

**Explanatory Memorandum to** The Care and Support (Disputes about Ordinary Residence, etc.) (Wales) Regulations 2015.

This Explanatory Memorandum has been prepared by the Department for Health and Social Services 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 Care and Support (Disputes about Ordinary Residence, etc.) (Wales) Regulations 2015 and I am satisfied that the benefits outweigh any costs.

*Mark Drakeford*

Minister for Health and Social Services

7 July 2015

## **Part 1 – OVERVIEW**

### **1. Description**

The Social Services and Well-being (Wales) Act 2014 (the 2014 Act) brings together local authorities' duties and functions in relation to improving the well-being of people who need care and support and carers who need support in a single Act. The Act provides the statutory framework to deliver the Welsh Government's commitment to integrate social services to support people of all ages, and support people as part of their families and communities.

Section 195 of the 2014 Act provides for the determination of disputes about where a person is an ordinarily resident in Wales and about the resolution of disputes between local authorities about ordinary residence, (and portability of care and support) and sets out the procedures that need to be followed when disputes arise.

Section 117(4) of the Mental Health Act 1983 (on mental health after care services) provides that section 195 of the 2014 Act applies to a dispute between local authorities in Wales about where a person was ordinarily resident for the purposes of section 117.

Section 189(8) of the 2014 Act provides that any dispute between local authorities about the application of the temporary duty on a local authority in cases of provider failure is to be determined under section 195 as if it were a dispute of that type.

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

No specific matters identified.

### **3. Legislative background**

The powers enabling these Regulations to be made are contained within Part 11, section 195 of the Social Service and Well-being (Wales) Act 2014 ('the 2014 Act') which makes provisions about how local authorities can make resolution of disputes relating to adult and children's ordinary residence and their portability of care and support.

This statutory instrument is subject to annulment in pursuance of a resolution in the National Assembly for Wales (**the negative procedure**).

The regulations will come into force on 6 April 2016.

### **4. Purpose & intended effect of the legislation**

The purpose of these Regulations is to make provision about the resolution of disputes between local authorities about where a person is ordinarily resident in Wales for the purposes of the Social Services and Well-being (Wales) Act 2014 and for the purposes

of section 117(3) of the Mental Health Act 1983. The Regulations also provide for the resolution of disputes between a sending and receiving authority under section 56 of the 2014 Act (portability of care and support) and between local authorities about the application of section 189 of the 2014 Act (provider failure: temporary duty on a local authority).

They are intended to clarify:

- which authority is responsible for meeting an individual's needs until the dispute is resolved
- the steps to be taken by local authorities to try to resolve the dispute prior to referring it for determination by the Welsh Ministers under section 195 of the Act
- the documentation that is to be supplied by local authorities when making a referral
- the process for seeking a review of determinations  
the arrangements for reimbursement between authorities when the effect of a revised determination following a review is that sums paid under a previous determination were not owed.

As set out in the legislative background these Regulations are made under section 195 of the Act and provide a new statutory framework for dispute resolution between local authorities in Wales and replace the existing guidance.

Dispute resolution procedures are currently contained in statutory guidance issued under section 7 of the Local Authority Social Services Act 1970 (LASSA). These relate to disputes about ordinary residence only.

The guidance is WOC 41/93, 'Ordinary Residence – Personal Social Services', which assists local authorities to identify when an individual is ordinarily resident in their area for the purpose of providing personal social services and (when required) residential accommodation under the 1948 Act. It includes the procedures to be followed when local authorities are in dispute, including when and how to seek a formal determination from the Welsh Ministers or Secretary of State.

These Regulations on dispute resolution largely replicate the existing procedures on disputes about ordinary residence contained in statutory guidance (WOC 41/93), but will give them regulatory force. They will be supplemented by the statutory code of practice relating to Part 11 of the Act.

The Regulations will also extend the dispute resolution procedures to disputes between local authorities about portability of care and support (under section 56 of the Act), about the temporary duty in relation to provider failure (section 189 of the Act), and about where a person was ordinarily resident for the purposes of mental health aftercare (section 117(3) of the Mental Health Act 1983).

## **5. Consultation**

A 12 week consultation on these regulations ran between 6 November 2014 and 2 February 2015. Further details on the consultation process are set out in the Regulatory Impact Assessment in Part 2.

The Report and a list of respondents can be founds at:

<http://gov.wales/consultations/healthsocialcare/part11/?status=closed&lang=en>

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

This Regulatory Impact Assessment explores the options and costings associated with these Regulations.

Three options were considered:

Option 1 – do nothing

Option 2 – Not using the regulation-making powers, but issuing statutory or good practice guidance only

Option 3 – Bring Regulations into force, supplemented by a code of practice (Preferred option)

### **Option 1: Do nothing**

The existing guidance on dispute resolution is contained within WOC 41/93, 'Ordinary Residence – Personal Social Services'. This is statutory guidance issued under section 7 of the Local Authority Social Services Act 1970, a power that will be repealed when the Social Services and Well-being (Wales) Act 2014 is implemented in April 2016. This means that the current guidance will no longer have statutory force from that date.

