

Explanatory Memorandum to the Regulated Services (Service Providers and Responsible Individuals) (Wales) (Amendment) Regulations 2024

This Explanatory Memorandum has been prepared by the Health and Social Services Department and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Regulated Services (Service Providers and Responsible Individuals) (Wales) (Amendment) Regulations 2024. I am satisfied that the benefits justify the likely costs.

Julie Morgan MS
Deputy Minister for Social Services

12 March 2024

1. Description

- 1.1 The Regulation and Inspection of Social Care (Wales) Act 2016 (“the 2016 Act”) provides the statutory framework for the regulation and inspection of social care services and the regulation of the social care workforce in Wales. To help achieve this, the 2016 Act provides the Welsh Ministers with a range of regulation-making and other subordinate legislation powers.
- 1.2 This Explanatory Memorandum relates to the Regulated Services (Service Providers and Responsible Individuals) (Wales) (Amendment) Regulations 2024 (“the Amendment Regulations”). The Amendment Regulations amend the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (“the Regulated Services Regulations”) in relation to three areas.
- 1.3 Firstly, the Amendment Regulations use the regulation-making power under section 2(3) of the 2016 Act to ensure that a local authority Intermediate Care service is not treated as a care home service despite paragraph 1 of Schedule 1 to the 2016 Act. These services will continue to be regulated as a domiciliary support service.
- 1.4 The Amendment Regulations also make it clear that when a provider of an accommodation-based service reconfigures the premises used by the service to accommodate 5 or more people, that the additional bedroom(s) and the communal areas of the service, must meet the requirements within Part 13 of the Regulated Services Regulations. This includes the requirement to have en-suite bathrooms, minimum bedroom sizes, minimal communal space, accessible outdoor space and, in certain circumstances, a passenger lift.
- 1.5 In addition, the Amendment Regulations make minor miscellaneous amendments to regulations 6 and 7 of the Regulated Services Regulations.

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

- 2.1 No specific matters have been identified.

3. Legislative background

- 3.1 The powers enabling the Amendment Regulations to be made are contained within sections 2(3), 27(1) and 187(1)(b) of the 2016 Act. Further details are set out below:
 - Section 2(3) enables the Welsh Ministers to prescribe, in regulations, things which are not to be treated as a regulated service for the purposes of the 2016 Act.

- Section 27(1) is a regulation-making power enabling Welsh Ministers to impose requirements on a service provider in relation to a regulated service.
- Section 187(1)(b) allows the Welsh Ministers to make regulations under the 2016 Act which make different provision for different purposes, for different cases and for different areas.

4. Purpose and intended effect of the legislation

- 4.1 The purpose of the Amendment Regulations is to close unintended loopholes in the Regulated Services Regulations. The Amendment Regulations exempt intermediate care services provided by a local authority from having to register as a care home service, provided that the care and support is delivered by the local authority's registered domiciliary support service, the accommodation is vested in the local authority and the service is limited to 16 weeks per individual. This ensures these services can continue to be regulated as domiciliary support services.
- 4.2 The Amendment Regulations also ensure that when a provider of an accommodation-based service reconfigures their premises to accommodate 5 or more people, that the additional bedroom(s) and the communal areas of the service, must meet the requirements within Part 13 of the Regulated Services Regulations.
- 4.3 Currently, the Regulated Services Regulations enable providers of accommodation-based services to register with 4 or fewer bedrooms (which are exempt from the requirements in Part 13 of the Regulated Services Regulations) and subsequently reconfigure the premises used by the service to add additional bedrooms without having to meet the Part 13 requirements.
- 4.4 In addition, providers of accommodation-based services with 5 or more bedrooms at the point of registration, who did not fall within categories A, B, or C, as set out in regulation 49(2) of the Regulated Services Regulations, may reconfigure their premises under the current system to add additional bedrooms without these rooms or the communal areas having to meet the requirements in Part 13 of the Regulated Services Regulations.
- 4.5 The Amendment Regulations close this loophole to ensure that environmental standards are maintained in accommodation-based services with 5 or more individuals.

5. Consultation

5.1 A 12-week public consultation was undertaken on these proposals between 15 May and 6 August 2023: <https://www.gov.wales/regulating-special-school-residential-services>

PART 2 - REGULATORY IMPACT ASSESSMENT

Options

Two options have been considered in the analysis of the costs, benefits, and risks of amending the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (“the Regulated Services Regulations”) to address two issues within the regulatory framework.

