

Explanatory Memorandum to the Partnership Arrangements (Amendment) and Regulated Services (Market Stability Reports) (Wales) Regulations 2021 and the Code of Practice and Guidance under the Social Services and Well-being (Wales) Act 2014.

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

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Partnership Arrangements (Amendment) and Regulated Services (Market Stability Reports) (Wales) Regulations 2021 and the Code of Practice and Guidance under the Social Services and Well-being (Wales) Act 2014. I am satisfied that the benefits outweigh any costs.

Julie Morgan MS
Deputy Minister for Health and Social Services
26 January 2021

Part 1 – OVERVIEW

Description

The Partnership Arrangements (Amendment) and Regulated Services (Market Stability Reports) (Wales) Regulations 2021 ('the Regulations') concern the preparation and publication of market stability reports under section 144B of the Social Services and Well-being (Wales) Act 2014 ('the 2014 Act'). They specify the period over which the sufficiency of care and support must be assessed, the date by which market stability reports must be published and in what format, and other matters which must be contained with the reports in respect of regulated services providing care and support. The Regulations also amend The Partnership Arrangements (Wales) Regulations 2015 so that local authorities and Local Health Boards must enter into a partnership arrangement for carrying out local authorities' functions under section 144B of the 2014 Act. This means that one market stability report will be prepared for each regional partnership board area ('the RPB area').

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

There are no specific matters identified.

Legislative background

The Partnership Arrangements (Amendment) and Regulated Services (Market Stability Reports) (Wales) Regulations 2021 ('the Regulations') are made under sections 144B, 166 and 168 of the 2014 Act, which brought 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 2014 Act works in parallel with the Regulation and Inspection of Social Care (Wales) Act 2016 ('the 2016 Act'). Together these Acts provide 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 families and communities.

Section 144B will be inserted into the 2014 Act by means of section 56 of the 2016 Act, once section 56 is commenced on 1 April 2021. Although inserted into the 2014 Act, section 56 was also intended to work in conjunction with sections 59 to 63 of the 2016 Act which provide for the setting up of a statutory market oversight regime for providers of regulated care and supported. Because it is not intended to commence section 59-63 at this time, it will only be possible to commence section 56 in part. The part which cannot be commenced is section 144B(2)(a)(ii), which relates directly to section 61 of the 2016 Act. The decision not to implement the market oversight provisions is explained in detail below.

Section 144B (market stability reports)

Section 144B requires a local authority to prepare and publish a local market stability report at such times as may be prescribed by regulations. The report must include an assessment of:

- the sufficiency of provision of care and support in the local authority area

- the extent to which ‘regulated services’ were provided in that area by ‘service providers’ to whom section 61 of the 2016 Act applies (this is the part that cannot be commenced at this time)
- any other matter relating to the provision of regulated services in the local authority area as may be prescribed by regulations
- the effect on the exercise of the local authority’s social services functions of the commissioning by the authority of any services in connection with those functions.

The assessment of these matters must be during such a period as may be prescribed in regulations.

The market stability assessment covers ‘regulated services’ only. ‘Regulated service’ has the meaning given by section 2(1) of the 2016 Act and the market stability assessments, and reports must therefore cover:

- a care home service (adults and children’s)
- a secure accommodation service (for children)
- a residential family centre service
- an adoption service
- a fostering service
- an adult placement (‘Shared Lives’) service
- an advocacy service
- a domiciliary support service
- any other service comprising the provision of care and support in Wales as prescribed by regulations made under section 2(1) of the 2016 Act

The local market stability report also has to include a report of any action taken by the local authority during the prescribed period in pursuance of its duty under section 189(2) of the 2016 Act (i.e. the temporary duty to meet needs in the case of a provider failure).

The market stability reports must be in such form as may be prescribed by regulations.

In preparing their market stability reports, local authorities must take account of their most recently published population needs assessments and area plans, and must consult with each health board with whom they carried out those assessments. Local authorities must also send a copy of their published market stability reports to the Welsh Ministers.

Section 144B also places a duty upon the Welsh Ministers to consult with any persons they think appropriate before making regulations on other matters relating to regulated services to be included in the market stability assessment.

Sections 166 and 168 (partnership arrangements)

Section 166(1) of the 2014 Act provides the Welsh Ministers with regulation-making powers to require specified partnership arrangements for carrying out social services or Local Health Board functions. Regulations made under this section include The

Partnership Arrangements (Wales) Regulations 2015 ('the Partnership Regulations'), which established regional partnership boards (RPBs). Regulation 9 and Schedule 1 describe the functions of local authorities and Local Health Boards which are to be carried out by these partnership arrangements. The Partnership Regulations are supplemented by the Part 9 Statutory Guidance (Partnership Arrangements).

