

Ministerial Advice

To: 1. Minister for Welsh Language and Lifelong Learning 2. Cabinet Secretary for Education 3. Cabinet Secretary for Health and Social Services

From: [hepgorwyd adran 40(2), Welsh Language Unit, CP2

Date: 22 November 2017

Subject: Legislation: Welsh Language Standards for the Health Sector – post consultation update

MATS Reference number: MA-L/EM/0764/17

When is a decision required from the Minister? 27 November 2017. This advice will need to be considered together with the advice in MA-L/VG/0368/17

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

Following the analysis of the responses to the consultation on the draft Regulations to make Welsh language standards for the Health Sector, and further discussions between Welsh language and Health policy officials, the Cabinet Secretary and Minister are asked to agree revisions to the policy for the Regulations.

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

The Minister and Cabinet Secretary are invited to agree;

- the policy behind proposed changes to the draft Regulations;
- that separate Regulations are prepared for the 9 professional healthcare Regulators with an England and Wales remit;
- that NHS Business Services Authority are not included in the proposed Regulations;
- that policy officials do not consider that a further consultation on the draft Regulations is required before they are laid before the National Assembly

and to note;

- separate advice will be provided on the proposed approach in relation to primary care services provided by independent Primary Care providers on behalf of Local health Boards(MA-L-VG-0368-17). We recommend that both sets of advice should be considered together before you make a decision on this MA-L;
- Draft Regulations have been prepared (doc 1) in accordance with the policy position outlined in this MAL. These draft Regulations are subject to some changes arising from final legal checks and translation. Substantive changes to the policy position outlined in this MAL could delay the laying of the Regulations. The proposed laying date is week commencing 11 December 2017 (if no further consultation is undertaken). The previous Minister committed to laying the Regulations before the end of 2017 and the Welsh Language Commissioner (“the Commissioner”) has publicly expressed her concern about the delay in making

these Regulations.

3. Deputy Director, Statement of Assurance

I, [hepgorwyd adran 40(2)], and [hepgorwyd adran 40(2)], confirm that we have quality assured this advice.

We are 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 in line with delivery of the government objectives in Prosperity for All: the national strategy.

Advice

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

Welsh Language Commissioner's standards investigation

4.1 Following the investigation, the Commissioner submitted a number of reports to the Welsh Ministers. The Commissioner recommended that the Welsh Ministers makes standards specifically applicable to the health sector bodies, and came to a specific conclusion about primary care. She concluded that:

'As primary care is the first point of contact for the majority of the public in terms of the health service the Welsh Language Commissioner believes that it is essential to ensure consistency in terms of linguistic behaviour across the health service in Wales in its entirety. As a result, primary care services provider must be subject to the Welsh language standards under the same statutory framework as the health organisations that were subject to this standards investigation'. Therefore, the Commissioner concludes that additional standards are needed to enable this to Happen.

4.2 The Commissioner was silent on how her conclusion should be achieved, and what standards might be needed.

4.3 Primary care is about those services which provide the first point of care, day or night, for more than 90% of people's contact with the NHS in Wales. General practice is a core element of primary care but is not the only element – primary care encompasses more health services including pharmacy, dentistry and optometry. It is also about coordinating access for people to the wide range of services in the local community to help meet their health needs and well-being needs. This can include for example community and district nursing, mental health teams and wide range of services provided by voluntary organisations. In the context of the draft standards primary care is defined as including the contracted services of general practice, dental, ophthalmic and pharmacy services. It does not include their private work. Sometimes Local Health Boards

provide these services themselves rather than contracting others to provide them on their behalf, e.g. out of hours GPs in some cases.

The Health sector

4.4 In July 2016 the Welsh Ministers consulted on the draft Welsh Language Standards (Health sector) Regulations 2016 which will make standards specifically applicable to health sector bodies (MA-(L)/ARD/5096/16). The draft Regulations also proposed to amend the Welsh Language Standards (No. 4) Regulations 2016 in order to add professional healthcare regulators to those Regulations. A copy of the consultation version is attached at Doc 2.

4.5 The consultation was launched on 14 July and closed on 14 October 2016. During this period policy officials met with Chief Executives and senior managers from each of the health boards and trusts that will be subject to the draft standards. Meetings were also held with Board of Community Health Councils, representatives of the healthcare regulators, representatives of the Royal Colleges and other professional bodies. Two public events were held in Galeri, Caernarfon and the Liberty Stadium, Swansea. Officials also met with representatives from *Cymdeithas yr Iaith*.

4.6 A total of 88 responses were received - 19 of the responses used a standard response prepared by *Cymdeithas yr Iaith* which focused on the lack of standards on primary care providers. *Cymdeithas yr Iaith* also submitted a petition signed by 759 individuals who argued that individuals interacted most frequently with primary care providers, and therefore standards should apply to that sector. 46 people attended the consultation events, mostly officials from the bodies that would come under the standards.

