

Explanatory Memorandum to the Social Care Wales (Proceedings before Panels) (Amendment) Regulations 2017

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

Minister's Declaration

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

The Social Care Wales (Proceedings before Panels) (Amendment) Regulations 2017

I am satisfied that the benefits justify the likely costs.

Rebecca Evans
Minister for Social Services and Public Health
14 February 2017

Part 1 – OVERVIEW

1. Description

The Social Care Wales (Proceedings before Panels) (Amendment) Regulations 2017 ('the Amendment Regulations') are made under Section 175 of the Act and amend the Social Care Wales (Proceedings before Panels) Regulations 2016 ("the Proceedings before Panels Regulations"). The Amendment Regulations are intended to remove the powers provided through the Social Care Wales (Proceedings before Panels) Regulations 2016 to the workforce regulator, Social Care Wales (SCW), namely regulations 10, 23 and 34, to issue a witness summons requiring a person to attend a hearing in relation to a registration appeals panel, fitness to practise panel or an interim orders panel. Any other person may also request the workforce regulator to issue such a summons. The Act does not provide any means of enforcing this requirement, therefore rendering it inoperable.

The route through the Civil Procedure Rules provides an effective means for SCW to summons witnesses, however, for it to operate, the organisation in question must have no alternative process for this purpose. Thus the new regulations are needed to remove the existing inoperable provision, to enable SCW to access the Civil Procedure process.

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

There are no specific matters that have been identified that are of interest to the Constitutional and Legislative Affairs Committee.

3. Legislative background

The powers enabling the 2017 Regulations to be made are contained in Section 175 of the Act. The Regulations are subject to the National Assembly for Wales' negative resolution procedure and will come into force on 3 April 2017.

4. Purpose & intended effect of the legislation

The Social Care Wales (Proceedings before Panels) (Amendment) Regulations 2017 ('the Amendment Regulations') amend the Social Care Wales (Proceedings before Panels) Regulations 2016 ("the Proceedings before Panels Regulations"). Regulations 10, 23 and 34 of the Proceedings before Panels Regulations are amended to enable Social Care Wales (SCW) to apply through the Civil Procedure Rules to the High Court or County Court for a witness summons. The amendment is made in relation to a registration appeals panel, a fitness to practice panel and an interim orders panel. The current Regulations provide for SCW to issue a witness summons requiring a person to attend a hearing, or any other person may request the workforce regulator to issue such

a summons. However the Act does not provide any means of enforcing this requirement, therefore rendering it inoperable.

The route through the Civil Procedure Rules provides an effective means for SCW to summons witnesses, however, for it to operate, the organisation in question must have no alternative process for this purpose. Thus the new regulations are needed to remove the existing inoperable provision, to enable SCW to access the Civil Procedure process.

5. Consultation

No formal public consultation has taken place as the Amendment Regulations are proposing a change to those that were part of a 12 week consultation that ran between 28 June 2016 and 20 September 2016. Overall these Regulations were well received with respondents generally supporting the proposals.

PART 2 – REGULATORY IMPACT ASSESSMENT

There are two options:

- Option one: do nothing.
- Option two: Use amendment regulations to remove the provision in the Proceedings before Panels Regulations that gives the workforce regulator the power to subpoena witnesses to regulatory panels and replace it with a requirement for them to undertake this process through the HM Courts and Tribunals Service.

Option one: do nothing

As the Proceedings before Panels Regulations are currently written, the workforce regulator, SCW, has the power to subpoena witnesses to give evidence at fitness to practise hearings or tribunals. This power enables the workforce regulator to ensure such hearings are fair with all relevant evidence considered by the panels. However, it does not provide the regulator with any enforcement powers to follow up non-compliance with the subpoena.

In order to utilise the regulation as it stands SCW would need to set up and administer a system where it would be responsible for serving notice on individuals to be witnesses at such tribunals and meet the costs associated with this work from its own budgets. However, such action is not enforceable if the person subject to a subpoena doesn't cooperate with it.

Option two: remove the power to subpoena witnesses and require the regulator to seek this intervention from HM Courts and Tribunal Service

In undertaking preliminary work in this area, it has become clear that the regulation duplicates an existing system whereby the workforce regulator (SCW) can apply to the courts to subpoena witnesses on its behalf. The current system is administered by HM Courts and Tribunals Service and provides a means of enforcement in Wales for non-compliance. Whilst there is a fee involved in utilising this process it would remove the need and cost to the regulator to set up and administer a "new" scheme, as proposed in option one.

Costs

Option one: do nothing

Workforce regulator

The costs of option one would also include the administrative costs of following up requests for witnesses and of rearranging regulatory processes and panels when a witness is not forthcoming. The workforce regulator has confirmed that approximately 25 cases per year are hampered by difficulties in obtaining witnesses. It was anticipated that the existence of this power would have a significant effect in encouraging parties to co-operate in the timely provision of evidence. The processing of each case equated to approximately one day of administrative time per case at a rate

of £128 per day and it was estimated that the cost to the regulator of chasing up evidence was approximately £3,200 per annum.

