

Explanatory Memorandum to the Local Health Boards (Constitution, Membership and Procedures) (Wales) Regulations 2009

This Explanatory Memorandum has been prepared by the Department for Health and Social Services, and is laid before the National Assembly for Wales in accordance with Standing Order 24.1.

Description

These Regulations revoke the Local Health Board (Constitution, Membership and Procedures) (Wales) Regulations 2003 (S.I. 2003/149 (W.19)) and the Local Health Boards (Constitution, Membership and Procedures) (Wales) (Amendment) Regulations 2007 (S.I. 2007/953 (W.84)).

They make provision for the constitution and membership of Local Health Boards (LHBs) in Wales, including their procedures and administrative arrangements.

Matters of special interest to the Subordinate Legislation Committee

None.

Legislative Background

The power to make these Regulations is provided by sections 12(3), and 13(2), and (4) of and paragraphs 4(1), (2) and 7(3) of Schedule 2 to the National Health Service (Wales) Act 2006 (the 2006 Act)

This instrument follows the negative resolution procedure.

Purpose and intended effect of the legislation

Welsh Ministers have determined through their *One Wales* policy statement to re-design the delivery of the NHS in Wales, to improve health outcomes and ensure that the NHS delivers care effectively with their partners. The internal market is to be abolished.

The overall objective of the NHS Reform Programme is to improve the provision of healthcare services for patients. *One Wales* committed the Welsh Assembly Government to '*...move purposefully to end the internal market...*', in order to improve services for patients. The end of the internal market in health is part of the wider Welsh Assembly Government determination to make co-operation, rather than competition, the bedrock of public service delivery in Wales.

On 2 April 2008, the Minister for Health and Social Services issued a Consultation Paper: *Proposals for Changing the Structure of the NHS in Wales* (the first Consultation Paper) for a 12-week consultation period. The proposals were designed to follow the changes already underway in the NHS, and proposed, amongst other things, a reduction in the number of LHBs from

twenty two (22) to seven (7), with the responsibility for community services transferring from NHS Trusts to LHBs.

Consultation responses indicated that the proposals in the first Consultation Paper should go further, and there should be one organisation responsible for those services currently undertaken by LHBs and NHS Trusts. As a result, on 2 December 2008, a further Consultation Paper was published for a 12-week consultation period – *Delivering the new NHS for Wales* (the second Consultation Paper).

The Regulations, which formed part of the second Consultation Paper, provide for the membership of the LHB Boards, which will in due course also apply to Powys Teaching LHB.

Part 2 of the Regulations provides for the membership of the LHB Boards, the appointment and eligibility requirements of members, the term of office of non-officer members, associate members, and the termination and suspension of officer members, non-officer members and associate members.

Each LHB Board will have twenty Members - eleven Non-officer Members and nine Officer Members:

- Chair;
- Vice-Chair
- Chief Officer;
- Eight additional Officers:
 - Medical Officer – who must be listed in the General Medical Council (GMC) GP Register or Specialist Register;
 - Nurse Officer – who must be included on the register maintained by the Nursing and Midwifery Council (NMC);
 - Officer who has responsibility for Public Health – who must have completed higher specialist training in public health or a related discipline and be listed in the GMC Specialist Register, the General Dental Council Specialist List in Dental Public Health, or the UK Public Health Register;
 - Officer who has responsibility for Therapies and Health Science – who must be included on the register maintained by the Health Professions Council (HPC);
 - Officer who has responsibility for Primary Care, Community Health and Mental Health Services;
 - Finance Officer;
 - Officer who has responsibility for Workforce and Organisational Development; and
 - Officer with responsibility for Strategic and Operational Planning;
- With the following nine Non-officer Members appointed by Welsh Ministers:
 - Person who holds a post in a University that is related to health;
 - Local Authority Member – to be a current elected member of a Local Authority within the area of the LHB;

- Voluntary Organisation Member – to be a current member or employee of a Third Sector organisation within the area of the LHB;
- Trade Union Member – who must be an employee of the LHB;
- Five other Independent Members.

The Regulations make provision for nominations to be made in the following cases:

- Local Authorities in the LHB area may nominate two elected members for the Minister to consider and to appoint as the Local Authority Non-Officer Member;
- Swansea, Cardiff and Bangor Universities may nominate two persons for specified LHBs, for the Minister to consider and to appoint as the University Non-Officer Member.

All public appointments referred to above (including the Chair and Vice-Chair), and those for Associate Members appointed by the Welsh Ministers referred to below, will be for a period of up to four years, and for not more than a term of eight years.