5. What is your advice to the Minister?

The general themes from the Health sector consultation are:

5.1 An acknowledgement by the health boards and trusts of the importance of being able to provide services in Welsh to their patients. Members of the public noted the importance of being able to receive health care in the language of their choice.

5.2 Recognition by the boards and trusts that improvements could be made in the provision of Welsh language healthcare services. The bodies recognised that the active offer advocated in "*Mwy na Geiriau...*" has not been implemented universally.

5.3 Concerns about the cost of implementing the standards and the risk of this diverting expenditure from frontline services.

5.4 Concern that, because of the range of IT systems used by the health boards and trusts, it would be difficult to ensure that the information about a patient's

language choice would be transferred across services and available to all staff, thereby making it difficult to comply with some of the proposed standards.

5.5 Concerns surrounding a lack of Welsh speaking staff within the bodies which led to doubts regarding their capability to comply with some of the proposed standards. This could lead to a dependence on written and oral translation. It was argued that providing translation would be impractical in situations such as outpatients and accident and emergency departments where the turnover of patients can be high and unpredictable.

5.6 A need was identified to increase the opportunities for professionals to be trained through the medium of Welsh so that they would be able to use Welsh in a healthcare setting.

Concerns were raised about the following specific areas:

Clinical Consultations (draft standard 25 of the consultation version at doc 2)

5.7 This draft standard required the health boards and trusts to ask the individual if they would like Welsh language support at a clinical consultation. If the individual confirmed that they would like to receive Welsh language support the health board or trust would have been under a duty to ensure that the individual understands what is happening during the clinical consultation (for example by providing a Welsh speaking member of staff or providing a translation service). The body would then have to provide Welsh language support at any subsequent clinical consultations. There would be no need to provide Welsh language support if the clinical consultation is undertaken in Welsh.

5.8 The bodies liable to comply with the standards raised a number of issues about their ability to comply with the proposed standard. They raised the following specific comments:

- The practicality of complying with the standard in all circumstances such as in accident and emergency where providing timely care is the imperative and outpatients where there is a high turnover of patients.
- The practicality of arranging Welsh language provision at each patient's clinical interaction during a hospital visit. It may be possible to anticipate some of the interactions in advance and plan Welsh language provision where necessary. However, the patient may be required to visit more departments or be seen by different practitioners which were not anticipated which could make it difficult for the body to comply with the standard.
- There were concerns that providing Welsh language support or translation could lengthen the duration of consultations which in turn would make it difficult to meet other statutory targets.
- Concern was expressed that the nuances of what is said by a patient could be lost in translation.
- The appropriateness of introducing another person, such as a translator, into a consultation and the bodies' ability to source sufficient translators with experience of working in medical situations.

5.9 In addition, it was noted that clinical consultations are undertaken by regulated healthcare professionals who work to agreed standards. Some bodies

noted a concern that introducing an extra undefined role into this situation (providing Welsh language support or translation), in particular if the patient's consent is being sought, could increase the clinical risk for the clinician and the body. The General Medical Council guidance requires a doctor, if they are unable to discuss an investigation or providing treatment with the patient to delegate their responsibility to a person:

- (a) That is suitably trained and qualified
- (b) That has sufficient knowledge of the proposed investigation or treatment, and understands the risks involved
- (c) That understands, and agrees to act in accordance with, the guidance in the GMC booklet *Consent: patients and doctors making decisions together*.¹

Respondents indicated that it would be difficult to ensure that every person who offered Welsh language support, whether a translator or another healthcare professional, would meet these requirements.

Primary Care

5.10 There was general support for the draft standards 83 – 97 of the consultation version at doc 2, that placed duties on health boards in relation to primary care - for example 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. Cymdeithas yr Iaith, some members of the public and some health boards expressed an opinion that these standards did not go far enough to provide Welsh language face to face primary care services to the public. Their view was that primary care providers should be subject to standards in order to provide a continuous Welsh language service between primary and secondary care as the majority of people's first point of contact with the NHS in Wales is with primary care. However, the health boards were of the view 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 through these Regulations.

Healthcare Regulators

5.11 The draft Regulations proposed to add 10 healthcare regulators to the Welsh Language Standards (No. 4) Regulations 2016 which specified standards for Welsh Tribunals and the Education Workforce Council. This was because these Healthcare Regulators hold fitness to practice hearings which are similar to the functions of those bodies already subject to the (No. 4) Regulations.

5.12 Nine regulators, eight of which are wholly based outside Wales, and the General Medical Council who have one small office in Wales, opposed this approach as they felt that they had little in common with the bodies named in the (No. 4) Regulations. They argued that as UK wide bodies fully funded by the fees of their registrants they should be subject to a separate set of standards that better reflected their circumstance and their remit.