If nothing is done, there would be no statutory guidance on the steps local authorities should take to avoid getting to the point of seeking a determination and on how to seek a determination by the Welsh Ministers under section 195(1) of the 2014 Act.

### **Option 2: Not using the regulation-making powers, but issuing statutory or good practice guidance only**

If it were decided not to make regulations, the current dispute resolution procedures could be incorporated into the statutory code of practice relating to Part 11 (within the chapter on ordinary residence), or dealt with in good practice guidance.

### **Option 3: Bring Regulations into force, supplemented by a code of practice (Preferred option)**

This option would involve using the regulation-making powers under section 195(2) of the Act in respect of ordinary residence and portability of care and support. This would include disputes arising from section 117 of the Mental Health Act 1983, and disputes arising under section 189 of the 2014 Act. This would be the first time there has been provision in regulations covering disputes of this nature. The procedures would build upon existing statutory guidance and good practice, and would be supplemented by the code of practice relating to Part 11 of the 2014 Act.

## **Costs**

### **Option 1: Do nothing**

There have been no requests for determination of disputes between Welsh local authorities since devolution. The only requests have been in relation to cross-border placements with English local authorities, which are covered by separate legislation and guidance.

Ordinary residence disputes are essentially disputes about responsibility for funding care and support, because where a person is ordinarily resident determines which local authority is responsible for assessing and meeting that person's care and support needs. Not having dispute resolution procedures in place would leave the settling of disputes to the discretion and goodwill of the local authorities concerned. Not having clearly agreed procedures in place could potentially encourage local authorities to seek determinations from the Welsh Ministers rather than seek to resolve disputes between themselves.

### **Option 2: Not using the regulation-making powers, but issuing statutory or good practice guidance only**

There are no obvious costs associated with this option. Having agreed dispute resolution procedures may reduce the cost of disputes overall (see 'benefits' below).

### **Option 3: Bring Regulations into force, supplemented by a code of practice (Preferred option)**

Clear and transparent procedures for handling disputes, with the force of regulation, and building upon existing good practice, should reduce the likelihood and number of disputes.

## **Benefits**

### **Option 1: Do nothing**

There are no obvious benefits to having no agreed dispute resolution procedures in place.

### **Option 2: Not using the regulation-making powers, but issuing statutory or good practice guidance only**

There are clear benefits to having clear and agreed procedures in place for resolving disputes about ordinary residence etc. These are the obverse of the costs associated with Option 1 (doing nothing) above. Agreed resolution procedures may help reduce the incidence and length of disputes between local authorities, and incentivise them to resolve issues before having to refer the dispute for formal determination by the Welsh Ministers.

Agreed resolution procedures could take the form of good practice guidelines agreed with the Welsh Local Government Association (WLGA) and Association of Directors of Social Services (ADSS) Cymru, procedures included in the statutory code of practice relating to Part 11 of the 2014 Act, or regulations made under section 195(2) of the 2014 Act supplemented by the Part 11 code.

### **Option 3: Bring Regulations into force, supplemented by a code of practice (Preferred option)**

The benefits of this option lie in the clarity that the regulations provide for local authorities in how disputes are to be handled, and the fact that they will have greater force by being in regulations rather than sitting only within a code of practice. The regulations will clarify:

- which authority is responsible for meeting an individual's needs until the dispute is resolved
- the steps to be taken by local authorities to try to resolve the dispute prior to referring it for determination by the Welsh Ministers under section 195 of the Act
- the documentation that is to be supplied by local authorities when making a referral
- the process for seeking a review of determinations
- the arrangements for reimbursement between authorities when the effect of a revised determination following a review is that sums paid under a previous determination were not owed.

The regulations will set out the broad framework for dispute resolution only. More detailed procedures for dealing with disputes, both at the local level and when referred for determination by the Welsh Ministers, will be included in the Part 11 code.

On balance, providing a framework for dispute resolution in regulations, supplemented by the statutory code of practice will best deliver these benefits.

### **Consultation**

A 12 week public consultation on these regulations and accompanying Code of Practice ran between 6 November 2014 and 2 February 2015. The documents can be found at: <http://gov.wales/consultations/healthsocialcare/part11/?status=closed&lang=en>

## Competition Assessment

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 regulations 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 businesses/organisations?	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 characterised 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

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

### Post implementation review

The Social Services Well-being (Wales) Act 2014 contains provisions to allow for the Welsh Ministers to monitor functions of the Act carried out by local authorities and other bodies. Ministers may require these bodies to report on their duties in implementing these regulations.

The Welsh Government will continue to monitor the impact of the regulations on areas such as the Welsh language, the UN Convention on the Rights of the child, older people and equality.