

National Assembly for Wales
Constitutional Affairs Committee

Report on the Proposed Mental Health (Wales)
Measure

June 2010



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Constitutional Affairs Committee

The Constitutional Affairs Committee must consider and report on any of the matters set out in Standing Order 15.2 and may consider and report on any of the matters set out in Standing Orders 15.3, and 15.6.

Powers

The Constitutional Affairs Committee was established in June 2007 (as the Subordinate Legislation Committee). Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 15. These are available at www.assemblywales.org

Committee membership

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
Janet Ryder (Chair)	Plaid Cymru	North Wales
Alun Davies	Labour	Mid and West Wales
Mike German	Welsh Liberal Democrats	South Wales East
William Graham	Welsh Conservatives	South Wales East
Rhodri Morgan	Labour	Cardiff West

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The Committee's Recommendations

The Committee's recommendations are listed below, in the order that they appear in this Report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

Recommendation 1. The Committee recommends that the first set of regulations made under Section 17(8) should be subject to the affirmative resolution procedure.

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Recommendation 2. The Committee recommends that there should be adequate consultation with all relevant parties in the course of drafting regulations concerning the content of care plans.

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Recommendation 3. The Committee recommends the use of the affirmative resolution procedure for the regulations establishing the period of time following discharge from secondary mental health services for which a previous service user remains eligible for re-assessment (22(1)(b)).

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Recommendation 4. The Committee recommends that the *Mental Health Act 1983* should be amended to provide that the first regulations made under sections 130E to 130H are made using the affirmative resolution procedure.

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The Committee's Role

1. The Constitutional Affairs Committee may consider and report on the following matters under the National Assembly's Standing Orders:
 - Standing Order 15.6 (ii) states that the Constitutional Affairs Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measuresthat grant powers to make subordinate legislation to the Welsh Ministers'.
 - Whilst it is not part of the Committee's remit to comment in the merits of the proposal which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on 'any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers'.
2. The purpose of this report is to inform the Assembly's Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

The Proposed Measure

3. The Welsh Government introduced the Measure on 22 March 2010. It was then referred to Legislation Committee No.3 to report on stage 1 consideration by 2 July 2010.

Scope and Intent

4. The proposed Measure places duties on Local Health Boards and local authorities in Wales in relation to assessment of mental health and treatment of mental disorder. It also makes provision in relation to independent mental health advocacy for qualifying patients - those are persons subject to the compulsory powers of the Mental Health Act 1983, and persons receiving treatment in hospital (suffering with a mental disorder) who are currently not able to access advocacy under the prevailing statutory regime. Advocacy will encompass advocacy connected with health related matters and social services.

Subordinate Legislation Provisions

5. The proposed Measure contains the following powers for the making of subordinate legislation:-

Part 1: Local Primary Mental Health Support Services

6. This Part of the proposed Measure provides that there will be local primary care mental health services throughout Wales delivered by Local Health Boards and local authorities working in partnership.

7. There are no delegated powers within this Part of the proposed Measure. However, there are powers elsewhere in the Measure that would impact on Part 1. Section 42 enables the Welsh Ministers to modify the operation of Part 1 in relation to local authority area. Section 44 gives delegated powers to the Welsh Ministers in respect of the eligibility of individuals to discharge the functions of a local mental health partner in carrying out primary mental health assessments under Part 1. It also provides the power to make regulations setting out the eligibility of individuals to be care coordinators in respect of secondary mental health services.

Part 2: Co-ordination of and care planning for secondary mental health service users

8. This Part of the proposed Measure provides that there will be local primary care mental health services throughout Wales delivered by Local Health Boards and local authorities working in partnership.

9. **Section 14(4):** regulations may provide for the identification of the mental health service provider with responsibilities of appointing a care coordinator when both the Local Health Board and local authority provide services to a person. **Procedure: negative** – justified in the Explanatory Memorandum as the regulations provide detail for a scheme which follows on from the proposed Measure itself.

10. **Section 15(3):** enables regulations providing for the cessation of appointment of a care coordinator. **Procedure: negative** – justified in the Explanatory Memorandum as being part of the scheme of appointment provided for under section 14(4).

11. **Section 17(1)(c):** provides that delegated powers may be used to prescribe the circumstances when a care and treatment plan must be reviewed and possibly revised. Section 17(8) makes further provision

in respect of care and treatment plans. **Procedure: negative** – justified in the Explanatory Memorandum as being concerned with administrative detail and procedure and as likely to require amendment in the future (Potentially at short notice).

Part 3: Assessments of Former Users of Secondary Mental Health Services

12. This Part of the proposed Measure provides individuals discharged from secondary mental health services with a new assessment of their need for services if they consider that this is required.