¹ *Consent: patients and doctors making decisions together* ; p15 General Medical Council

Policy response to the consultation

- 5.13 In response to the comments received during the consultation, and following further policy work and discussions with health policy colleagues, a number of changes are proposed to the draft Regulations that were consulted upon.
- 5.14 These proposed Regulations contain a number of exceptions to standards, some of which are specific and some of which are general. Policy officials have considered these exemptions and consider that without the exemptions, there is a good argument that it would be unreasonable or disproportionate for the body to comply.
- 5.15 The main changes to the policy are as follows (some of which take the form of an exception to a standard). Further detail is provided below:
- Deletion of standard requiring Welsh language support at clinical consultations;
 - Service delivery standards to apply to primary care when a Local Health Board is providing that service itself (not sub-contracted);
 - Requirement to identify inpatients who wish to communicate in Welsh;
 - Requirement to have a plan setting how the body will increase its ability to conduct clinical consultations in Welsh;
 - Deletion of a number of documents standards that means a narrower range of documents will be required to be translated;
 - Deletion of a standard requiring a body to hold a meeting in Welsh (without translation);
 - Deletion of a number of courses standards and an amendment to the definition of what constitutes a course;
 - Requirement to provide Welsh language training to Welsh speaking staff members.

Revisions to individual standardsClinical Consultation (draft standard 25 of the consultation version at doc 2)

- 5.16 Standard 25 of the consultation version did not provide individuals with a right to have a clinical consultation in Welsh. Standard 25 required the body to offer Welsh language support during a clinical consultation. Welsh language support meant ensuring the individual had understood what was happening during that consultation. That could have been provided by simply asking in Welsh whether they had understood, and if they had, there was no requirement to do anything else. If a body was able to provide a clinical consultation in Welsh, it would not have to provide Welsh language support. It is important to note the effect of the original standard so that the context of the proposed changes can be understood, particularly given the likely political interest in these changes. Standard 25 of the consultation version did however mean that whilst the clinical consultation might not be in Welsh, the individual would encounter a Welsh speaker (be that in person or over the phone).
- 5.17 As discussed in paragraphs 5.7 – 5.8 above, draft standard 25 caused considerable concern amongst the bodies that were included in the draft Regulations. Other bodies who represent the professions and trade associations

also raised concerns. Due to the objections from these bodies we do not think that it would be feasible to continue with the draft standard. Concerns surrounding the Welsh speaking capacity and capability of the existing workforce also means that officials believe that it is not currently reasonable or proportionate to expect any of the bodies to consistently offer Welsh language support in clinical consultations, if the individual has expressed a wish to receive that support.

- 5.18 There may be areas where offering Welsh language support would be possible and there are some examples of clinical consultations provided in Welsh. However, until bodies arrange their clinical workforce and build the capacity and capability, imposing a legal duty would place a risk on current staffing procedures, recruitment and service delivery and would bring resistance from the health and professional bodies.
- 5.19 In light of the consultation responses, we propose to replace draft standard 25 with newly drafted service delivery standards which relate to inpatient care, and new operational standards which put in place a system to encourage improvement so that bodies are in a position to offer Welsh language clinical consultations in the future.
- 5.20 The Minister will wish to note that clinical consultations will be exempted from telephone standards, internet, social media, public events and all meeting standards to reflect the increasing use of telemedicine, such as skype and interactive video in delivering health care at a distance. Other standards will apply in relation to clinical consultations e.g correspondence standards when an individual is sent an appointment letter and documents standards when the body produces documents about clinical consultations etc. Correspondence which contains reports of a clinical consultation (e.g test results) are exempted, as well as documents which contain information about a named individual.
- 5.21 The new standards are as follows:
- To build on good practice developed in Ysbyty Cwm Rhondda and by Betsi Cadwalader University Health Board, we propose to introduce a service delivery standard (standards 23-24 of the proposed Regulations at doc 1) that will require health boards and trusts to ask inpatients on the first day of admission whether they wish to use Welsh. The body must identify to staff if an inpatient wishes to communicate in Welsh. The standards will not place duties on the body to *provide* a Welsh language service to the patient, however a prompt (which could be for example the *laith Gwaith* symbol on a board above the bed) will allow staff who are able to speak Welsh to actively offer and start a conversation with the patient in Welsh.
 - A new operational standard (standard 110-110A of the proposed Regulations at doc 1) that will require bodies to produce and publish a 5 year plan setting out the extent to which they are able to offer to carry out clinical consultations in Welsh. The plan must also include the actions they will take to increase their ability to offer clinical consultations in Welsh, and a timetable for those actions. There will also be a requirement for the bodies to report at the end of year three and five assessing the extent to which they have complied with their plan. In their plan, a body could focus their improvement efforts on a particular area where they have identified a need to offer a Welsh language service (a geographical area or a

healthcare area such as children or dementia services).

- A new standard to provide training opportunities for employees who wish to improve their Welsh language skills (standard 101 of the proposed Regulations at doc 1).

