settings to provide emergency domiciliary support for temporary residents and asked for guidance on accountability within these situations, with possible repercussions for providers and Responsible Individuals under existing legislation. .

One respondent was keen that the exemptions should also work to help prevent hospital admissions, and should not drive a focus on discharge exclusively. The respondent felt flexibility should also be increased in other settings e.g. supported living.

There was support for the proposition that as much data and information, as reasonably possible, should be gathered on the use of the exemptions, to enable ongoing and future monitoring of these services

However, concerns were expressed that the establishment of new services, requiring additional staffing and resources, may shift these away from existing services, who are already experiencing difficulties with recruitment, retention, equipment and funding. Also that additional funding announced by the Welsh Government might be absorbed into the new services and reduce that available to others.

It was felt that more could be done to increase capacity of existing services, before creating new services that could exacerbate challenges in delivering safe care. Consideration should also be given to the development of an 'exit strategy' for any new services, so this is appropriately managed when they are no longer required.

One respondent, whilst understanding of the need to produce a set of measures to support care providers under the current exceptional circumstances and agreeing that the use of premises unlikely to meet the standards required under the 2016 Act for emergency

⁴ <http://www.legislation.gov.uk/wsi/2017/1264/contents/made>

residential services may be appropriate and would ease capacity, had a number of concerns and suggestions. These were:

- whether the new services would have to meet the same standards of care set out in the Regulated Services (Service Provider and responsible Individuals) (Wales) Regulations 2017.
- the need to specify where responsibility and accountability for oversight of exempted provision lies in the absence of a mechanism for monitoring or reporting of how these new services are meeting the needs of and protecting vulnerable people over a period of 9 months.
- the need to articulate specifically why services for looked after children should not be included within the exemption, and clarify why a similar level of protection would not be extended to older people who may lack capacity and be without family at this time.

There were calls that if the exemptions need to be in force for longer than the intended 9 months, that a statement should be made before the Senedd, to demonstrate accountability for the decision.

Welsh Government response

Application to adult social care settings

The Welsh Government has carefully considered the points raised, many of which reflect the concerns addressed in the initial development of the policy. Although, not being registered services, services will not be held by a Regulator to the standards set out in the 2017 Regulations, the Coronavirus Regulations do represent a benchmark of standards of care and support to which commissioners, we would expect, would pay regard when commissioning such care, and likewise providers when delivering it. Local authorities and local health boards, as the commissioners of such care, will retain oversight and their duty of care in relation to individuals receiving services, which will be further secured through a contract with the services, thus addressing the point made in relation to which body will oversee standards.. Finally, Health Inspectorate Wales and CIW will have regulatory oversight of local authorities and local health boards in their delivery of their statutory functions to provide care and support/health services and safeguard people, including through their commissioning function.

Although the Welsh Government notes the points raised in relation to the exception not applying to older people lacking capacity and without family, their situation is not considered fully comparable with that in relation to vulnerable children. In addition, it is not considered realistic to draft an exemption along those lines as the exemption applies to services, which would have a mixture of residents/clients with and without capacity, and with or without family, rather than to individuals.

Application to children's social care settings

The Welsh Government's position is that it is not minded to permit the establishment of emergency, non-registered services for children due to the particular vulnerabilities of this group.

Duration of changes, transitional arrangements, etc

The Welsh Government has noted the points made in the consultation responses regarding how long the changes should stay in place, how they should be reversed and what information should be provided to whom. These will be reflected on in developing the arrangements made to revoke the Coronavirus Regulations once the emergency period is over.

Other points

The Welsh Government has noted the points made in relation to pay, staffing and resourcing, use of funding, development of existing capacity etc. The Coronavirus Regulations facilitate the speedy expansion of provision through the creation of new exempt services but do not enjoin this. Any such provision can only be created with the support or at the behest of local service commissioners (local authorities and local health boards) and part of the process of considering the creation of such services will include considering the effect on local registered provision.

In relation to shared rooms, the Welsh Government is minded to permit the expansion of capacity in care homes to respond to the current emergency by permitting, in specific circumstances, the creation of new shared rooms through the repurposing of currently unoccupied bedrooms and other unused space.

2. Relaxing requirements on service providers to undertake pre-employment checks on employees in domiciliary and residential care

This requires amendments to the Regulated Services Regulations, using powers in section 27(1) of the 2016 Act.

Responses received

Many responses generally agreed that these measures are proportionate, in the circumstances, given the likelihood of increasing pressure on staffing resources to provide care and support, either in care homes or domiciliary care settings. They will increase flexibility for providers and afford the opportunity to make informed choices during the recruitment process, which should be undertaken or overseen by the Responsible Individual.

The proposal not to include care home services for children was understood, however, it was observed that domiciliary care workers often support a mix of adult and child clients, so limiting people to adult only could be operationally problematic. Social Care Wales would be supportive of the exemption being extended to include care home services for children, as they, as the workforce regulator, would retain the right to refuse an individual's application to register.

It was suggested by several respondents that clarity on what 'reasonably practicable' means – in terms of obtaining satisfactory evidence of previous employment, relevant qualification and employment history – would be helpful, perhaps through guidance or reference to relevant case law. This will mitigate the risk of varied interpretation. There

was recognition that local protocols would need to adapt, to ensure safe application of the changes and to ensure they are not taken advantage of by inappropriate applicants.

It was noted that some providers are already looking at alternative ways to undertake pre-employment checks, such as telephone references and use of payslips to confirm employment history, and it was suggested that the pre-requisite for birth certificates may be relaxed, subject to having two other forms of identification and providing birth certificates within a set timescale.

