

Ministerial Advice

To: Cabinet Secretary for Health and Social Services

Minister for the Welsh Language and Lifelong Learning

From: [hepgorwyd adran 40(2)]

Date: 1 December 2017

Subject: Welsh Language Standards for the Health Sector – primary care

MATS Reference number: MA-L/VG/0368/17

When is a decision required from the Minister? This MA-L should be considered together with the advice in MA-L/EM/0764/17

1. What is the issue you are asking the Minister to consider?

The Cabinet Secretary and the Minister are asked to agree the proposed approach for the imposition of Welsh language duties on independent primary care providers.

2. What action(s) are you recommending to the Minister?

Ministers are invited to agree :

- the proposed approach in relation to primary care services provided by independent primary care providers;
- to the placing of Welsh Language duties on independent primary care providers by amending the relevant contracts/terms of service regulations
- if this proposed approach is agreed, to authorise policy instructions to be sent to Legal Services on the legislative changes required; and
- that officials start consultation and negotiation with the statutory representative bodies for independent primary care providers to reach an agreement on the proposed approach.

Ministers are also asked to note that:

Separate advice is provided in MA-L/EM/0746/17 which sets out the policy position on the imposition of Welsh Language Standards on the health sector. It is proposed in that MA that the Welsh Language Standards (No. 7) Regulations (“the Health Sector Regulations”) will place standards on LHBs for all services provided by them, including primary care services. The standards will not apply to those primary care services provided on their behalf by independent primary care providers.

3. Deputy Director, Statement of Assurance

I, [hepgorwyd adran 40(2)], Health and Social Services Group confirm that I have quality assured this advice.

I am satisfied that the recommended decision or action, if agreed, would be lawful and affordable. Welsh Government policy priorities and cross portfolio implications have been fully considered.

Advice**4. Context - What is the situation that has led to this advice?**

4.1 For the purpose of this advice, an independent primary care provider is a person who provides a primary care service on behalf of an LHB. A primary care service means a service provided on behalf of the LHB under a contract, arrangement or agreement made under or by virtue of any of the following provisions of the 2006 NHS Wales Act: -

- a) *Section 41(2)(b) (primary medical services);*
- b) *Section 42(1) (general medical services contracts);*
- c) *Section 50 (arrangements by Local Health Boards for the provision of primary medical services);*
- d) *Section 57(1) (general dental services contracts);*
- e) *Section 64 (arrangements by Local Health Boards for the provision of primary dental services);*
- f) *Section 71 (arrangements for general ophthalmic services);*
- g) *Section 80 (arrangements for pharmaceutical services);*
- h) *Section 81 (additional pharmaceutical services);*
- i) *Section 92 (pilot schemes);*
- j) *Section 102 (local pharmaceutical services schemes).*

Context – Development of Welsh Language Services in Primary Care

4.2 Provision and improvements of Welsh language services in primary care have been a key area of discussion between the health sector and the Welsh Language Commissioner, especially following the publication of her inquiry into primary care in June, 2014.

4.3 One of the key actions in the inquiry included:

- From April 2016, health boards will demonstrate more people are routinely reporting they are able to communicate in Welsh when seeking care and support from primary care.

4.4 The 'More than just words...' strategic framework 2016-19 sets out our commitment to strengthen the planning and delivery of Welsh language services in health, social services and social care. The follow up framework was published in March 2016 and in response to the inquiry outlined key actions with regard to Welsh language services in primary care, including by March 2017:

- "Welsh language services provision in primary care to be strengthened through including the Welsh language in the national GMS, Optician, Pharmacy and Dental Contracts. This will be done in line with the Welsh Language Commissioner's Inquiry into the Welsh language in Primary Care. 'My Language, My Health'."

Welsh Language Standards for the Health Sector – The Welsh Language Standards (Health sector) Regulations

4.5 The consultation draft contained some limited primary care standards (standards 83-97) that placed duties on health boards in relation to primary care to provide some Welsh language services (e.g. documents, a translation service for signs) to primary care providers, and to signpost those providers willing to provide a primary care service through the medium of Welsh.