5.22 Consideration was given to including a “sunrise clause” which would have meant setting the date in the Regulations at which the operational standard to prepare a plan would be “switched off” for some bodies or in some areas. This would have been supported by a new service delivery standard, which would, in simple terms, require a body to conduct clinical consultations in Welsh. The aim would be that bodies had until the ‘sunrise’ date to prepare to be able to conduct clinical consultations in Welsh. From that date there would be no need for a plan, but there would be a duty to conduct clinical consultations in Welsh.

5.23 The appeal of this as a policy is that it would be clear to the body that their improvement plans must lead to a situation where they can conduct clinical consultations in Welsh. A body could outline in their plan that they were going to increase Welsh language capacity in a certain geographic or healthcare area. Following consideration of the progress assessment, the Commissioner could move to impose the standard to provide clinical consultations in Welsh on them.

5.24 Deciding on a specific date when the “sunrise clause” should take effect requires detailed consideration which is not possible based on the information we currently have available. For example we could choose 5, 10 or 15 years after the standard is specified in Regulations. However it would be difficult to defend the length of time chosen. On the other hand including a set deadline in Regulations would encourage the bodies to focus on improving their ability to deliver clinical consultations in Welsh so that they could meet the standard by the given date.

5.25 It is also difficult to define the criteria the bodies need to meet to prompt the switching on of the “sunrise clause” as this is likely to vary over time and from one type of clinical consultation to another. Factors such as how, where and when the clinical consultation is delivered and staff turnover will need to be taken into account which cannot be predicted at this stage.

5.26 A variation of this option would be to not specify the ‘sunrise’ date but to leave that decision to the Commissioner. The Commissioner would be able to impose the standard to conduct clinical consultations in Welsh on a body when the Commissioner considered that to be reasonable and practicable. However, there is a risk that the Commissioner would impose this clinical consultation standard without first imposing the operational standard to prepare a plan. This operational standard is designed to give a body an opportunity to increase its capacity to conduct clinical consultations in Welsh.

5.27 The responses received to the consultation from the local health boards and trusts made it clear that they would not be able to comply with draft standard 25 for a considerable period of time, although there are examples of good practice in some areas.

5.28 We advise therefore that a standard requiring a body to hold a clinical consultation in Welsh is not included in the Regulations. There is a risk that

including a standard in the Regulations which would not be reasonable or proportionate to comply with at this point in time would confuse the bodies and the public.

5.29 The introduction of a standard requiring a body to hold a clinical consultation in Welsh would require further consultation with the health bodies and is likely to elicit responses based on their inability to forecast their capacity to comply with the standard in the future.

5.30 We advise that the Regulations are revisited five years after the bodies begin to comply with proposed standard 110. The proposed standard means that a body will have to assess the plan's progress after three years and at the end of the plan's 5 year period. If, at this point, it is clear that it is reasonable to impose duties on some bodies to provide clinical consultations in Welsh, then a service delivery standard to that end could be added to the Regulations at that point.

Primary Care Services provided directly by Local Health Boards

5.31 Following consideration and discussions with health policy colleagues, we propose that the primary care standards that were consulted upon should be extended. The effect of these standards is set out in paragraph 5.10 above. It is proposed therefore that, in addition to the standards consulted upon, the majority of the Service delivery standards should apply in relation to primary care services provided directly by the local health board. Those standards will apply when local health boards provide primary care services directly, but not when they contract with an independent primary care provider to provide those services on their behalf.

5.32 In practice it will mean the following;

- Primary care service provided directly by the Local Health Board – will need to comply with Standards. Of the 439 GP practices 20 are directly managed by the NHS (4.5%).
- Primary care service provided by Independent primary care providers – no need to comply with Standards

This means that all services provided directly by LHBs will be subject to the same treatment in the same Regulations making it easier for them to plan and organise their Welsh language provision across services. Placing duties on local health boards with regard to the primary care services they provide is the first step in improving Welsh language services within primary care and a positive response to the concerns raised during the consultation. The methods developed by local health boards may well form a basis for further development and progress in Welsh language services with independent primary care providers in the future.

5.33 Apart from one exemption, it will be for the Commissioner to decide when issuing compliance notices which standards should apply in relation to primary care. The Commissioner will not be able to require bodies to comply with standard 19 (body phoning individuals) when the call relates to primary care services. We believe it is unreasonable for any local health board to have to comply with this

