

Explanatory Memorandum to the National Health Service Trusts (Membership and Procedure) (Amendment) (Wales) Regulations 2022

This Explanatory Memorandum has been prepared by the Health and Social Services Directorate of the Welsh Government and is laid before Senedd Cymru 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 National Health Service Trusts (Membership and Procedure) (Amendment) (Wales) Regulations 2022. I am satisfied that the benefits justify the likely costs.

Eluned Morgan MS

Minister for Health and Social Services

11 March 2022

PART 1

1. Description

- 1.1 These Regulations make provision for the role of a statutory vice-chair on the boards of directors of NHS Trusts in Wales (“NHS Trusts”) as an additional non-executive director post, including with respect to their tenure of office (including termination and suspension), appointment, disqualification for appointment, eligibility for reappointment and their powers and role in the proceedings and committees of NHS Trusts.
- 1.2 These Regulations also make provision providing for a decrease in the maximum permitted number of non-executive directors (excluding the chair and vice-chair) from 7 to 6 in consequence of the additional of the statutory vice chair post and an increase in the maximum permitted number of executive directors of NHS Trusts from 5 to 6 (including the Chief Executive) in order to maintain the balance of non-executive to executive directors and to further strengthen the governance arrangements of each Trust.
- 1.3 Lastly, the Regulations amend the establishing legislation for the existing NHS Trusts, Velindre University National Health Service Trust (“Velindre”), Welsh Ambulance Service National Health Service Trust (“Welsh Ambulance Service Trust”) and Public Health Wales National Health Service Trust (“Public Health Wales”), to provide that each Trust shall have a vice-chair on its board and to alter the number of directors on the board of each Trust.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 None.

3. Legislative background

- 3.1 These Regulations amend the following statutory instruments which relate to the establishment, membership and procedures of NHS Trusts:
- the National Health Service Trusts (Membership and Procedure) Regulations 1990 SI 1990/2024;
 - the Velindre National Health Service Trust (Establishment) Order 1993 SI 1993/2838;
 - the Welsh Ambulance Services National Health Service Trust (Establishment) Order 1998 SI 1998/678;
 - the Public Health Wales National Health Service Trust (Establishment) Order 2009 SI 2009/2058 (W. 177); and
 - the Public Health Wales National Health Service Trust (Membership and Procedure) Regulations 2001 SI 2009/1385 (W. 141).
- 3.2 Paragraph 4 of Schedule 3 to the National Health Service (Wales) Act 2006 (“the 2006 Act”) gives the Welsh Ministers the power to make regulations with respect to the membership and procedures of NHS trusts.
- 3.3 Paragraph 4 of Schedule 3 to the 2006 Act was amended by section 24 of the Health and Social Care (Quality and Engagement) (Wales) Act 2020 (“the 2020 Act”) to allow the Welsh Ministers to make regulations about the qualifications for and the tenure of office of vice-chairs of NHS Trusts (including the circumstances in which they cease to hold office, or may be removed or suspended). The amendment was made in connection with an amendment to paragraph 2 of Schedule 3 to the 2006 Act which enables the Welsh Ministers, if they consider it appropriate, to appoint a vice-chair to the board of NHS Trusts.
- 3.4 These Regulations are being made under the negative procedure.