The appointment of the Chair, Vice-Chair and the Non-Officer Members will be public appointments, and therefore must take into account the principles laid down by the Commissioner for Public Appointments and in the Welsh Minister's Code of Practice for Ministerial Appointments to Public Bodies.

In addition, there can be no more than three Associate Members of the Board to be appointed by the Welsh Ministers. The three Associate Members appointed by the Minister are ex-officio Members, and therefore will not be subject to the same principles.

The LHB Board can appoint a further Associate Member, but before it can make the appointment it must obtain the written consent of the Minister to that appointment. Any such Board appointment will be for a period of up to one year, with a maximum term of four years.

Part 3 provides for the proceedings and administrative arrangements of the LHB Boards, including the powers of Vice-Chairs, the appointment of committees and sub-committees, and meetings and proceedings.

Part 4 sets out transitional arrangements for Powys Teaching LHB, including the appointment of new members and provisions for existing members to cease to be members.

Part 5 contains transitional arrangements.

Implementation

It is intended these Regulations should come into force on 1 June 2009. This will allow the Local Health Boards (LHBs) to operate in shadow form from that date, and to be fully operational from 1 October 2009.

Consultation

The Consultation process has been described in detail in the Regulatory Impact Assessment below.

Regulatory Impact Assessment

Options

Following consultation on the first Consultation Paper, consideration was given to a suitable model for the LHB Board. The model would have to comply with the statutory provisions for boards and board membership, as set out in the 2006 Act, which empowers Welsh Ministers to make provision in regulations about the appointment of chair, vice-chair and other members, conditions for appointment, tenure of office, circumstances for removal, and the maximum and minimum number of members.

In light of the Governance in Health Review of NHS bodies in Wales undertaken in 2007/8, the following options were considered for the seven LHBs Board structure:

Do Nothing

This option would result in the Local Health Board (Constitution, Membership and Procedures) (Wales) Regulations 2003 remaining in force, which would not be considered an appropriate Board structure for the seven larger LHBs.

Option 1 – a Corporate Model, which is similar to the newly-formed NHS Trust boards in Wales;

Option 2 – a Stakeholder Model, which is similar to the current LHB board structure in that it has a wide range of members;

Option 3 – a Two-Tier Model, which would have two separate Boards, an Executive Board, responsible for supporting the CEO to ensure the Local Board is organised, resourced and motivated to deliver its objectives effectively, and a non-statutory Stakeholder Advisory Board responsible for providing advice to the CEO on the strategic leadership and management of the Local Board;

Option 4 - a Mixed Model, which is similar to the third option with a main Board, and a separate non-statutory Stakeholder Reference Group, but differs in that it is not a tiered model but an inclusive model.

Option 4 – a Mixed Model Board – was identified as the preferred model for the following reasons:

- The Board would have a small majority of independent members, reflecting established good practice;
- The Board's size enabled decisive action;

- This model brings together the strengths from the current NHS Trust corporate board model and the current LHB inclusive board model;
- It would be seen as a new model for a new organisation;
- It balanced collaborative ethos with a focused, skilled leadership structure; and
- It involved a broad range of stakeholders from across all local communities in advising and influencing the statutory board in the running of the LHB.

Costs

Public Appointments

The overall indicative cost of the public appointments for the Chair, Vice-Chair and Non-Officer Members (NOMs) of the Board is less than the existing remuneration costs for LHBs and NHS Trusts.

Officer Appointments

The current Executive costs for LHBs and NHS Trusts was £18.8m in 2007/8. Current estimates for the salaries for the Officer Members of the seven LHB Boards will provide savings over the existing structure. In the mid to long term these savings will be re-directed into front line patient services.

Resulting from consultation, the Regulations have been amended to include an additional Officer for Therapies and Health Science for all seven LHBs.

Local Authorities

It is not considered that there would be any significant cost implications for Local Authorities arising from the making of the Order. Due to the reduction in the number of LHBs, which will result in the end of co-terminosity between LHBs and Local Authorities, it will be essential that existing partnerships are strengthened and enhanced. The statutory duty for Health, Social Care and Well-being Strategies and Children and Young People's Plans will remain.

A Local Authority elected member will be one of the Non-Officer members on the LHB Board.

Third Sector

It is not considered that there would be any significant cost implications for the Third Sector arising from the making of the Order. The Third Sector will be essential in delivering healthcare services in the new structures.