Regulation 10 of the Partnership Regulations describe the objectives of RPBs. These objectives currently include, to ensure partnership bodies work effectively together to respond to the population assessment carried out in accordance with section 14 of the 2014 Act and implement plans for each of the local authority areas which local authorities and health boards are each required to prepare and publish under section 14A of the 2014 Act.

Section 168 of the 2014 Act allows for the regulations to require a partnership board in respect of a partnership arrangement to be established by one or more local authorities. The regulations may also make provision about the objectives and functions of partnership boards, the procedures to be followed and the making of reports by partnership boards.

Sections 59-62 of the 2016 Act (market oversight)

It was envisaged that section 56 of the 2016 Act would work in conjunction with the provisions setting up a market oversight regime contained in 59, 60, 61 and 62:

- Section 59 contains regulation making powers allowing the Welsh Ministers to specify criteria to identify which social care providers should be the subject of a financial sustainability assessment by Care Inspectorate Wales (CIW).
- Section 60 contains a regulation making power to determine whether criteria apply to a service provider.
- Section 61 allows the Welsh Ministers, through the service regulator, CIW, to assess relevant service providers' financial sustainability and where it thinks there is a risk of failure, require the provider to develop a plan to mitigate or eliminate such risk and arrange for a person with appropriate professional expertise to carry out an independent review of the business.
- Section 62 requires the Welsh Ministers to inform the relevant local authority if they have information that the failure of a provider is likely.
- Section 63 requires the Welsh Ministers to prepare and publish national market stability reports which review the sufficiency of care and support in Wales, having regard to local market stability reports. The aim is to identify gaps in service provision across Wales, support forward planning, provide better market oversight of important providers and build public confidence in the stability of social care services. CIW, on behalf of the Welsh Ministers, would be responsible for producing these reports. There is no requirement to make regulations in relation to national market stability reports.

It is not our intention to commence, or to make any regulations under, sections 59, 60, 61, 62 or 63 at the current time. The reasons for this are explained below.

This statutory instrument must be laid before and approved by a resolution of the Senedd (the affirmative procedure) on account of the partnership provisions.

The Regulations will come into force on 1 April 2021 at the same time as section 56 of the 2016 Act is commenced (in part) and section 144B inserted into the 2014 Act.

Purpose and intended effect of the legislation

The Regulations are intended to require local authorities and Local Health Boards work together to prepare and publish market stability reports for the area covered by a Regional Partnership Board ('the RPB area'). This means that local authorities must discharge their duty under section 144B in partnership with each other and the Local Health Board, and on a regional footprint.

The Regulations also specify the period over which the sufficiency of care and support must be assessed, which matters must be taken into account when assessing the stability of the market for regulated services providing care and support, and the date by which the first market stability reports must be published. The Regulations will be supported by a code of practice for local authorities, and statutory guidance for local authorities and Local Health Boards.

Regulation 2 is made under section 144B(2)(a)(iii) and requires local authorities, whilst preparing a local market stability report, to include an assessment of those other matters relating to the provision of regulated services in the local authority area, which are specified in the Schedule and include the sufficiency of provision of care and support, the overall quality of care and support, the current or developing trends of care and support, any significant challenges and the impact of commissioning and funding.

Regulation 3 is made under section 144B(2)(a)(i) and provides for the period of assessment of the sufficiency of provision of care and support.

Regulation 4 is made under section 144B(1) and provides for the times local authorities must prepare and publish their market stability reports.

Regulation 5 is made under section 144B(3) and requires the market stability report to be in an electronic format.

Regulation 6 is made under sections 166(1)(b) and (4)(a) and 168 and amends the Partnership Arrangements (Wales) Regulations 2015. This requires local authorities and Local Health Boards to enter into a partnership arrangement for carrying out the local authorities' functions under section 144B.

Code of Practice and guidance on the exercise of social services functions and partnership arrangements in relation to market stability reports

These Regulations will be supported by a code of practice and statutory guidance on market stability reports.

The power to issue codes is contained in Section 145 of the Act, which states that the Welsh Ministers may issue, and from time to time, revise, one or more codes on the exercise of social services functions. The code mandates how local authorities

must undertake their sufficiency and market stability assessments, and prepare their market stability reports, working together with the Local Health Board and the RPB.