4.6 There was general support for the draft standards relating to primary care. However, Cymdeithas yr Iaith, some members of the public and some health boards felt that these standards did not go far enough to provide face to face Welsh language primary care services to the public. In order to provide a continuous Welsh language service between primary and secondary care their view was that primary care providers should be directly subject to service delivery standards. This was based on the fact that the majority of people's first point of care with the NHS in Wales is with primary care and for vulnerable groups, for example the elderly, patients with dementia and children, communicating in their first language is a matter of need rather than choice. The petition from Cymdeithas yr Iaith called on the Welsh Government to re-look at the proposed standards for the health sector to include providers of primary care services, including GP practices and pharmacists to ensure firm and complete rights in this important area. The petition was also sent to the Assembly's Petitions Committee.

4.7 In her response to the consultation, the Welsh Language Commissioner expressed concern that standards 83 – 97 do not go far enough to ensure a situation where it is possible for the public to receive primary care services in Welsh. However, the Commissioner has not offered any guidance or suggested a way forward that would address her concerns. She and her

officials have indicated a concern about the volume of issuing individual compliance notices to independent primary care providers and the bureaucracy that this approach would generate.

4.8 Following the consultation, health and Welsh language officials have been considering how to approach Welsh language service provision in relation to primary care. MA-L-EM/0764/17, which needs to be considered alongside this advice, seeks agreement to the approach for primary care services delivered directly by LHBs. It is proposed in that MA-L that the health sector regulations will impose standards on LHBs for all services they directly provide, including primary care services. This advice therefore considers the approach in relation to primary care services provided on their behalf by independent primary care providers.

5. What is your advice to the Minister?

Options considered for independent primary care providers

5.1 In light of the consultation responses officials have considered the following options for dealing with independent primary care providers:

1) Apply the Welsh Language Standards to all primary care services – whether provided directly by the Local Health Board or sub-contracted to an independent provider.

5.2 This would treat sub-contracted primary care services in the same way as all other sub-contracted services and would have the benefit of the Standards being consistent across the entire primary care sector. However, Local Health Boards stated in their response to the health sector consultation that it was not appropriate for them to be responsible for the day to day delivery of Welsh language services by independent primary care providers. Policy officials believe this is due to the complexities of the contractual arrangements between the Local Health Boards and the providers. As such, it is considered that it would not be reasonable and proportionate to impose Standards on Local Health Boards when the services are provided on their behalf by independent primary care providers.

2) Imposing standards directly on independent primary care providers in relation to those primary care services provided on behalf of the Local Health Board

5.3 This option would entail specifying Standards (and preparing appropriate Regulations) so that the Commissioner could issue each individual independent primary care provider with a Compliance notice.

5.4 This option is consistent with Welsh Government policy of imposing Welsh language duties on persons as it follows the framework of the Measure. It would provide clear duties in the form of standards and would allow enforcement by the Commissioner.

5.5 This option would entail specifying at least one standard for all of the activities listed in Schedule 9 to the Measure. The list in Schedule 9 includes correspondence, telephone calls, reception of visitors, personal meetings, public meetings. This is because section 42 of the Measure requires the Welsh Ministers to make a standard (or standards) specifically applicable to a person in relation to each of those activities if the person in question undertakes that activity. Having considered the list in Schedule 9, it appears on initial assessment that every independent primary care provider would, on balance, undertake each of those activities, apart from help-lines and call centres, awarding grants and issuing official notices. No standards would be required for activities not undertaken by independent primary care providers.

5.6 Additionally, the Welsh Ministers do not have to make a standard (or standards) specifically applicable to a person in relation to each of those activities if the Welsh Ministers think that it would be unreasonable or disproportionate to do so.

On the basis that the Welsh Ministers have to make standards for each of these activities specifically applicable then a decision would have to be taken as to the level of that standard.

5.7 Examples of the types of standards that could potentially be made specifically applicable to primary care service providers could include:

- Correspondence;

You must state in correspondence that you welcome receiving correspondence in Welsh, [that you will correspond to correspondence in Welsh][and that corresponding in Welsh will not lead to a delay]

- Telephone calls;

When a person contacts you on your main telephone number (or numbers), you must greet the person in Welsh.

5.8 Standards for independent primary care providers are likely to be different to the Standards for Local health boards, though that would require further policy consideration. If they were different, the situation would be the same as option 3 - there would be no consistency within the sector as independent primary care providers would be subject to different Standards to the Local Health Boards when providing primary care services. It would also be for the Commissioner to decide what standards were reasonable and proportionate for each provider. We could therefore not say with certainty the same standards would apply across the primary care sector if this option was pursued.