In its response to the second Consultation Paper, the Wales Council for Voluntary Action (WCVA) (the national support network for the Third Sector) worked up proposals with the Third Sector for a minimum infrastructure to enable participation and engagement, and ensure strategic working at the LHB level. The recommendation is for Regional Co-ordinators at the LHB

level, in addition to the existing local health and social care facilitators at the Local Authority level.

A Third Sector member will be one of the Non-Officer Members on the LHB Board.

Independent Sector

It is not considered that there would be any significant cost implications for the Independent Sector arising from the making of the Order.

Consultation

Stakeholder Engagement

There has been evidence of stakeholder engagement throughout the NHS Reform Programme. Consultation on the Regulations (December 2008 – February 2009) followed an inclusive engagement phase, which started in April 2008 when the first Consultation Paper was issued.

Consultation Paper I: *Proposals to Change the Structure of the NHS in Wales* was more of a discussion paper that set out proposals to abolish the internal market in Wales. During the consultation period - from the 2nd April to the 25th June 2008 - a number of consultation events were held across Wales:

- Forty-eight Technical Consultation Events were held to ensure that participation would be possible for those who had a direct interest in shaping the detailed arrangements that would be needed to support our final proposals. They were chaired by the Head of the Department for Health and Social Services;
- Twenty-three Local Consultation Events (in each Local Health Board area and two in Powys) were held with patient groups, local leaders, Community Health Councils and voluntary organisations to ensure that local interests were fully engaged in the process. Invitation letters were issued to every Community Health Council, County Voluntary Council Local Health Board and NHS Trust in Wales, requesting that they invite all their contacts, patient groups and community networks to these events.

In total, eight hundred and seven responses were received to the first Consultation, which identified that there was significant support from stakeholders on the overall direction of travel. A summary of the consultation responses can be found at

<http://wales.gov.uk/consultations/closedconsultations/healthsocialcare/nhswales/?lang=en>

At that stage, the NHS Reform Programme was established, with a formal Programme Board. This Board now meets on a bi-monthly basis, and comprises a number of key external stakeholders, including:

- Local Government;
- Third Sector;
- Wales Audit Office;
- NHS senior managers and clinicians; and
- Trade Union/Representative bodies.

Consultation on the Regulations

The Regulations were subject to a twelve week consultation period, between the 2nd December 2008 and the 25th February 2009.

Consultation Paper II: *Delivering the new NHS for Wales*, which included the draft Order, was published electronically in the first instance, and was available on the Welsh Assembly Government website and on the HOWIS website. Hard copies of the Consultation Paper were produced and sent to LHBs, NHS Trusts, Community Health Councils and County Voluntary Councils, to be displayed wherever the public has access.

There have been three technical consultation events led by the Chief Executive, NHS Wales during the consultation period:

- 27th January 2009 – South East Wales event – All-Nation Centre, Cardiff;
- 6th February 2009 – North Wales event – Venue Cymru, Llandudno;
- 10th February 2009 – Mid and West Wales event – Halliwell Centre, Carmarthen.

In addition, the seven Transition Directors (who are leading change within the new LHB area) have held local consultation events within their areas.

Consultation Responses

Four hundred and seventeen 417 responses were received during the consultation period. All responses are available on the Welsh Assembly Government website at <http://wales.gov.uk/topics/health/publications/health/responses/responses/?lang=en>

Summary of Responses

(i) General Responses

- Approximately 65% of respondents were mostly or totally in favour of the proposals presented;
- Approximately 10% of respondents were against the proposals; and
- Approximately 6% of respondents were indifferent or neutral to the proposals presented.

(ii) LHB Board Membership

Most respondents replied to this question (approximately 51% of total respondents to the consultation, or 211 responses), with approximately 18% in favour of the membership, and approximately 62% in favour of the membership proposals, but with caveats.

The main comments made by those who supported the membership proposals with some changes, commented as follows:

- The suggestion that there should be more than one Local Authority (LA) Member on each LHB Board – it was considered that the proposal for one LA member would not be sufficient to cover the complexity and diversity of LAs included within the larger LHBs, which would no longer be co-terminous;
- The suggestion that there should be more than one Third Sector member on each LHB Board;
- The role of the Vice-Chair – respondents were confused over its remit;
- There was a wide-spread demand for additional sectoral representation at Officer Member level. These included requests for a new post for an Officer for Allied Health/Therapies, for Dentists, for Pharmacy and Medicines Management;
- There was also demand for additional sectoral representation at Non-officer Member level. These included requests for additional NOM positions for Community Health Councils and Carers;
- There were some misgivings about the size of the board being too large but this was not widespread;
- Similarly, there was a small number who felt that the Boards were not representative, suggesting more democratic, citizen and clinical-oriented representation;
- There was overall support for the roles of the Board, with some concerns expressed about the Associate Members roles;
- A number of respondents suggested that the Chairs of the Stakeholder Reference Group and the Professional Forum should be full board members, rather than Associate Members.