The workforce regulator estimates that, of those 25 cases, six cases would require a witness or potentially more than one witness to be summoned to give evidence before a tribunal. The workforce regulator has estimated that, when you factor in the cost for administering the application to the court, the court fee and the regulator's associated legal costs for two days per case (estimated at approximately £3,000 per case), the total cost would equate to between £45,000 and £60,000. The variation to the costs takes into account the possibility that some witnesses, when made aware of the potential consequences of failing to comply with a summons, could therefore enticed them to co-operate more willingly and therefore reduce the numbers needing to be served a subpoena.

Option two: remove the power to subpoena witnesses and require them to seek this work from HM Courts and Tribunal Service

Workforce regulator

By reverting to the existing scheme and utilising a system that is already in place, we are proposing to remove the costs associated with developing and administering a procedure that would, in effect, duplicate the current system. Whilst the workforce regulator would still incur costs in relation to preparing a case as outlined above in Option 1, they would now only be subject to filing an application with HM Courts and Tribunals Service to issue a witness summons that would incur a £50 fee and not the costs associated with any follow up action if the witness failed to appear. These costs would fall on the court.

However, the existing system does present an additional cost for the regulator in that they would, under the relevant practice guidance from HM Courts and Tribunal Service, be expected to offer a witness reimbursement of their travelling expenses to and from the court and compensation for loss of time for attending the session. The guidance states that:

Travelling expenses and compensation for loss of time

- 3.1** When a witness is served with a witness summons he must be offered a sum to cover his travelling expenses to and from the court and compensation for his loss of time.
- 3.2** If the witness summons is to be served by the court, the party issuing the summons must deposit with the court:
 - (1) a sum sufficient to pay for the witness's expenses in travelling to the court and in returning to his home or place of work, and
 - (2) a sum in respect of the period during which earnings or benefit are lost, or such lesser sum as it may be proved that the witness will lose as a result of his attendance at court in answer to the witness summons.
- 3.3** The sum referred to in 3.2(2) is to be based on the sums payable to witnesses attending the Crown Court.

3.4 Where the party issuing the witness summons wishes to serve it himself, he must:

- (1) notify the court in writing that he wishes to do so, and
- (2) at the time of service offer the witness the sums mentioned in paragraph 3.2 above.

The Crown Prosecution Service has provided a guidance note on the reimbursement rates for witnesses¹. As the costs would vary between each case it is therefore not possible to provide an estimate of the annual costs at this stage.

Workforce

Members of the workforce are also able to apply to the court to seek a subpoena a witness to give evidence if they feel that the person would be reluctant to do so without one. They will also be subject to paying for the cost of the subpoena and for providing a contribution towards the costs of the person attending.

Benefits

Option one: do nothing

There are no benefits to this option, as the proposal will in effect duplicate a process that currently exists but does not provide the workforce regulator with an enforcement measure.

Option two: remove the power to subpoena witnesses and require them to seek this work from HM Courts and Tribunal Service

Workforce regulator

This option will improve the efficiency and effectiveness of the regulatory process by enabling regulatory decisions to be made in a timely way based on relevant evidence. Where there are delays in the provision of necessary information from any person relevant to regulatory proceedings, the regulator will be able to make a referral to the courts to enforce the appearance of witnesses.

Workforce

Members of the workforce are also able to apply to the court to seek a subpoena a witness to give evidence if they feel that the person would be reluctant to do so without one.

This option will help to ensure that referrals in relation to registrants can be considered efficiently and effectively with less likelihood of delay due to difficulty in the regulator obtaining the necessary evidence.

¹ <http://www.cps.gov.uk/legal/assets/uploads/files/Attachment%201.pdf>

Service user / citizens

This option will help to ensure that complaints against registrants can be considered efficiently and effectively with less likelihood of delay due to difficulty in the regulator obtaining the necessary evidence. Service users and citizens will benefit from greater public assurance with such complaints being investigated and concluded in a more timely fashion.

Summary and preferred option

Two options have been considered. Option one is to retain the existing system whereby the workforce regulator administers a witness summons to give evidence necessary for the progress of regulatory proceedings. However, as it has no enforcement measures that could be enacted if the witness refuses to comply with the subpoena, this would simply incur expense for no benefit.

Option two provides the regulator with the opportunity to apply to the courts for a witness to give their evidence at the tribunal. This has an enforceable procedure that would have consequences for the individual if they fail to comply and we envisage that the existence of this power would encourage co-operation with the regulator. As there is already an existing system that has enforcement powers, it would be prudent to return to the status quo and reduce the potential financial burden on the workforce regulator from having to develop and administer such a scheme to one that simply requires it to pay the costs of an application to the courts. Therefore option two is the preferred option.

Competition Assessment

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?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
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

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.

We do not consider it necessary to undertake a competition assessment for these Regulations since they will not affect the business sector in any significant way.