The statutory guidance for local authorities and Local Health Boards is issued under section 169 of the 2014 Act. It deals specifically with the partnership arrangements for preparing and publishing market stability reports, and is intended to be read in conjunction with the code of practice.

Consultation

A 12 week consultation on these regulations was carried out between 16 September 2020 and 25 November 2020. 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 found at:

Part 2 – REGULATORY IMPACT ASSESSMENT

CONTEXT

OPTIONS

Options considered by the Welsh Government in relation to market stability reports are as follows:

Option 1 – do nothing: maintain the status quo

Under option 1, section 56 of the 2016 Act would not be commenced at this time. Section 144B of the 2014 Act would not come into force, no regulations would be made under this section, and local authorities would not be required to prepare and publish market stability reports.

Option 2 – commence and bring regulations into force

Under option 2, section 56 of the 2016 Act would be commenced, inserting section 144B into the 2014 Act. Each local authority would be required to prepare and publish a market stability report for its local authority area. Regulations would be made under section 144B concerning the specified period for assessment, matters that must be included with respect to regulated services, and the date on which reports must be published.

Option 3 – commence, bring regulations into force, and also amend the Partnership Regulations

Option 3 adds an additional element to option 2. Under this option, the Partnership Regulations would also be amended, so that local authorities and Local Health Boards would be required to form a partnership arrangement to prepare and produce market stability reports on a regional footprint (covering the RPB area).

COSTS

Option 1 – do nothing: maintain the status quo

No additional costs would be incurred by local authorities or any other public body if we decided not to commence section 56 of the 2016 Act. Arguably, however, there would be indirect costs to social care commissioners of failing to implement the market stability provisions. The purpose of market stability reports is to enable local authorities to assess whether the supply of care and support sufficiently meets demand as set out in the population needs assessment, and to assess the stability of the local market for regulated services providing care and support. They would also require local authorities to assess the impact of their commissioning decisions on the exercise of their social services functions. This would then all feed into the area plan, which sets the high-level strategic priorities for commissioners across the RPB area, based on the supply and demand analysis. Failure to undertake a robust and comprehensive analysis of these various factors could lead, at best, to local authorities committing public expenditure inefficiently or, at worst, to potentially catastrophic market failure resulting in potentially expensive public sector bailouts.

Option 2 – commence and bring regulations into force

Bringing these provisions into force would ensure that local authorities have appropriate information about the sufficiency of care and support provision within their local area, and about the stability of the local market for regulated services. It would also require them to assess the impact of their commissioning decisions on the discharge of their social services functions. This should help them make more strategic and cost-effective commissioning decisions, which more closely matches supply with demand, as well as helping them to shape the market for social care so that it better meets local needs and circumstances. The matters specified in Schedule 1 to the Regulations would require local authorities to consider factors such as risk, trends and challenges, and the actions they might need to take to mitigate any adverse and potentially costly impacts of these factors on the future supply of regulated services.

There will be some direct costs to local authorities in preparing these reports. These will relate to staff time and engagement with citizens and providers. Whilst the impact of this should not be underestimated, especially in the light of additional pressures on staff and other resources as a result of Covid-19, the factors to be considered are those that local authorities should be considering anyway as part of taking a strategic look at what they provide and how they provide it, and how they might best future-proof provision.

Option 3 – commence, bring regulations into force, and also amend the Partnership Regulations

Arguably, preparing market stability reports on a regional footprint could be seen as imposing an additional task of undertaking a regional analysis over and above what must be done within each local authority area, and this could add to the administrative costs of producing the reports. However, if a genuinely collaborative and partnership approach is taken to the production of these reports, there should be no additional costs. The statutory guidance on partnership working, which will accompany the regulations, will place a requirement upon local authorities and the

Local Health Board to contribute to any costs involved in the exercise, and to agree with the wider RPB what other resources, including staff, might need to be deployed.

A regional partnership approach will also ensure that market stability reports can be prepared alongside the population needs assessments and feed into area plans, both of which are also produced on a regional footprint. Together they will form part of a strategic regional approach to identifying need / demand and supply, and planning care and support services across the region. This will enable RPBs to identify which services are best provided on a regional rather than a local authority basis, leading to more co-ordinated and cost-effective provision – e.g. cutting down on expensive bespoke arrangements by individual local authorities. Examples include specialist provision for disabled children or adults, and safe accommodation for children with the most complex needs and challenging behaviours.