(iii) LHB Board Composition

The overwhelming majority of respondents to this question (126 out of 184 – or 68.5%) supported the higher proportion of non-officers than officers, with only 24 opposing it. The main reasons for support were the additional scrutiny and critical role that they will bring, with others emphasising their value on bringing flexibility to the boards.

Among people opposed to the proposed arrangement, opinions were widely divided, with some preferring equal membership, and other requesting more officers.

The Health, Well-being and Local Government Committee

On the 12th February 2009, the Minister for Health and Social Services, the Chief Executive NHS Wales, and the Deputy Chief Medical Officer (in his role as Medical Director) attended the Health, Well-being and Local Government Committee to discuss the provisions of, amongst other things, the Order.

The Committee did ask for clarification on a number of issues relating to the establishment of LHBs and these were addressed in full. A transcript of the meeting can be found at <http://www.assemblywales.org/bus-home/bus-committees.htm>

Changes to the Draft Regulations

Following consultation, the following changes have been made:

Part 1

Interpretation

- The definition of “Trade Union” has been inserted;
- The definition of “shadow period” has been inserted;
- The definition of “health care profession” has been removed – given the amendment to medical officer eligibility;
- The definition of “primary and community care services” has been removed due to complications in defining “community care”.

Part 2

Membership of Local Health Boards

- Reg 3 (1)(b) - the responsibility of the vice-chair (for primary and community care and mental health) has been removed to avoid any ambiguity of role between the Vice-Chair and the officer member responsible for these responsibilities, and the wider corporate / strategic role of the Vice-Chair;
- Reg 3 (2)(e)(ii) - to improve clarity of interpretation and understanding “community care” has been amended to “community health”;
- Reg 3 (2) (f) - the definition of the officer responsible for “human resource management” has been specified as “ an officer who has responsibility for workforce and organisational development”;
- Reg 3 (2)(h) – the definition of the planning officer responsibility has been specified as “an officer who has responsibility for the strategic and operational planning of the provision of health services”;
- Reg 3 (2)(l) - as a result of consultation, a new officer member has been specified -” an officer who has responsibility for therapies and health science.”;
- Reg 3 (3) - A number of consultation responses sought clarity on whether any other responsibilities could be included within the specified officer responsibilities. Reg 3(3) specifies that officer members will have such other responsibilities as may be prescribed by the Board. This

amendment recognises that the range of specified officer responsibilities are not exhaustive, but rather, represent the minimum range of responsibilities designated to specific officer members. This amendment avoids being prescriptive on how delegated responsibilities should be allocated to allow individual LHBs the flexibility to determine how best to do so within an organisation structure that they determine meets their particular requirements and circumstances;

- Reg 3 (4) (a) - (c) - to avoid ambiguity of interpretation, the specific responsibilities for a Local Authority member, a Voluntary Organisation member and a Trade Union member have been removed. The specific responsibilities for these roles will be set out in job descriptions;
- Reg 3 (4) (d) - to improve clarity of interpretation and understanding, the words “that is related to health” have been inserted in relation to a person holding a post in a university.

Appointment of Local Health Board Members

- Regulation 4 (8) - to improve clarity of interpretation, the word “represent” in relation to the interests of the community has been removed and the words “to ensure that they are representative” of the interests of the community have been inserted.

(a)

- Regulation 4 (9) – as a result of consultation, this new regulation specifies nomination arrangements for the Local Authority member

(b)

- Regulation 4 (10) – as a result of consultation, this new regulation specifies nomination arrangements for the University member

Termination of Appointment of Officer Members

- Regulation 8 (5) - As a result of concerns raised in consultation about the potential for members to become ineligible for appointment (through say bankruptcy) during the tenure of office, Regulation 8 (5) has been inserted to require members to disclose any circumstance resulting in ineligibility of appointment during tenure of office;
- Regulation 8 (9) - As a result of concerns raised in consultation about the frequency of board meetings and the potential for termination after missing say only one meeting (if Boards meet bi-monthly), failure to attend a meeting has been extended from three months to six months.