- standard when it is providing primary care services because individual surgeries may not have the necessary Welsh language skills to enable them to comply with this standard consistently. The local health boards will have an opportunity to discuss other standards which they consider unreasonable or disproportionate to comply with (including in relation to primary care) with the Commissioner (and ultimately, to appeal to the Tribunal).
- 5.34 There will not be a duty to provide Welsh language support at clinical consultations or to hold clinical consultations in Welsh, see paragraphs 5.19 – 5.32.
- 5.35 This approach should be considered together with the recommendation in MA-L/VG/0368/17 which deals with placing Welsh language duties on independent primary care providers through the primary care contracts and terms of service regulations. . The reasons for not treating sub-contracted primary care in the same way as other sub-contracted services are explained in MA-(L)/ARD/5096/16 (paras 5.27 – 5.29).
- 5.36 Health policy colleagues will submit separate advice on the proposed approach to deal with independent primary care service providers to the Cabinet Secretary and Minister (MA-L/VG/0368/17).
- 5.37 Taken together we consider that the approach will introduce duties at the right level in a reasonable and proportionate way. It recognises that local health boards have been working under the Welsh language schemes and are much better prepared for the introduction of the standards and should therefore be able to meet the requirements for Welsh language services in primary care they provide. Independent primary care providers, on the other hand, have a low level understanding of Welsh language services.
- 5.38 Whilst this policy treats all Local Health Board services in the same way, the effect of this policy may be confusing from the service user's perspective as it may not be clear whether their primary care provider is an independent one or not, and therefore whether the standards will apply. Registered patients are formally notified of any changes in management of practices and policy officials would therefore expect a service user to have an awareness and be informed of the arrangements in place.
- 5.39 Policy officials, in conjunction with health policy colleagues, have considered other options to deal with primary care services which independent primary care providers provide on behalf of Local Health Boards. Further detailed advice is provided on this issue in MAL/VG/0368/17 which we advise you consider in conjunction with this MAL. The proposals do not relate to the private services the independent primary care providers provide.
- 5.40 The preferred option to place duties on independent primary care providers through the contracts and terms of service regulations will require consultation and a negotiation with the statutory representative bodies. Those discussions have not yet commenced. Officials expect that mutual agreement can be reached through constructive engagement, if not the process would then involve a 12 week consultation. Due to the need to undertake this consultation documentation accompanying these Regulations (e.g Response to Consultation) and

commitments in plenary will need to be limited to stating that we will be engaging with the statutory representative bodies.

5.41 Given the consultation responses and the Commissioner's recommendation 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. This may affect the passage of these Regulations in the Assembly, which must be approved by the Assembly before they are made.

5.42 As noted in 5.38 policy officials have considered other options and further analysis is provided in MAL/VG/0368/17. All of the options have their own complications and difficulties. We advise that both sets of advice should be considered together.

Case Conferences (draft standard 26 of the consultation version at doc 2)

5.43 Following the concerns expressed that the requirements of draft standard 26 (to provide two way translation if necessary in case conferences when the patient is present) could lead to delays in arranging case conferences we propose to amend the standards so that only case conferences arranged at least 5 working days in advance are captured.

5.44 Case conferences to discuss the treatment of an individual that only involve professionals will continue to be exempted however the exemption has been reworded to avoid the need to list the professions. This is in response to a concern expressed by the health bodies that the list is not comprehensive and may become outdated as job titles change or new roles created.

Meetings arranged by a body that are open to the public (draft standards 27 – 31 of the consultation version at doc 2)

5.45 It is proposed to amend these standards to only capture meetings that are open and at which the public are able to contribute to the proceedings. This amendment will mean that bodies will not be required to provide translation facilities at meetings when the public are invited as observers only.

5.46 The consequence of this amendment will be that bodies will not be under an obligation to provide translation for a board member at a board meeting, or for a guest speaker. We consider that it is unlikely a body would refuse a board member or a guest speaker's request for translation to allow them to speak in Welsh at the meeting. We also consider that the increased costs and practicalities of providing translation outweigh the consequence of not being under a duty to provide translation for a board member.

Awarding contracts (draft standards 71 – 75 of the consultation version at doc 2)

5.47 Procurement for the NHS in Wales is delivered on behalf of the health bodies by Velindre NHS Trust (through NHS Wales Shared Services Partnership (NWSSP)). It is responsible for developing the tender packs for all procurements. The consultation version of the Regulations would have required approximately 1000 tender packs to be published in Welsh. A tender pack can run to 800 pages and cost between £7,000 - £10,000 to translate. The types of activities procured

vary considerably from maintenance of clinical equipment to some services that will engage directly with patients such as the provision of home therapies.

5.48 We consider it unreasonable to place health bodies under a duty to translate all of these tender packs. We therefore propose to amend standard 57 (of the proposed Regulations at doc 1) so that only tenders where the subject matter of the contract suggests that it should be produced in Welsh have to be produced in Welsh.

5.49 This reflects the approach adopted by the Commissioner for standards relating to contracts in compliance notices for local authorities. Commissioner only requires some local authorities to provide a tender pack in Welsh if (a) the subject matter of the tender suggests that it should be produced in Welsh and (b) the anticipated audience (the companies who are likely to tender) and their expectations suggest that the document should be produced in Welsh.

5.50 In the health sector we anticipate that the types of tenders caught by this standard will be, for example, contracts relating to translation services and training relating to the Welsh language. The majority of contracts let by the NHS are for maintenance of equipment, management reviews and some services that engage with the patients such as delivering and maintaining equipment in a patient's home which we do not envisage would be caught by this standard.

5.51 Companies will continue to be able to submit a tender bid in Welsh irrespective of whether the invitation to tender has been published in Welsh and bodies would have to treat that application no less favourably than an application made in English.