4. Purpose and intended effect of the legislation

- 4.1 Section 24 of the Health and Social Care (Quality and Engagement) (Wales) Act 2020 amends the 2006 Act to provide Welsh Ministers with the power to appoint a statutory vice-chair to NHS Trusts established under the 2006 Act (which includes Public Health Wales, the Welsh Ambulance Service Trust and Velindre) if they consider it appropriate.
- 4.2 The powers were taken in order to strengthen the quality and governance arrangements within NHS Trusts by introducing a formal statutory vice-chair role for each Trust, as opposed to the current non-statutory vice-chair role which is filled by an existing non-executive director of each Trust. The aim is to standardise and clarify the roles and responsibilities of chair and vice-chair arrangements across these NHS organisations; strengthening leadership and therefore deliver as part of the commitment to improvement in quality service standards and patient experience.
- 4.3 The Welsh Government believes it is important to maintain a balance in the number of non-executive directors (Independent Members) and executive directors on a board, with the majority number made up of Independent Members. Therefore in order to maintain this balance on the boards of NHS Trusts, the Regulations include:
- A requirement for an independent statutory vice-chair as an additional non-executive director post for Velindre, Public Health Wales and the Welsh Ambulance Service Trust.
 - A reduction in the maximum permitted number of non-executive directors on the boards of all NHS trusts, excluding the chair and vice-chair, from 7 to 6 in consequence of the additional statutory vice-chair post;
 - An increase in the maximum permitted number of executive directors on the boards of all NHS Trusts from 5 to 6;
 - A reduction in the actual number of non-executive directors on the board of the Welsh Ambulance Service Trust, in addition to the chair and vice-chair, from 7 to 6. As the Welsh Ambulance Service Trust currently has 7 non-executive directors (in addition to the chair), in comparison with Velindre and Public Health Wales which have only 6 non-executive directors (in addition to the chair), in order for the composition of the boards of the 3 NHS Trusts to be consistent, with the agreement of the Welsh Ambulance Services Trust, the number of non-executive directors of the Welsh Ambulance Service Trust will be reduced to ensure that the boards of all 3 NHS Trusts shall have 6 non-executive members, in addition to the chair and vice-chair;
 - An increase in the actual number of executive directors on the boards of Velindre, Public Health Wales and the Welsh Ambulance Service Trust, from 5 to 6.
- 4.4 At present all 3 NHS Trusts have a non-statutory vice-chair drawn from among their existing non-executive directors. However, this creates inequities, including an increase in time commitments for those taking on the role, with local approaches developing regarding remuneration for the additional responsibility and time commitment. By providing for a separate statutory vice-chair role, these inequities can be removed.
- 4.5 Creating a position where the time commitment is clear at appointment may also widen the pool of individuals able to undertake the role. The existing arrangements require the vice-chair to be appointed from an existing cohort of non-executive directors, all of whom will have applied for a role requiring a lesser time commitment. It is therefore likely some individuals who have the required skills and interest in undertaking the role are not able step forward due to other time commitments outside of the Trust.
- 4.6 The existing arrangements also appoints individuals based on their skills and experience to fulfil the role of a non-executive director. These may be different to those required of a vice-chair-- with responsibilities as outlined in paragraph 11 above. The appointment of a

statutory vice-chair as an additional and separate non-executive director will allow for appointment of individuals with the appropriate skills and experience to fulfil this role.

Risks if this legislation is not made

4.7 By doing nothing the inequities outlined above would continue and may have a potential negative impact on the individual undertaking the role and other non-executive members.

Improving outcomes for disadvantaged or excluded sections of society

4.8 The Equality Act 2010 requires public organisations and bodies to actively consider the impact of the decisions they make on the need to eliminate discrimination and advance equality of opportunity. It also requires Local Health Boards, NHS Trusts and local authorities to consider how they can positively contribute to a fairer society through promoting equality in their day to day activities.

4.9 The role of statutory vice-chair will increase potential leadership capacity to support and contribute to the wider board's approach to equality and improving outcomes for disadvantaged or excluded sections of society through the addition of an additional leadership post on the boards of all 3 NHS Trusts.

5. Consultation

5.1 The Welsh Government's proposals regarding the statutory vice-chair role were first consulted on as part of the Green Paper: Our Health, Our Health Service, between July and November 2015. The Green Paper explored whether legislation could help efforts to further improve the health service in Wales. To do this, the paper asked people to share their views on issues relating to the quality of health services and its governance and functions, including the arrangements for vice-chairs of NHS Trusts.

5.2 Overall, 170 written responses to the Green Paper were received¹. A report summarising the outcome of the consultation was published in February 2016.

5.3 Following consideration of the responses, the Welsh Government included a proposal for a statutory vice-chair position on the boards of NHS Trusts, in the White Paper: Services Fit for the Future, Quality and Governance in Health and Care in Wales, which was published for consultation between 28 June and 29 September 2017. A total of 336 responses to the White Paper were received.

5.4 Additionally, the Welsh Government presented at a number of stakeholder meetings before and during the consultation period, and held a number of events between 18 and 28 September 2017 at various venues across Wales which attracted approximately 100 people in total. These events were attended by a number of groups who are traditionally under-represented in consultations including people with learning disabilities and their carers, young people, older people, and BAME participants.