13. **Section 22:** regulations may make provision for the period of time in which a person may be entitled to request an assessment following discharge from secondary services. **Procedure: negative** – justified in the Explanatory Memorandum as the regulations will relate to a scheme flowing from the proposed Measure and may require periodic review.

14. **Section 28:** Welsh Ministers may make regulations regarding the determination of a person’s usual place of residence. **Procedure: negative** – justified in the Explanatory Memorandum as maintaining consistency with other subordinate legislation dealing with the same matter.

Part 4: Mental Health Advocacy

15. Part 4 of the proposed Measure amends the Mental Health Act 1983 (“the 1983 Act”) in respect of Independent Mental Health Advocacy. Following amendment, the 1983 Act will then provide for a scheme of independent advocacy for individuals subject to compulsion under the 1983 Act and also for patients receiving treatment in hospital for mental disorder who are not subject to compulsion under the 1983 Act.

16. **Sections 29 to 36 insert new sections 130E to 130L** into the 1983 Act. The Act currently provides delegated powers in relation to independent advocacy in the form of regulations – “The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008”. To achieve the policy objective of the Measure, the new delegated powers outlined below are conferred on Welsh Ministers.

17. **New section 130E** establishes a principle of independence for advocates and enables the Welsh Ministers to describe the persons from whom the Independent Mental Health Advocate (“IMHA”) should be independent.

18. **New sections 130F and 130G** enable the Welsh Ministers to prescribe further forms of help and advice which may be given to an IMHA in addition to those set out in section 130F and 130H.

19. **New section 130H** allows the Welsh Ministers to set out persons other than those professionally concerned with the patient who the IMHA may visit and interview in connection with their functions under the 1983 Act.

20. **Procedure: all negative.** The negative procedure will apply to all regulations made under the 1983 Act as amended. This is justified in the Explanatory Memorandum on the grounds that the regulations will be used to provide administrative detail and are required to be sufficiently flexible to respond to expected developments and improvements to advocacy within Wales. The negative procedure mirrors that applicable to the current provisions in the 1983 Act.

21. **Section 42** enables the Welsh Ministers to modify the operation of Part 1 of the proposed Measure in relation to local authority area. **Section 44** gives delegated powers to the Welsh Ministers in respect of the eligibility of individuals to discharge the functions of a local mental health partner in carrying out primary mental health assessments under Part 1. It also contains the power to make regulations setting out the eligibility of individuals to be care coordinators in respect of secondary mental health services.

22. **Section 43** provides similar powers in relation to Part 3 of the proposed Measure.

23. **Procedure: Sections 42 and 43 affirmative.** The affirmative procedure is justified in the Explanatory Memorandum as appropriate as these sections have potential to modify provisions in Part 1 which are themselves subject to full scrutiny of the Assembly; consequently the regulations are subject to a similar level of scrutiny.

24. **Section 44 negative:** Justified in the Explanatory Memorandum as providing sufficient flexibility to respond to future changes in professional practice.

Part 5: Part 6 of the proposed Measure: Miscellaneous and supplemental

25. **Section 46:** This provision enables Welsh Ministers to provide for services related to housing and welfare services over and above those relating to allocation and securing of accommodation under Part 7 of the Housing Act 1996. **Procedure: negative:** Justified in the Explanatory Memorandum as this provision allows for a list of services which may change over time.

26. **Section 51** provides that the proposed Measure will come into force in accordance with provision made by the Welsh Ministers by order. **Procedure: no procedure,** as is customary for commencement provisions.

Part 6

27. However, Part 6 of the proposed Measure (other than sections 49(1) and 50) and any provision containing a power to make regulations or an order, to the extent that the provision contains such a power, will come into force at the end of a period of two months from the day on which the proposed Measure receives Royal Approval.

Issues arising from evidence and recommendations of the Committee

28. The Committee considered the Proposed Mental Health (Wales) Measure on 20 May 2010 and received written and oral evidence from the Minister for Health and Social Services, Welsh Government Edwina Hart MBE AM.

General

29. The Committee is satisfied that the proposed Measure achieves the correct balance between powers on its face and the subordinate legislation powers given to Welsh Ministers.

30. The Committee agrees that although there are a considerable number of regulation making powers in the proposed Measure, it will not be unnecessarily complex.

31. Looking at the subordinate legislation provisions it contains, the Committee sees no reason why the National Assembly should not agree to the general principles of the Proposed Measure.

Scope of the proposed Measure

32. The Committee considered the suggestions that timeframes specifying a maximum period between referral by a GP for assessment and the making of the primary assessment and between qualifying as a patient in Part 2 and the completion of a care plan should be included in the proposed Measure.

33. The Committee agreed that assessment should be based on clinical care needs in each individual case rather than on prescribed time limitations.