Termination of Appointment of Members and Associate Members Appointed by Welsh Ministers

- Regulation 10 (4) - As a result of concerns raised in consultation about the potential for members to become ineligible for appointment (through say bankruptcy) during the tenure of office Regulation 10 (4) has been inserted to require members to disclose any circumstance resulting in ineligibility of appointment during tenure of office;

- Regulation 10 (5) - As a result of concerns raised in consultation about the frequency of board meetings and the potential for termination after missing say only one meeting (if Boards meet bi-monthly) , failure to attend a meeting has been extended from three months to six months.

Termination of Appointment of Associate Members appointed by the Board

- Regulation 12 (4) - As a result of concerns raised in consultation about the potential for members to become ineligible for appointment (through say bankruptcy) during the tenure of appointment, Regulation 12 (4) has been inserted has been inserted to require members to disclose any circumstance resulting in ineligibility of appointment during tenure of office;
- Regulation 12 (5) - As a result of concerns raised in consultation about the frequency of board meetings and the potential for termination after missing say only one meeting (if Boards meet bi-monthly) , failure to attend a meeting has been extended from three months to six months.

Part 3

Meetings and Proceedings

- Regulation 15 (5) - to improve clarity of interpretation and understanding, the following has been inserted “Where a joint committee or joint sub-committee has been established in accordance with regulation 14(b), the Board must approve any Standing Orders that may be made by that committee or sub-committee”

Part 4

Transitional Arrangements for Powys Teaching Local Health Board

- Regulations 18 -20 - The transitional arrangements for Powys Teaching Local Health Board have been inserted and set out the arrangements for the existing members of Powys Teaching Local Health Board and the arrangements for the shadow board.

Part 5 - Miscellaneous

Transitional Arrangements during the shadow period

- Regulation 21 - to improve clarity of interpretation and understanding during the shadow board period, the following has been inserted “No business may be transaction at a meeting unless the number of members present is not less than two.”

Schedule 1 - Procedures for Appointment of Members

- As a result of concerns raised consultation about the need for clarity about whether the appointment of associate members is a public appointment, Schedule 1 has been amended to apply only to those members specified in Regulation 4 (1) - the Chair, Vice- Chair, and non-officer members appointed by the Board. Associate Members have been removed from Schedule 1 since they are not Board members (they do not hold voting

rights) They do, of course, have a vital role in advising the Board to ensure that the decisions are taken on an informed basis.

Schedule 2, Part 2 - Eligibility Requirements for Chairs, Vice-Chairs and Non-Officer Members

- As a result of concerns raised in consultation about eligibility requirements being overly constrained, Schedule 2 Part 2 has been amended to specify that a Trade Union member and a University member are not ineligible to become a Chair, Vice Chair or member. Further, a person is only ineligible if he/ she has been in the paid employment, within the preceding year, of a LHB within the area of the Board, or an NHS Trust within the area of the Board, Velindre NHS Trust or Welsh Ambulance Service NHS Trust.

Schedule 2, Part 3 – Eligibility Requirements

- Eligibility Requirement for the Medical Officer - as a result of concerns raised in consultation about the potential for a medical officer to not be registered as a medical practitioner, the eligibility requirement for medical officer has been amended from specifying that a person must be a member of a healthcare profession to specifying that a person must be listed in the GMC GP Register or Specialist Register;
- Eligibility Requirements for the Public Health Officer - the eligibility criteria has been specified;
- Eligibility Requirements for the Therapies and Health Science Officer - the eligibility criteria has been specified;
- Eligibility Requirements for the Voluntary Organisation Member - to improve clarity of interpretation and understanding, the words “ that operate within the Boards area “ have been inserted;
- Eligibility Requirements for the Trade Union Member - the eligibility criteria has been specified.

Schedule 3 - Rules as to meetings and Proceedings of Boards

- 2(3) – Concerns were raised in consultation about the ability of senior, non-board officer members, to transact secretarial aspects of business in the absence of officer board members. The words “of the Board “have been removed to allow (senior) officers to undertake the secretarial tasks set out in 2 (3). In addition, the specified notice of meeting be extended from 3 days, to “where reasonably practicable, at least ten clear days”;
- 4(2) - Concerns were raised in consultation about the need for the Board to take into account the interests not only of health professionals but also the interests of the community within the Board’s area. The words “interests of the community within the Board’s area“ have been inserted to address this issue.

Post implementation review

The effect of the Regulations will be monitored as part of the Benefits Realisation Framework, and also as part of the next OGC Review, which is planned for September 2009.

Summary

It is considered that the LHB Board model provided in these Regulations is the most effective model for the seven LHBs in Wales.

This model will combine the best of both the current LHB and NHS Trust arrangements, whilst being a corporate, strategic board able to make decisions.