The regulation of Intermediate Care services run by local authorities

The first issue relates to the regulation of intermediate care services run by local authorities in extra care type settings. Intermediate care services provide short term accommodation and care for people either stepping down from, or up to, hospital. The purpose of these services is to address current pressures on the hospital system by helping people to avoid unnecessary hospital admission, support people to be as independent as possible following a hospital stay, and to support people to remain living at home if, due to illness or disability, an individual is having increasing difficulty with daily life.

We are aware of intermediate care being provided in an assisted living arrangement (also known as extra care) by local authorities, who are also leasing the accommodation. The care and support element is provided by the local authority’s registered domiciliary support service. However, as the accommodation is being provided by the local authority together with the care under these arrangements, they fall within the legal definition of a care home service under the 2016 Act.

We consider that, whilst it is appropriate to continue to regulate the care and support element of these services as a domiciliary support service, it is not proportionate or necessary to regulate them as a care home service.

The reconfiguration of accommodation-based services

The second issue relates to providers of accommodation-based services reconfiguring their premises after registration to add additional bedrooms.

Part 12 of the Regulated Services Regulations places general requirements about the physical standards of rooms and facilities for all accommodation-based services. This includes ensuring they are accessible, are of an adequate size and are properly maintained.

Part 13 of the Regulated Services Regulations sets out additional requirements about the physical standards of rooms and facilities for new or extended accommodation-based services. This includes the requirement to have en-suite bathrooms, minimum sized bedrooms, accessible outdoor space, and communal space for three categories of “new premises”. These categories are summarised as follows in regulation 49(2):

- Category A: The premises used for the provision of the service consist of a new building or an existing building which has been converted for the purpose of providing the service.
- Category B: The premises consist of a building or buildings to which an extension is added.
- Category C: This category captures unoccupied premises which were not being used to provide a regulated service immediately prior to service provider's registration of the service under the 2016 Act but have previously been used for that purpose at some point in the past, by another provider.

The purpose of Part 13 of the Regulated Services Regulations is to achieve improvement in the built estate over time without destabilising the market.

There is legal uncertainty about whether additional bedrooms created by reconfiguring existing premises are caught by Part 13 of the Regulated Services Regulations. This is because as the provider is already registered, the premises are not new accommodation and because the practice does not fit neatly into any of the categories described in Part 13.

We wish to address these loopholes to ensure that services creating additional bedrooms after the registration of the service, to accommodate 5 or more individuals, meet the requirements set out in Part 13 of the Regulations. This is comparable to the approach taken for extensions to accommodation-based services.

For this RIA, the options under consideration are:

Option one: do nothing - do not create regulations to amend the Regulated Services Regulations

This option reflects the current position.

The regulation of Intermediate Care services run by local authorities.

Under option one, an intermediate care service run by a local authority under their current arrangements would be required to register as a care home service.

The reconfiguration of accommodation-based services

Under this option, accommodation-based services will continue to be able to reconfigure their premises after registration to create additional bedrooms without the extended service having to meet the requirements in Part 13 of the Regulated Services Regulations, such as en-suite facilities, minimum sized rooms, accessible outdoor space and in certain circumstances a passenger lift.

Option two: create regulations which amend the Regulated Services Regulations

The regulation of Intermediate Care services run by local authorities.

Under this option, an intermediate care service would be exempt from having to register as a care home service but would still be required to be regulated as a domiciliary support service. The exemption would be subject to the intermediate care service being provided by the local authority, the accommodation being owned or leased by the local authority, the domiciliary support element of the service being registered with CIW and the service limited to 16 weeks per individual.

The reconfiguration of accommodation-based services

Under this option, the Regulated Services Regulations would be amended to ensure that, should an accommodation-based service reconfigure their space to create additional bedrooms for 5 or more individuals, that the extended service (which encompasses the additional bedroom(s) and communal areas of the home) meets the requirements of Part 13 of the Regulated Services Regulations.

Costs

Option one: do nothing - do not create regulations to amend the Regulated Services Regulations

This is the baseline option and, as such, there are no additional costs associated with this option. The following section outlines the potential implications of not amending the Regulated Services Regulations.

The regulation of Intermediate Care services run by local authorities.

Under option one, a local authority run intermediate care service provided in an extra care setting would not be exempt from the requirement to register as a care home service. Regulating this type of service as a care home would not be appropriate or proportionate due to the purpose and nature of the service.

More significantly, to meet the registration requirements for a care home service, the provider would need to demonstrate that the accommodation meets the environmental standards within the Regulated Services Regulations. Should an extra care service have more than 4 bedrooms it would be required to have en-suite facilities in all bedrooms, minimum space in communal areas and bedrooms, accessible outdoor space and in certain circumstances a passenger lift. Indicative costs for installing en-suite facilities are included under option 2. These requirements (and the accompanying costs) are considered disproportionate for the nature and purpose of this type of service.