5.5 A consultation summary report was published in February 2018.²

¹ Welsh Government. Consultation – summary of responses - Our Health, Our Health Services Green Paper [Internet]. Welsh Government; 2016. Available from: <https://gov.wales/sites/default/files/consultations/2018-01/160222greenpapersummaryresponsesen.pdf>

² Welsh Government. Consultation – summary of responses - Services Fit for the Future [Internet]. Welsh Government; 2018. Available from: <https://gov.wales/sites/default/files/consultations/2018-02/180226summary-of-responses.pdf>

- 5.6 Responses to the NHS Trusts vice-chair proposal were generally in favour of the proposal. The NHS Trusts specifically stated both in response to the White Paper and in evidence to the Senedd Committees during the passage of the UK Health and Social Care Bill that they were in favour of the vice-chair position being an additional non-executive statutory public appointment and have confirmed in subsequent discussions that this remains their favoured position. The Welsh Ambulance Service Trust already has an additional non-executive director in comparison with Velindre and Public Health Wales. In discussion with the Welsh Ambulance Services Trust, given the Trust currently has 7 non-executive directors (not including the chair) – one of which undertakes the non-statutory vice-chair role, they were of the view that their board size would be effective with a reduction in their non-executive director number set against the addition of the new statutory vice-chair role. This adjustment by the Welsh Ambulance Services Trust would mean the boards of the 3 NHS Trusts would be consistent in number. The 3 NHS Trusts have agreed this approach.
- 5.7 As part of those discussions, the NHS Trusts also requested an increase in executive director numbers from 5 to 6 to increase capacity and capability and support better delivery. This was also agreed in order to maintain a balance in the number of non-executive directors and executive directors on the boards.
- 5.8 Thus provision to give the Welsh Ministers the power to appoint a statutory vice-chair to NHS Trusts, if they consider it appropriate, was included in Section 24 of the 2020 Act.
- 5.9 Welsh Government has discussed the implementation of the vice-chair role with all three NHS Trusts and has received confirmation that the implementation of the role as an additional non-executive director (except in the case of the Welsh Ambulance Service Trust – see para 5.6 above), along with the increase in the number of executive directors, is welcomed.

6. Regulatory Impact Assessment (RIA)

- 6.1 A Regulatory Impact Assessment on the policy proposal to enable the Welsh Ministers to appoint a statutory vice-chair to NHS Trusts was completed for the 2020 Act.³ This has been reviewed and updated where necessary during the development of these Regulations and is presented in Part 2, below.

³ <https://gov.wales/sites/default/files/publications/2020-06/health-and-social-care-quality-and-engagement-wales-act-explanatory-memorandum.pdf>

PART 2 – REGULATORY IMPACT ASSESSMENT

7. Options

7.1 Two policy options have been identified and explored in the development of these Regulations:

- **Option 1:** Do nothing;
- **Option 2:** Introduce these Regulations to make provision relating to a new statutory vice-chair role on the boards of NHS Trusts and to increase the number of executive directors.

Option 1 - Do Nothing

Description

7.2 This option would involve not making regulations under section 203(9) and (10) of, and paragraph 4 of Schedule 3 (as amended by section 24 of the Health and Social Care (Quality and Engagement) (Wales) Act 2020) to, the National Health Service (Wales) Act 2006 (“the 2006 Act”) and the continuation of the existing position under which NHS Trusts have the power to appoint a non-statutory vice-chair from the existing non-executive directors on the Board to allow the proceedings of the Trust to be conducted in the absence of the chair.

Costs

7.3 There are no new or additional costs attached to this option.

Benefits

7.4 Doing nothing would change nothing. Currently NHS Trusts have the power to appoint a non-statutory vice-chair from amongst the existing non-executive directors, but this results in an increase in nominal time commitments on an existing non-executive director. By doing nothing this would continue and may negatively impact on the non-executive director undertaking the role as well as undermine the benefits of a having a separate vice-chair.

7.5 Doing nothing would not involve additional costs, but would not achieve any of the benefits of Option 2.

Option 2 – Make Regulations to provide for the role of statutory vice-chair on the boards of NHS Trusts (as an additional non-executive director post) , to decrease the number of non-executive directors (excluding the chair and vice-chair) and increase the number of executive directors

Description

7.6 This option involves the making of regulations which make provision providing for the statutory vice-chair position on the boards of the 3 NHS Trusts (Velindre, Public Health Wales and the Welsh Ambulance Service Trust). This option also alters the maximum number of permitted directors on the boards of NHS trusts, in accordance with the changes set out at paragraph 9 of the Explanatory Memorandum.