Research

5.52 A response to the consultation argued against the exemption of research from service delivery standards. The respondents argued that a significant number of patients take part in research or clinical trials in Wales and that they should be offered Welsh language services whilst doing so (e.g. correspondence, forms etc.).

5.53 The local health boards increasingly work in partnership on research and development with the Universities who are subject to Welsh Language Standards (No. 6) Regulations 2017 which do not capture research. Research was exempted in those Regulations because of the commercial nature of the work, and we did not wish to interfere with those activities. However, since then the White Paper has suggested that all bodies (including private sector bodies) could be required to comply with standards. As a result, exempting an activity on the basis that it might affect its commercial activists would be contrary to those proposals.

5.54 Given the joint working undertaken by the Universities and the bodies subject to these Regulations, it is considered appropriate to ensure they have the same exemption. . We therefore recommend that research should be exempted from these Regulations.

Courses offered by a body (draft Standards 79 – 81 of the consultation version at

doc 2)

5.55 The responses to the consultation indicated that some of these standards were not relevant as they do not offer education courses specifically for under 18s and concern was expressed about the lack of Welsh language tutors.

5.56 These standards have therefore been amended so that bodies are now only required to offer a course in Welsh to one or more individuals if an assessment indicates a need for the course to be offered in Welsh (proposed standard 63 of the Regulations at doc 1). The policy intention is that the type of courses we wish to be caught by the standard is a course offered to patients to help them manage long term health conditions. As a result, the following have been exempted from the standard;

- courses that lead to a qualification or exam;
- courses where the majority of participants are undertaking the course as part of their professional development;
- courses where the majority of participants are staff members;
- courses where a fee is paid.

Planning and training its workforce

5.57 In addition to the lack of Welsh speakers within the workforce, comments were received that some of the existing Welsh speakers lack confidence and are reluctant to use Welsh in the workplace. In order to address this concern and build the capacity of the bodies' existing workforce we propose to introduce a new standard (see standard 101 of the proposed Regulations at doc 1) that requires the bodies to provide training opportunities for employees who wish to improve their Welsh language skills. The aim here is that those employees would then be confident enough to use it in the workplace. This will complement the existing language training standards that focus on supporting new and existing learners.

5.58 The concerns raised during the consultation about the lack of opportunities for students to train through the medium of Welsh is outside the scope of these Regulations. Officials have raised these issues with colleagues in Health.

Definitions

5.59 Regulation 1(4) defines the terms used in the standards. As part of the process of refining the Regulations there have been some additions and amendments to definitions included within the regulations.

5.60 The main policy change has been to clarify that the standards do not apply to services provided in a care home. It was arguable that 'care home' was a 'private hospital' in the consultation draft at doc 2, but in order to make the position clear, services provided in a care home have now been specifically excluded.

Private Hospitals

5.61 The Commissioner asked us to reconsider the exemption of private hospitals in Wales from the Regulations (see regulation 1(8) of the proposed Regulations at doc 1). She argued that private hospitals that provide services on behalf of the health boards should be treated in the same way as other sub-contractors.

5.62 In 2015/16 the percentage of NHS patients who were treated in private hospitals in Wales and England was approximately 1% of elective (i.e. planned) admissions to Welsh NHS hospitals. Due to the low numbers involved we have decided to maintain our policy position of exempting private hospitals in Wales, and private clinics and care homes, as the cost of complying with the standards will outweigh the benefit.

Healthcare Regulators

5.63 In light of the response from the healthcare regulators and further discussions with these organisations we are preparing separate Regulations for the eight regulators who have no offices in Wales and the General Medical Council which has a small office in Cardiff which is not open to the public.

5.64 We will continue with the proposal to insert Social Care Wales (formerly Care Council for Wales) in the (No. 4) Regulations as originally proposed as they are a Wales only body, funded by Welsh Government. They did not oppose this in their consultation response, and a further discussion with the body has confirmed that they are content with the approach. They noted that they would prefer to be subject to the same standards as the Education Workforce Council (the (No. 4) Regulations) which is also a professional Regulator working solely in Wales, as opposed to the standards for the other healthcare Regulators who serve Wales and areas beyond Wales.

NHS Business Services Authority (“NHSBSA”)

5.65 The NHS Business Services Authority is a special health authority which provides services in England and in Wales. It was included in the Commissioner’s second investigation and in the consultation version of these Regulations. It provides a small number of services to people who live in Wales the most significant is the online application for an European Health Insurance Card (EHIC). It also administers the Low Income Scheme that helps with costs such as dental charges and sight tests.

5.66 Other services that they are responsible for in Wales are ‘back office’ services relating to pensions for NHS staff, and NHS Staff Injury Benefits Scheme, and administering payments to dentists for NHS contract work.

5.67 It has no offices in Wales providing its services from a number of locations in England with its main office in Newcastle upon Tyne.