5.9 The main disadvantage of this option is that the Commissioner would need to consider whether the standards were reasonable and proportionate for each provider to comply with, and send a compliance notice to each provider (the Commissioner has informally told us that she would not favour this option however she has not made any public statements to this effect). Our initial assessment indicates that this would require 2046 compliance notices across all independent primary care providers. However, the nature of the limited

standards being considered could mitigate this issue as it is possible (depending on the standards) that the Commissioner would consider that all standards were reasonable and proportionate and send the same compliance notice to all providers, although this may not be the case for providers with a high percentage of private patients.

5.10 The independent primary care provider would also be required to respond to the Commissioner's queries on a complaint received about compliance with the standards. This would have resource implications for the provider and it would add another administrative requirement at a time when we are trying to reduce bureaucracy and the associated workload for providers. The process would also potentially alienate and counter against our aim to work and provide a supportive environment with the independent providers on improving Welsh language services.

5.11 It is also important to note the position of pharmacists, opticians and most dental practices is somewhat different to GP practices as only part of the services they provide are on behalf of the LHB. These bodies often provide private services side by side. The standards would only attach to the services they provide on behalf of the LHB and not the private services. The practical effect of this is that these providers would need to be able to determine at the outset of their interaction whether the individual they were providing a service to at a particular time (e.g. in a phone call) was an LHB patient or a private patient. There may therefore be scope to argue that for these providers, it would be unreasonable or disproportionate to specify standards relating to the activities in Schedule 9. This could give the Welsh Ministers more freedom as to the standards to specify for these providers.

3) Place Welsh language duties on independent primary care providers through their contracts/terms of service

5.12 This option would involve placing Welsh language duties on independent primary care providers through their relevant primary care contracts and terms of service.

5.13 Policy officials consider that if this option is pursued, the Welsh language duties should be prescribed on a national level as a mandatory contractual term/term of service in the regulations set out in para 6.10. This would mean that the contracts and terms of service will have to contain duties on the providers in relation to the Welsh language. These duties will only apply to the primary care services they undertake on behalf of the Local Health board. They will not apply to private services that they undertake. As with option 2, the practical effect of this is that these providers would need to be able to determine whether the individual they were providing a service to at a particular time was an NHS primary care patient or a private patient.

5.14 Amending the legislative contract/terms of service to place Welsh language duties on independent primary care providers would avoid the issue of the Commissioner sending compliance notices to each provider. The duties would sit within the existing contract/reporting systems, be enforceable by the LHB, and would provide clear duties in the form of contractual obligations. Providers would understand the requirements as they are used to dealing with

obligations in the form of contracts or terms of service. It also maintains a single approach to reporting and meeting the duties under the terms of service for the independent primary care providers.

5.15 However, this option is inconsistent with Welsh Government policy of Welsh language duties being imposed under the framework of the Measure. This option would not provide the Commissioner with enforcement rights and therefore could attract criticism from the Commissioner. We have been informally advised that the Commissioner is not supportive of option 2 due to concerns about the individual compliance notices that would need to be issued, however she has not made any public statements to this effect. This approach could also risk scrutiny and criticism from the Assembly/public as we could be seen to be circumventing the procedure agreed by the Assembly for the imposition of Welsh language duties. There is therefore a political risk attached to this option. This may affect the passage of the health sector regulations in the Assembly, which must be approved by the Assembly before being made.

5.16 Pursuing this option could give rise to different levels of Welsh language service provision within the primary care sector. This is because LHBs would be subject to standards for the primary care services they provide directly, but no standards would apply when primary care services are provided by independent primary care providers on their behalf. In the primary care setting, some patients may not be aware when they are receiving an LHB provided service or not. [hepgorwyd adran 42] Similar issues would also likely arise if option 2 was pursued, as standards for independent primary care providers would not necessarily be the same as standards for LHBs and indeed under option 2 the Commissioner would, in any event, be able to impose different standards on each provider as she saw fit.