Under the Part 4 and 5 Code of Practice (Charging and Financial Assessment) issued under the Social Services and Well-being (Wales) Act 2014, a local

authority must not charge for reablement to a person for up to 6 weeks. Should a local authority-run intermediate care service have to close due to the burden on the local authority of the service being regulated as a care home, the local authority may have to commission this service from a private care home, which could be more expensive for them (whilst still being free to the individual).

As an alternative to registering as a care home provider, local authorities could adapt their arrangements and enter into short term tenancy agreements with individuals in receipt of intermediate care, thus legally separating the care and accommodation aspect of the service. However, it is disproportionate for local authorities to enter into tenancy agreements with individuals due to the short-term nature of the service and because individuals will have their own homes. Entering into a new tenancy agreement could have negative consequences for individuals, such as loss of housing benefit, and would be an overly bureaucratic arrangement for this type of short-term service.

The reconfiguration of accommodation-based services

Under option one, there is a greater risk of challenge to CIW from service providers in the event of CIW refusing an application from a provider to vary their registration where the requirements of Part 13 have not been complied with. A challenge to CIW could result in a lengthy legal process which may require significant investment of time for both CIW's registration team, legal services and for providers.

Option two: create regulations which amend the Regulated Services Regulations

The regulation of Intermediate Care services run by local authorities

Under this option, local authorities providing intermediate care services in extra care settings will be able to continue to manage these services as domiciliary support services. Local authorities will not, therefore, incur any additional costs associated with registering these services as care home services, as described in option one.

Individuals who use these services will not be required to enter into tenancy agreements with the council. Entering into a tenancy agreement creates legal responsibilities for both parties. It could risk the loss of housing benefit for those in receipt of such support and is likely to have broader implications for all individuals regardless of whether they rent or own their homes. Requiring individuals to enter into a tenancy agreement would be overly complex and bureaucratic given the short-term nature and purpose of the service.

The reconfiguration of accommodation-based services

Under option two, the Regulations would be clear that, should a provider vary their registration to create additional capacity in the service, that the extended service - which encompasses the additional bedroom(s) and communal areas of the home - has suitable space and facilities to meet the needs of all

individuals living at the service. Providing this clarity within Regulations will reduce the risk of challenge to CIW in the event of refusal of an application to vary the registration where the requirements of Part 13 are not complied with. This should save time for both CIW and legal services and provide clarity for providers.

Since January 2019, 24 providers have registered care homes as four-bedroom services and subsequently reconfigured the homes a few months later to create a fifth bedroom. 12 of these services were care homes for children. The total number of care home services of any size that have applied to vary their registration to increase their maximum capacity is 159. 37 of these services were care homes for children. From this data we are, however, unable to state which of these variations were due to a reconfiguration of the home, as there could be other ways that a provider could increase their capacity, such as an extension to the building.

Requiring the additional service to meet requirements equivalent to Part 13 of the Regulated Services Regulations is likely to require significant investment from providers. Some of these costs were outlined in the Regulatory Impact Assessment for the Regulated Services Regulations which came into force in 2017. The [RIA](#) stated:

According to quotes gained from a number of reputable home improvement websites, the cost of fitting an en-suite usually ranges from around £3000 to £4500 plus VAT. However, the cost to install an en-suite including a shower would vary significantly depending on whether there was an existing en-suite present in the room with space for a shower to be installed, the quality of the materials used for the en-suite, the location of the premises and the number of en-suites being installed at any one time.

Given the recent inflationary pressures and changes in global economic conditions, the cost of fitting an en-suite in 2024 is likely to be much higher. In many cases, reconfiguring an existing space whilst ensuring it meets the minimum space requirements will be impossible without extending the building.

This is not a new requirement but an amendment which restores the original policy intention of the Regulated Services Regulations. The aim of these Amendment Regulations is to close the legal loophole to ensure that standards are upheld in homes with 5 or more bedrooms and that improvements continue to be made to the built estate in Wales.

This change will not be applied retrospectively. It will apply to applications for variation of registration determined by CIW after 31 March 2024.

Benefits

Option one: do nothing - do not create regulations to amend the Regulated Services Regulations

The regulation of Intermediate Care services run by local authorities

Under this option, local authorities providing intermediate care in extra care settings under their current arrangements would be required to register as a care home service even though it is recognised that this is not appropriate or proportionate for services of this purpose and nature. The additional requirements placed on care home services may result in these services being unable to comply and unable to register and could lead to these services closing.