5.68 As there are considerable differences between the types of services provided by NHSBSA compared with the other bodies in the proposed Regulations we believe that more work needs to be undertaken to determine which standards would be appropriate for this body. We also propose to consider the NHS Blood and Transplant Authority at the same time which is also a Special Health Authority which provides services in England and Wales. This body was not included in the Commissioner’s second investigation and therefore more work and discussions need to occur in relation this body.

5.69 We therefore have removed the NHS Business Services Authority from the

proposed Regulations at doc 1.

5.70 A new Wales only Special Health Authority has been established but is not yet operational. This body is known as Health Education and Improvement Wales. Policy officials will liaise with health colleagues about imposing standards on this body in due course.

Other amendments

5.71 Consultation responses and policy research indicated that the bodies subject to these standards would not be in a position to comply with the following standards. We therefore advise that the Welsh Ministers should not proceed to specify these standards:

- Standard 10 of the consultation version at doc 2– deal with a phone call in Welsh in its entirety.
- Standard 22 of the consultation version at doc 2- to hold a meeting with another invited person in Welsh without the aid of translation.

Reviewing the standards in light of the call for evidence on the White Paper

5.72 Officials are aware of the perception that standards are onerous, complex and difficult to implement because of the number of standards. This was supported by the evidence submitted by bodies during the evidence gathering sessions which informed the preparation of the White Paper on Welsh language legislation which was published in August. During the process of reviewing the draft Regulations officials have considered the responses to the evidence gathering sessions, the policy direction outlined in the White Paper and have looked for opportunities to reduce the number of the standards.

5.73 Officials propose to delete the following standard on the basis that it is onerous and unreasonable to comply with:

- Standard 163 of the Consultation version at doc 2 – the requirement to record the number of staff who wear badges that indicate that they are able to speak Welsh.

5.74 In response to the perception that the number of standards in previous sets of Regulations have been too numerous, some standards have been merged. This reduces the number of standards but does not affect the duties the bodies can be required to comply with. For example:

- In previous Regulations, three separate standards were included in relation to meetings. One imposed a duty on bodies to hold the meeting in Welsh, another to provide simultaneous translation in meetings and another to provide consecutive translation. This gave the Commissioner the option of which standard to impose on bodies. We propose to merge these standards (see standard 21 of proposed Regulations at Doc 1) to give the bodies the ability to decide whether the meeting will be in Welsh, or if not, which method of translation to use.[hepgorwyd adran 42].
- Service delivery standards relating to notices have been merged with the standards relating to signs.
- Some operational standards have also been merged – specifically standards that impose duties to provide different types of documents and policies to staff in Welsh.

5.75 Standards that deal with documents have been amalgamated. As opposed to having 8 separate standards (standards 37-44 of the Consultation version at doc 2) which included duties to provide different types of documents in Welsh, we propose to have one standard which puts a duty on bodies to assess whether a Welsh version needs to be produced depending on the subject matter or the anticipated audience of the document. As well as reducing the number and the bureaucratic appearance of the standards, it changes the focus from translation to a more reasonable approach of providing the documents that are most likely to be needed and used by the public. However, this new approach will mean that the bodies will not be required to translate any specific documents – but to assess the need for each one to be produced in Welsh, and then produce it in Welsh if that assessment suggests it should be based on the anticipated audience and the subject matter.

5.76 These changes may result in some documents that would have been translated if the list of documents were retained not being translated eg policies, strategies and corporate plans. However, we believe that this is a more pragmatic approach which will continue to capture the documents that are important to the public.

5.77 The documents and forms categories of standards have also been merged to create one category of standards. A separate standard has been retained requiring bodies to produce forms to be completed by an individual in Welsh.

5.78 The number of record keeping standards has also been reduced, following criticism that the record keeping standards in previous regulations were onerous and bureaucratic. We propose to retain three record keeping standards that require the bodies to keep a record of the number of complaints they receive relating to their compliance with standards, the Welsh language skills of their staff, and of the Welsh language skills requirement of vacant posts. These have been retained due to the importance of workforce planning within the health sector and the number of complaints is a valuable indicator of the public's perception of the quality of the Welsh language services the body provides.

5.79 Due to these changes, and due to the other policy proposals in this MA-L, the number of standards in the draft Regulations thus far is 121, compared with 185 in the Regulations which were subject to the consultation.

Regulatory Impact Assessment (RIA)

5.80 As part of the consultation on the draft Regulations we asked the bodies that will be subject to the standards to complete an RIA. While it is not yet known which of the standards will apply to each body, it is considered likely that there will be additional one-off and recurrent costs incurred by the organisations to comply with the standards.

5.81 We have concerns about the data received as some responses were incomplete, inconsistent or lacking in clear rationale. For example, one response noted a cost implication of £1m without providing any detail or justification, whilst some bodies have duplicated costs in particular staffing costs. We are also aware that amendments to the draft Regulations proposed in this MA-L will change the

costs indicated in the draft RIA. The changes with regards to clinical consultations will have an impact on the estimated costs, as some LHBs estimated significant costs for having to comply with standard 25 of the consultation version which we now propose to remove (see paragraphs 5.19 – 5.32) .