5.17 At the current stage of policy development, we envisage placing broadly the following requirements on contractors through amendments to their contractual terms and terms of service which correlate with some of the standards that LHBs will (subject to their compliance notices) be required to comply with and set out in the Health Sector regulations. However, we recognise further work with Legal Services will be required on the final duties to ensure the constitute contractual terms, and we will provide further advice once the specific duties are finalised:

The contractor will:

- 1) provide information to the Local Health Board about which primary care services the contractor is able to offer through the medium of Welsh;
- 2) take advantage of the translation service offered by the Local Health Board in order to provide a bilingual sign when erecting a sign in connection with the services it provides on behalf of the Local Health Board;
- 3) make available to patients and members of the public any Welsh language version of a document and forms provided to the contractor by the Local Health Board;
- 4) encourage their Welsh speaking staff to wear a badge provided by the Local Health Board that conveys that the wearer is able to speak Welsh;
- 5) encourage and provide opportunities for their staff to attend training courses and events arranged by the Local Health Board, and to make available to staff information provided by the Local Health Board, to develop their awareness of

the Welsh language and understanding of how to use Welsh in the workplace;
and

6) encourage the recording of the active offer and patient language preference

5.18 If primary care providers do not adhere to the duties, it is expected as a first step, that LHBs will informally encourage primary care providers to meet the relevant duty. If a primary care provider persistently refuses to adhere to the duties then LHBs can take a more formal approach through the relevant contractual remedies which we expect would be a last resort. We are also presently working on a toolkit for independent primary care providers in the delivery of the active offer and Welsh language services and this can potentially incorporate guidance on the Welsh language duties.

5.19 The changes to the contract/terms of service regulations will require consultation with the contractors' representative bodies. The process would initially involve consultation and negotiation through the normal channels to agree the duties with:

- the General Practitioners Committee Wales;
- the Welsh General Dental Practitioners Committee and the British Dental Association Wales;
- Optometry Wales; and
- Community Pharmacy Wales.

5.20 Officials expect that mutual agreement can be reached through constructive engagement and consultation with the representative bodies. There is no guarantee that agreement will be made, and therefore if this option is pursued, public statements should be limited at this stage to state that we will be engaging with the relevant statutory bodies.

Policy Officials' preferred option – place Welsh language duties on independent primary care providers through their contracts/terms of service (option 3)

5.21 All of the options have their own complications and difficulties. We consider that option 3 provides the most practical and reasonable way forward. While we recognise that the proposal will not provide the "face to face" Welsh language primary care services that the Commissioner and Cymdeithas yr Iaith have called for, we hope that placing some achievable Welsh language duties on independent primary care providers will provide a reasonable starting point to introduce Welsh language provision in the primary care sector.

5.22 The main reason for recommending this option is that independent primary care providers have not previously been subject to Welsh language schemes as is the case with the majority of bodies that are required to comply with Welsh language standards. Based on current understanding of capacity and capability, placing standards on independent primary care providers would at this point in time not be reasonable or appropriate. It is essential that we introduce duties at the right level that are reasonable, and do not impact on service delivery or staff recruitment given the current pressures being faced by the sector.

- 5.23 We recognise that pursuing this option will result in different levels of service provision within the primary care sector, however it is likely that this would also be the case if option 2 was pursued. We consider that this can be justified on the basis that the independent providers need to be gradually introduced to Welsh language provision in order to ensure service delivery and staff recruitment is not impacted. This is a first step in providing Welsh language services within primary care and we believe it is a positive response to some of the concerns raised during the consultation on the health sector regulations.
- 5.24 Amending the legislative contract/terms of service will avoid the bureaucracy of the Commissioner sending compliance notices to each provider. This option also provides a constructive way for the LHBs to work with and provide support for primary care providers, as the duties will be enforceable by the LHB. LHBs will subject to their own standards (subject to a compliance notice being issued by the Commissioner), therefore they can raise awareness about the importance of the provision of Welsh language services. This in our view will provide a better platform for us to work with the sector to develop and increase the use of Welsh language services based on patient choice and need within primary care.
- 5.25 This option also provides us with the opportunity to negotiate with the representative bodies of the profession on the proposed changes to their contracts/terms of service and work constructively on a way forward. There is a danger that imposing the Welsh language standards which would be enforceable by the Commissioner could alienate the professions at a time when we are seeking good relations to deliver the primary care agenda. Officials expect that mutual agreement can be reached through constructive engagement and consultation. Due to the need to undertake this consultation, documentation accompanying the health sector regulations and commitments in plenary will need to be limited to stating that we will be engaging with the statutory representative bodies.
- 5.26 Given the consultation responses, the Commissioner's recommendation and a recent letter from 30 healthcare professionals relating to extending the standards to the whole of the primary care sector, there is a political risk attached to this option and policy recommendation, on the basis that this option will not fully address the concerns raised by some stakeholders in the consultation. However, none of the options would fully achieve this given the current inability of the independent primary care sector to comply with more onerous Welsh language duties. This may affect the passage of the health sector regulations in the Assembly, which must be approved by the Assembly before they are made.
- 5.27 It should be noted that costs for options 1 and 2 have not been considered within the Regulatory Impact Assessment for the draft regulations and if this is the preferred Ministerial approach then a further assessment would be required in respect of the resource implications.
- 5.28 As noted in the finance section further advice will be provided following the negotiation/ consultation with the independent primary care contractor representative bodies to reach an agreement on the proposed approach