7.7 As set out in paragraph 5.6 above, the Welsh Ambulance Services Trust currently has 7 non-executive directors, in addition to the chair and vice-chair, compared to Velindre and Public Health Wales which only have 6. Consequently, these regulations also provide for a reduction in the number of non-executive directors of the Welsh Ambulance Service Trust, in addition to the chair and vice-chair, from 7 to 6. This means that, set against the addition

of the statutory vice-chair role, each board of the 3 NHS Trusts will have 6 non-executive members, excluding the chair and vice-chair.

7.8 The option also increases the number of executive directors of all 3 NHS Trusts from 5 to 6 (including the Chief Executive) in order to maintain the balance between non-executive and executive director board member numbers.

Costs

7.9 There are increased costs to the NHS Trusts and to the Welsh Government from this option and are described below and set out in the summary table below.

Costs to NHS Trusts

Vice-Chair Remuneration

7.10 All costs with regard to the remuneration of vice-chairs will be met by the NHS Trusts.

7.11 Remuneration rates for the board members of NHS Trusts are determined by the Welsh Ministers in accordance with paragraph 11 of Schedule 3 to the 2006 Act. The current remuneration rates for vice-chairs on Local Health Boards in Wales are banded, providing rates between £34,788-56,316 for a time commitment of 13 days per month. Members are regarded as holders of an office for tax and National Insurance purposes. All remuneration relating to the appointment is taxable and Pay As You Earn (PAYE) in respect of income tax and National Insurance Contributions will be deducted at source. The appointment is non-pensionable.

7.12 Currently, the NHS Trusts chair and non-executive directors receive Band 2 level remuneration. In a vice-chair role this would be expected to be £30 – 35k per annum.

7.13 Responses to the consultation from NHS Trusts suggested a nominal time commitment of 8 days for vice-chairs of NHS Trusts, with remuneration paid on a pro-rata basis. At band 2, this would result in remuneration of approximately £18,461. However, it is envisaged that NHS Trusts will be provided with the option of recruiting up to a time commitment of 13 days in order to provide flexibility, when necessary, to balance resources against contemporary requirements of the NHS Trust.

7.14 Thus new and recurring costs to Velindre and Public Health Wales could fluctuate between approximately £18,500 and £35,000 per annum for each NHS Trust, according to the nominal time commitment.

7.15 The new and recurring cost to the Welsh Ambulance Service Trust of the statutory vice-chair will be lower as the vice-chair role at the Welsh Ambulance Service Trust is being created without an increase in the existing number of non-executive directors. Thus the cost to the Welsh Ambulance Services Trust will be the uplift in salary from a standard non-executive director role to a vice-chair Role. The non-executive director role at WAST is currently £9,360 per annum. Thus depending on the days worked (assuming a nominal time commitment of 8 to 13 days), the new and recurring cost to the Trust would fluctuate between approximately £9000 and £25,500 per annum.

7.16 Thus across all three Trusts the new and recurring costs of the statutory vice-chair role would range from £46,000 to £95,500 per annum.

Remuneration of an additional Executive Director on the NHS Trust Board

7.17 All costs with regard to the remuneration of additional executive directors will be met by the NHS Trusts.

7.18 Senior individuals who hold the position of a director within an NHS Trust are remunerated in accordance with their role and responsibilities. Not all directors are 'executive directors' of the Trust, and appointing an existing director to an executive director position will result an uplift in responsibility. The costs are estimated to be £6,500 to £26,000 per Trust per annum (depending on job evaluation and uplift in responsibility), including National Insurance and pension. Any additional costs resulting from any additional executive directors will be met by the NHS Trusts.

Costs to Welsh Government

7.19 The cost of the public appointments process for the recruitment of statutory vice-chairs to the NHS Trusts will be met by the Welsh Government.

7.20 The appointment process for the statutory vice-chair is estimated to cost £2,000. This cost includes consideration of additional publicity requirements with the increased focus on diversity. The vice-chair would be expected to be appointed for a 4 year term, with the process thus costing an average £250 to £500/annum. The costs would be a recurring additional cost for the Welsh Government.