There was a suggestion that the approach proposed be extended to Schedule 2 Part 1 (Regulation 59) of the Regulated services (Service Providers and Responsible Individuals) (Wales) Regulations 2017, specifically, 8 (a) and (b) which require a copy of the staff member's full qualifications and experience to be held at the service, and their passport and birth certificate to be obtained and held at the service. The change in respect of 8 (a) would ensure this mirrors the changes to Schedule 1 Part 1 and relaxing (b) would ease difficulties of obtaining birth certificates and passports, which will put further barriers in the way of swift recruitment in a crisis situation. The respondent requested that these regulations are suspended, with the requirement that they are then fulfilled within a reasonable period once the emergency legislation is lifted.

One respondent strongly opposed relaxation of the requirements on pre-employment checks in domiciliary and residential care for adults. Instead they advocated the use of the new Covid-19 DBS applications and fast-track Barred List check service that covers social workers employed to provide services to people who have or are expected of having Covid-19. They stressed the close and personal care delivered by domiciliary and residential care workers and urged that pre-employment checks were essential to safeguarding individuals, suggesting that these measures would pose an unacceptable increased risk.

There were calls that if these exemptions need to be in force for longer than 9 months, that a statement should be made before the Senedd, to demonstrate accountability for the decision. A transition period (of 3 months) should be provided for, to allow providers recovery time, to place all documentation for those workers who were recruited under the temporary measures, to take stock, and prepare to resume normal recruitment procedures.

Welsh Government response

Holding copies of employees' birth certificates, certificates of qualifications, etc on file

The Welsh Government, whilst understanding the intent behind the proposal that the requirement for a copy of a staff members' birth certificate be held at the service be relaxed, considers that as this is not a pre-employment requirement/check, that there is no need to amend paragraph 8(b) of Schedule 2. Services which do not, for reasons connected with the Coronavirus pandemic, have copies of birth certificates on file for staff members taken on during the pandemic period should make appropriate arrangements to get such when the emergency period has passed.

Overseeing of work of individuals recruited on the basis of incomplete checks

The matter of ensuring that proper arrangements are in place for overseeing and assessing persons once in post - given relaxation of the checks - is already addressed in the other Regulations within the Service Provider and Responsible Individuals (Wales) Regulations 2017.

Meaning of 'Reasonably practicable'

The Welsh Government has noted the request for clarity on the meaning of "reasonably practicable" when applied to pre-employment checks and intends to address this FAQs or guidance.

Applicability to adult social care staff

The Welsh Government has carefully considered the concerns expressed. Domiciliary care workers are required to register with Social Care Wales with effect from 1 April 2020, and the great majority have now done so. Voluntary registration of residential care workers for adults has also commenced. It is important to note that the Regulations do not permit the omission of relevant pre-employment checks, but rather relax the requirements for holding evidence of such checks, expressly in connection with the special circumstances of the current emergency. In particular, the person is required to provide as full and satisfactory information or documentation in respect of those matters as is reasonably practicable. The Welsh Government considers that the Regulations are proportionate and appropriate. No changes are being made through the Coronavirus Regulations to requirements around Disclosure and Barring Service checks.

Pre-employment checks in children's social care settings

The Welsh Government has noted the response but is not presently minded to extend the provisions which related to pre-employment checks to services for children, notwithstanding the possibility that some services might cater for mixed (child/adult) client groups. This is given the particular vulnerabilities of looked after children as a group.

DBS Checks

The matters raised in relation to DBS checks have been noted by the Welsh Government for consideration in relation to proposed notices under s.33 of the Coronavirus Act 2020.

3. Other feedback received

Concerned was expressed that legislative change may come too late assist the peak discharge period.

The possibility of temporarily relaxing requirements around service management, minimum staffing levels and double-handling may assist with staffing difficulties, whilst ensuring safe and risk-informed care, at this time was raised.

Clarity was sought, on the use of properties made available by unregistered providers e.g. private homes or property not previously used for care provision, and whether this would be permissible if deploying a registered provider to provide care services in such properties.

It was noted that the temporary new service for DBS checks appeared to be assisting providers in getting new staff/volunteers in place fairly quickly. However, it relayed that there have been instances where providers have been incorrectly informed by DBS staff that the service does not apply to care workers and other staff, such as cleaners, who are vital to the operation of care homes.

It was felt there needed to be a route through which any unintended consequences of the changes could be fed through to the relevant bodies such as Welsh Government, CIW and Social Care Wales, and that this should be communicated clearly through any accompanying guidance. This should also address how the flexibility introduced through the changes will be phased out and this communicated to providers, to enable them to adjust their services with reasonable notice. The provisions should be kept under review.

Social Care Wales felt it was important to emphasise that these changes should not be viewed as an indicator that aspects of the 2016 Act were failing, rather that it enables changes to be made in times of emergency.

Welsh Government response

The Welsh Government has noted the points raised and will take appropriate account of them in implementing the policy and in subsequent arrangements to transition back into normal modes of working.

List of respondents to the consultation

1. Gwent Regional Partnership
2. Wrexham County Borough Council
3. Betsi Cadwaladr University Health Board
4. Community Housing Cymru
5. Care Forum Wales
6. Cymorth Cymru
7. Social Care Wales
8. Pobl Care and Support
9. The Older People's Commissioner for Wales
10. Aneurin Bevan University Health Board
11. Cwm Taf Morgannwg Health Board