including any resource implications of imposing through the contracts.

6. What legal or policy obligations are relevant to this advice?

[hepgorwyd adran 42]

Equality

- 6.1 The Welsh Ministers are subject to the public sector equality duty (the “PSED”) under section 149 of the Equality Act 2010. The PSED obliges the Welsh Ministers, when carrying out their functions, to have due regard to the need to:
- a. eliminate discrimination, harassment, victimisation and other conduct which is unlawful under the Equality Act;
 - b. advance equality of opportunity for the equality groups protected by the Equality Act 2010 (age, disability, gender reassignment, race, religion or belief, sex, sexual orientation); and
 - c. foster good relations between the different equality groups.

- 6.2 The PSED applies to the development of policy proposals. A draft Equalities Impact Assessment has been prepared for the draft Health Sector Regulations which will be revisited before the final regulations are laid. No one, in any part of Wales, should be denied opportunities to use the Welsh language, nor denied the opportunity to learn Welsh because of their race, ethnicity, disability, gender, sexual orientation, age or religion. Welsh language services should be available to, and accessed by, all communities.

Rights of the Child

- 6.3 The Welsh Ministers are also obliged to have due regard to the United Nations Convention on the Rights of the Child when exercising their functions, including when formulating new policies. *Children’s Rights Impact Assessment*
- 6.4 A draft Children’s Rights Impact Assessment has been prepared for the draft Health Sector Regulations which will be revisited before the final regulations are raised.

Well-being of Future Generations (Wales) Act 2015

- 6.5 The Welsh Ministers are subject to the well-being duty in section 3 of the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development (as defined in section 2 of that Act). The steps they must make in doing so must include setting and publishing well-being objectives that are designed to maximise their contribution to achieving the well-being goals set out in section 4 of that Act and taking all reasonable steps (in exercising their functions) to meet those objectives. The Welsh Ministers adopted and published their well-being statement in September 2017.
- 6.6 The work to develop Welsh language services with independent primary care providers will contribute to the following well-being objectives of the Welsh

Ministers:

- Deliver health and care services fit for the future
- Promote good health and well-being for everyone
- Build resilient communities, culture and language

6.7 The approach we are proposing reflects the sustainable development principle and is based on an *involvement* of independent primary care providers in developing its capacity and capability to deliver Welsh language services and do so in a way which supports *collaboration* and *integration* among them.

Welsh Language Standards

6.8 Placing Welsh language duties on independent primary care providers will have clear benefits to the Welsh language, and we consider that the proposed approach is the most reasonable and proportionate way to introduce Welsh language provision in primary care services when such services are provided by independent primary care providers.

7. What are the financial implications of Ministers agreeing to this advice and which budget will this be paid through?

Cost: None

Budget: None

Further advice will be provided following the negotiation with the independent primary care contractors representative bodies to reach an agreement on the proposed approach including any resource implications of imposing through the contracts.

HSS Finance clearance code: JB 2017/6423

8. What communication or media activity is planned following this decision?

If you agree to the approach primary care policy officials will start to undertake engagement and consultation with the independent primary care contractors' representative bodies once policy proposals are finalised to reach agreement.

An official response to the consultation will be published to coincide with publishing the revised Welsh language standards for the health sector that will include the proposed approach for independent primary care providers we will be engaging with the representative bodies on as part of our response to the feedback received.

Annex A: Copy Recipients

[hepgorwyd adran 40(2)]