5.82 In response to these issues (but not the inclusion of primary care), we have asked some bodies to review their RIA for quality assurance purposes. This has resulted in a reduction in cost estimations, specifically in relation to estimations for recruiting additional staff to comply with the Standards, by as much as £500,000. Where cost estimations have been provided solely against standards that have now been removed from the draft Regulations they have been deducted, with the organisations' approval, from the overall estimated costs provided by that organisation in their RIA. These changes will be fed into the preparation of the final RIA.

5.83 This approach, and a draft RIA has been reviewed by colleagues in Knowledge and Analytical Services, and the Chief Economist Office and they are content.

Further consultation

5.84 Changes made to the draft Regulations that have been outlined in this advice - deletions, amendments to standards, or new standards - have arisen from the responses to the consultation, further policy investigation, discussions with colleagues in health and the evidence gathering exercise that fed into the creation of the White Paper that was published in August. The quality assurance exercise that officials undertook in creating an RIA also indicated that the costs of implementing the standards would decrease if the changes in this advice were implemented. Bringing primary care services provided directly by local health boards (but not those contracted) within the scope of the Regulations, and the separate advice provided by health policy colleagues on the approach towards independent primary care providers, also demonstrates that the Welsh Ministers have taken into account the consultation responses provided by the Welsh language lobby regarding primary care.

5.85 In terms of judicial review, policy officials consider that there is a low risk that, should the Regulations be passed, anyone will make an application to judicially review the Regulations. [hepgorwyd adran 42] . Further advice is set out in paragraphs 6.8 – 6.33 .

5.86 In light of the points above and the legal advice set out in section 6 of this MA, policy officials believe that the risks identified in relation to not consulting further are acceptable. Therefore, policy officials recommend that do not believe that a further public consultation is necessary before the Regulations are laid before the Assembly.

5.87 However, there is a reputational risk in not consulting further on the changes. Certain groups (in particular the Welsh language lobby) will feel that their concerns have not been addressed, especially with respect of clinical consultations. The body subject to standards will not be under a duty to provide Welsh language support at clinical consultations. The Welsh language lobby will perceive this as a weaker alternative to what was presented in the draft standards during the consultation. This may lead to a more difficult passage of the

Regulations through the Assembly. However, the revised standards build on existing good practice and are aimed to lead to improvements in Welsh language provisions over time. Policy officials believe that a further consultation will bring similar responses from stakeholders as with the first consultation, and the reasons for making the amendments will remain the same, which primarily is the lack of capacity within the health sector to provide Welsh language services universally.

5.88 We believe that local health boards will welcome the change in policy regarding primary care that they deliver as these services are directly within their control. It will mean that they can plan the provision of all services they deliver in the same manner whether primary or secondary care. However, this has not been raised with the local health boards. The numbers of GP practices run directly by the local health boards is low and in some circumstances they may remain within a local health board's control for short periods of time whilst alternative provisions are put in place. Local health boards often run primary care out of hours services too. If local health boards have concerns regarding taking over services for a short period of time or any primary care service which needs to comply with standards, they will have an opportunity to raise concerns with the Commissioner when she consults on a draft compliance notice, or can apply for a variation after the compliance notice has been given. This will require the local health boards to be proactive in their discussions with the Commission.

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

[hepgorwyd adran 42]

Well-being of Future Generations (Wales) Act 2015

A Wales of vibrant culture and thriving Welsh language – the implementation of Welsh language standards contributes to this goal. It will increase the opportunity for people to access services in Welsh and to live their lives through the medium of Welsh thus protecting and promoting the language, the culture and heritage of Wales.

Equality and Human Rights

An Equalities Impact Assessment has been prepared for the proposed Regulations. 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.

Children's Rights Impact Assessment

A Children's Rights Impact Assessment has been prepared for these Regulations which will be published when the Regulations are laid.

Welsh Language Standards

The proposed Regulations have been subjected to the Welsh Government's Welsh

Language Impact Assessment. The assessment identified clear benefits to the Welsh language, including increasing use of the Welsh language.

The Welsh Language Impact Assessment has been approved by internal Welsh Language Standards compliance officials. Clearance code: 16/06/01.

Promoting Economic Opportunity for All - Tackling Poverty Agenda

The proposed Regulations aim to improve to the experience of Welsh speakers when interacting with the health sector and to reduce inequality in health.

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

Cost: None

Budget: None

The EPS Operations Team is content this MA(L) complies with Interim Finance Notice 01/2015 (EPS/EM/02/17).

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

8.1 An official response to the consultation will be published following your agreement to the revised policy direction. The document will be sent under separate advice.

Annex A: Copy Recipients

[hepgorwyd adran 40(2)]

Additional copy recipients specifically interested in this advice:

[hepgorwyd adran 40(2)]