7.21 For the purposes of the summary table below, the appointment costs for all three NHS Trusts have been allocated to years 2022/23 and it has been assumed that all vice-chairs will serve a four year term with a new round of appointments four years later.

Benefits

7.22 In recent years, the role and function of the vice-chair has been viewed by NHS Boards and by Welsh Ministers as a valuable role and a necessary requirement. Changes in the external environment mean that vice-chairs are being called on routinely to participate in collaborative and partnership based activities on an all-Wales basis. This was highlighted by the service responses received at Green Paper⁴ and White Paper^{Error! Bookmark not defined.} consultations on the then Health and Social Care (Quality and Engagement) (Wales) Bill. The currently nominated non-statutory vice-chairs of NHS Trusts are also being asked more often to deputise for the chair, whose role has similarly expanded, as the Trusts have become more integrated within the wider NHS.

7.23 The benefits of a statutory public appointed vice-chair position on a Board have been demonstrated in respect of Local Health Boards (LHBs) where vice-chairs have specific roles and responsibilities beyond that of deputising in the chair's absence, for example by:

- Providing strong, effective and visible leadership, across primary care, community care and mental health services, internally through the board and committees, and externally through connections with a wide range of stakeholders;
- Playing a full and active role in the governance of an organisation, providing opinion and challenge and support to the board on key issues;
- Contributing to the work of the board based upon independence, past experience and knowledge, and ability to stand back from operational management;
- Contributing and accepting corporate decisions to ensure a joined up, robust and transparent decision making process by the board;
- Further strengthening the Independent Membership capability and act as sounding board for the chair.

⁴ Welsh Government. Green Paper: Our Health, Our Health Service [Internet]. Welsh Government; 2015.

Velindre Vice Chair remuneration	£18,500 - 35,000	£18,500 -35,000	£18,500 -35,000	£18,500 -35,000	£18,500 -35,000	£18,500 -35,000	£18,500 -35,000	£18,500 -35,000
Velindre Executive Director remuneration	£6,500 - £26,000	£6,500 - £26,000	£6,500 - £26,000	£6,500 - £26,000	£6,500 - £26,000	£6,500 - £26,000	£6,500 - £2,6000	£6,500 - £2,6000
Public Appointment Process	£6,000	-	-		£6,000	-	-	-
Total NHS Trusts	£65,500-£173,500	£65,500-£173,500	£65,500-£173,500	£65,500-£173,500	£65,500-£173,500	£65,500-£173,500	£65,500-£173,500	£65,500-£173,500
Total Welsh Government	£6,000	-	-	-	£6,000	-	-	-
Total – Minimum	£71,500	£65,500	£65,500	£65,500	£71,500	£65,500	£65,500	£65,500
Total - Maximum	£179,500	£173,500	£173,500	£173,500	£179,500	£173,500	£173,500	£173,500

7.30 The total costs to NHS Trusts and the Welsh Government, over an 8 year period from 2022-23 to 2029-30 range between £536,000 and 1.4 million.

8. Competition Assessment

8.1 Not applicable.

9. Post implementation review

9.1 The effectiveness of NHS Trust governance is kept under constant review both within the NHS Trusts and externally via audit and review mechanisms.

9.2 NHS Trusts in Wales should comply with the Corporate Governance in Central Government Departments: Code of Good Practice 2017 and are required to undertake an assessment to evidence their compliance.

9.3 NHS Trusts are required to report against this assessment and wider governance as part of their annual reporting arrangements. Each must produce an Annual Governance Statement which provides the reader with a clear understanding of the organisation and its' internal control structure, the stewardship of the organisation, an explanation of the risks the organisation is exposed to both currently and looking forward – and how these are mitigated, the potential impact of the risks and operating environment on the achievements of the organisation, and how the organisation has coped with the challenges faced.

9.4 The Auditor General for Wales has a statutory function to report on the economy, efficiency and effectiveness with which public bodies, including NHS Trusts, have used and may improve the use of resources. In discharging this function the governance of NHS Trusts will be considered.

9.5 The Chairs of NHS Trusts are accountable to the Minister for Health and Social Services and the effectiveness of these changes will be considered via these accountability arrangements.