Part 2: Coordination of and care planning for secondary mental health service users

34. The Committee is content with the use of the negative resolution procedure for any legislation resulting from Section 14(4) and Section 15(3) of the proposed Measure, which provides Welsh Ministers with general powers to make Regulations to identify which mental health service provider is responsible for appointing a care co-ordinator, when both a Local Health Board and a local authority provide services to a person and Section 15(3), which covers the cessation of such an arrangement, if it is needed, if the service provider that appointed them no longer provides a service to the patient.

Care and treatment plan

35. The Explanatory Memorandum to the proposed Measure states that there will be a requirement to provide services in accordance with the care and treatment plan “so far as it is reasonably practicable to do so”. Given that this may create an incentive to draw up plans that reflect resource availability rather than patient need, the Committee believes that the first set of regulations made under section 17(8) should be subject to affirmative (rather than negative) resolution.

Recommendation 1: the Committee recommends that the first set of regulations made under Section 17(8) should be subject to the affirmative resolution procedure.

36. Given the importance of regulations concerning the content of care plans, the Committee recommends that there should be an adequate consultation with all relevant parties in the course of drafting these regulations.

Recommendation 2: the Committee recommends that there should be adequate consultation with all relevant parties in the course of drafting regulations concerning the content of care plans.

Review and revision of the care and treatment plan

37. Having considered the Minister's reassurance that any changes intended as a result of the review and revision of the care and treatment plan would be minor and would be accompanied by suitable guidance to monitor and audit their introduction, the Committee is satisfied with the choice of the negative resolution procedure for the regulations providing for the review and revision of the plan (17(1)(c) and 17(9)).

38. The Committee was content with the Minister's assurance that Part 2 of the proposed Measure, i.e. in sections 14(4), 15(3), 17(8), 17(1)(c) and 17(9) will commence in 2011.

Part 3: Assessments of former users of secondary mental health services

39. The Committee is content with the Minister's explanation that enough flexibility is provided by the regulation making powers (rather than specifying on the face of the proposed Measure) in sections 22(2), 25(2)(b) and 28(1) of Part 3 of the proposed Measure relating to the assessment of former users of secondary mental health services.

40. The Committee is content with the use of the negative resolution procedure for the adjustments to the period of time within which a report of the assessment must be provided to the person assessed (Section 25(2)(b)).

41. The Committee recommends that the regulations establishing the period of time following discharge from secondary mental health services, for which a previous service user remains eligible for re-assessment, (Section 22(1)(b) should follow the affirmative resolution procedure.

Recommendation 3: the Committee recommends the use of the affirmative resolution procedure for the regulations establishing the period of time following discharge from secondary mental health services for which a previous service user remains eligible for re-assessment (22(1)(b)).

Part 4: Mental health advocacy

Extension of advocacy duties in the proposed Measure

42. The Committee is satisfied with the Minister's assurance that there are extensive plans to consult with stakeholders in the process of drafting regulations under the new section 130E(4), which would allow Welsh Ministers to set out the persons from whom Independent Mental Health Advocates should be independent.

43. The Committee established that the use of the negative resolution procedure in making regulations under the powers in the new section 130E is in line with provisions in the *Mental Health Act 1983*. Despite this, as Part 4 of the Proposed Measure provides for an expanded statutory scheme of independent mental health advocacy, the Committee recommends that the first regulations made under sections 130E to 130H should be made under the affirmative resolution procedure and that appropriate amendments should be made to the *Mental Health Act 1983* to facilitate this.

Recommendation 4: The Committee recommends that the *Mental Health Act 1983* should be amended to provide that the first regulations made under sections 130E to 130H are made using the affirmative resolution procedure.

Part 5: General

44. The Committee is content with the regulation making powers in sections 42 and 43 being subject to the affirmative resolution procedure.

45. The Committee is content with the regulation making powers in section 44 being subject to the negative resolution procedure, providing that parties with an interest in the regulations, particularly relevant professional groups, are consulted on their content.

Part 6: Miscellaneous and Supplemental

46. The Committee agrees that it is necessary to give powers to Welsh Ministers to make regulations to specify services relating to housing or welfare services beyond the provision of accommodation under Part 7 of the Housing Act 1996.

Witnesses

The following witnesses provided oral evidence to the Committee on 20 May 2010. A transcript of the session can be viewed in full at www.assemblywales.org

20 May 2010

Edwina Hart MBE AM	Minister for Health and Social Services, Welsh Government
Claire Fife	Mental Health Legislation Manager, Welsh Government
Tracey Jones	Legal Adviser - Food and Health Team, Welsh Government

List of written evidence

The Committee considered the following written evidence. All written evidence can be viewed in full at www.assemblywales.org

Document	Reference
Proposed Mental Health (Wales) Measure	CA(3)-14-10(p1)
Explanatory Memorandum	CA(3)-14-10(p2)
Legal Advisers' Report	CA(3)-14-10(p3)
Letter from the Chair to the Minister and response	CA(3)-14-10(p4)&(5)