The reconfiguration of accommodation-based services

Under this option, providers of accommodation-based services wishing to reconfigure their premises would benefit from the loophole in the Regulated Services Regulations allowing them to vary their registration to add additional bedrooms without having to meet the requirements of Part 13 of the Regulated Services Regulations.

Option two: create regulations which amend the Regulated Services Regulations

The regulation of Intermediate Care services run by local authorities.

Amending the Regulated Services Regulations to exempt local authority run intermediate care services from having to register as a care home service will ensure they can continue to operate as a domiciliary support service. We consider this to be a more proportionate approach to regulating this type of service, as they are more akin to a short term supported living arrangement than a care home service. Ensuring these services can continue to be regulated in this way means the service will be regulated proportionately. These services are provided by local authorities without charge for a specific purpose and a limited period in order to bridge the gap between hospital discharge and returning home when appropriate community care is not available.

Ensuring these services can continue to operate is important as they provide a valuable service that supports both individuals and the wider health and social care system. These services prevent unnecessary hospital or care home admission, support timely discharge from hospital and help people to be as independent as possible after a stay in hospital.

The reconfiguration of accommodation-based services

Amending the Regulated Services Regulations will close the loopholes within the Regulations to ensure that the extended service, which encompasses the additional bedroom(s) and communal areas of the home, has suitable space and facilities to meet the needs of all the individuals living at the service, in line with the original policy intention. It will also provide clarity and certainty to reduce the risk of challenge in the event of refusal of an application to vary the registration where the requirements of Part 13 are not complied with.

Risks

Option one: do nothing - do not create regulations to amend the Regulated Services Regulations

The regulation of Intermediate Care services run by local authorities

If local authority run intermediate care services are required to register as a care home, there is a risk that these services will be regulated in a way that is unsuitable for that type of service. Intermediate care services play a crucial role in bridging the gap between acute care and returning home to live independently, helping individuals regain their independence and reducing the burden on hospitals.

Should intermediate care services have to close, individuals transitioning from hospital to home or those needing support at home, may face challenges if they are not able to find an alternative service. They could experience delayed discharges from hospitals or be admitted to hospital unnecessarily, putting additional strain on the healthcare system.

The reconfiguration of accommodation-based services

Providers reconfiguring their homes to add additional bedrooms after registration may have reduced communal space for the remaining residents and will not have en-suite facilities in the additional bedroom(s). This would lead to inconsistencies in standards across care homes in Wales. This practice is also likely to lead to slower improvements in the built estate over time, which is contrary to the policy intention.

As stated in the section on costs, there is also a greater risk of legal challenge to CIW from providers of accommodation-based services in the event of CIW refusing an application to vary the registration where the requirements of Part 13 are not complied with. A challenge to CIW could result in a lengthy legal process which may require significant investment of time for both CIW's registration team, legal services and providers.

Option two: create regulations which amend the Regulated Services Regulations

The regulation of Intermediate Care services run by local authorities

Under option two, there is a risk that only exempting intermediate services run by a local authority may appear inconsistent with the overall approach to regulation under the 2016 Act. This was reflected in two responses to the consultation. One respondent questioned why the exemption applies only to local authorities and not to other non-profit care providers, as the wider flexibility would support government aims for rebalancing the market and progressing the Further, Faster initiative. Another stated that there should be

equity applied to the regulations across all care settings - short, intermediate and longer term.

These Regulations deal with the pressing matter of ensuring that existing intermediate care services provided by local authorities can continue to be regulated in an appropriate and proportionate way. These services are provided by local authorities without charge, for a specific purpose and a limited period in order to bridge the gap between hospital discharge and returning home when appropriate community care is not available.

The reconfiguration of accommodation-based services

There is a risk that option two could deter providers or prevent them from creating additional bedrooms to their service due to not being able to meet the requirements in Part 13 of the Regulated Services Regulations. This could have a small impact on the overall capacity within the social care system, including care homes for children. The Welsh Government policy to eliminate private profit from the care of children looked after could increase the impetus to enhance capacity within local authority run, or not-for-profit run, care homes for children, which might prompt them to expand their services.

However, option two reinforces the original policy intention which is that expansions to accommodation-based services with 5 or more individuals must meet the requirements in Part 13 of the Regulated Services Regulations. This position ensures that individuals living in services with 5 or more bedrooms have sufficient private and communal space and facilities, and that improvements continue to be made to the built estate over time.

Conclusion

Based on an appraisal of the costs, benefits and risks of both options, option two is the preferred option.