BENEFITS

Option 1 – do nothing: maintain the status quo

The benefit of not commencing section 56 of the 2016 Act, and of not making regulations under section 144B of the 2014 Act at this time is that local authorities would not have the additional task of not preparing market stability reports. It should, however, be noted that local authorities will need to consider issues such as the sufficiency and sustainability of provision, including the state of the market for regulated and other care and support services, regardless of whether there is a formal requirement to produce market stability reports – this is necessary in order to fulfil their social services functions effectively and in line with the overarching requirements of the 2014 Act. Not having to formally undertake such assessments or produce a report would not, therefore, deliver a huge benefit in terms of what local authorities actually have to do.

There are no other obvious benefits to this option. If we did nothing, the benefits of undertaking sufficiency and market stability assessments on a regional footprint (as discussed in options 2 and 3 below) would not be realised.

Option 2 – commence, and bring regulations into force

The requirements to assess the sufficiency of care and support, and the stability of the market for regulated services providing care and support, put on to a formal statutory footing activities that local authorities should be undertaking in order to effectively plan and deliver care and support within their local areas, to meet the needs and demand identified in their population needs assessments and fulfil their over-arching duties under the 2014 Act. The regulations and supporting code will ensure that there is a common approach across Wales, including a common timescale and matters that must be considered. This will lead to a set of reports which can be used not only to inform local and regional decision-making but also by Welsh Government and other bodies (such as Care Inspectorate Wales and the National Commissioning Board) to shape national policy on commissioning, resourcing and shaping the market for social care. Market stability reports will be a key component of the strategic commissioning cycle, which already includes population needs assessments (focusing on need / demand) and joint area plans

(focusing on strategic planning and commissioning). The market stability reports will fill in the supply-side data which is currently missing.

Option 3 – commence, bring regulations into force, and also amend the Partnership Regulations

The benefits of this option will build upon the benefits identified under option 2. The additional benefit of a regional partnership approach is that it will allow for a more strategic approach to planning and commissioning of care and support provision, linking directly with the population needs assessments and area plans which are already produced on a regional footprint. It will assist local authorities, Local Health Boards and other partners on the RPB to determine which services are best commissioned or provided on a regional or sub-regional basis, and to adopt a more regional approach to market shaping where appropriate. It will build upon regional approaches already being undertaken by RPBs (including, for example, the requirement for pooled budgets for residential care for older people), and through other initiatives such as the National Fostering Framework and the National Adoption Service.

RISKS

Option 1 – do nothing: maintain the status quo

If the market stability report provisions are not implemented, there will be no formal framework for local authorities to assess the sufficiency of care and support provision and the stability of the market for regulated services. This carries the risk of uncoordinated and ad hoc local arrangements being put in place, making it difficult for RPBs to take a strategic view across their area when preparing their joint area plans. It also means that there would be a missing link within the strategic planning and commissioning cycle, which is meant to encompass population needs assessments (section 14 of the 2014 Act), market stability reports (section 144B) and area plans (section 14A).

Option 2 – commence and bring regulations into force

Social care is under significant pressure due to a variety of factors which have been exacerbated by the Covid-19 pandemic. The nature of this risk has been explored by Welsh Government in its White Paper 'Rebalancing Care and Support (published on 12 January 2021 – see especially the 'case for change' section). Unstable and unsustainable markets for social care is a key risk factor in delivering quality care and support to those who need it, and the market stability provisions in section 144B of the 2014 Act are the proposed regulations and code / guidance are designed to mitigate these by ensuring that local authorities have an accurate and up-to-date understanding of the state of their local markets. The list of matters in the Schedule to the Regulations (matters relating to regulated services) specifically requires them to consider risks alongside other factors such as challenges and trends.

The main risk in undertaking a sufficiency assessment as part of the market stability report is that this might identify levels of unmet need which leave local authorities potentially open to challenge for not meeting their statutory obligations to meet the

needs of individuals who need care and support, or of carers who need support. The same applies to the requirement in the Schedule to identify any gaps in provision of regulated services. However, there is a need for local authorities to be transparent about the services they provide and the way they meet their statutory responsibilities, and the purpose behind the requirement to identify gaps and calculate risk and challenges is to enable local authorities to better fulfil their obligations. The purpose is not to penalise local authorities, but to support them to future proof their markets and take timely mitigating action where necessary. The requirement to submit the reports to Welsh Ministers will ensure that these factors can feed into national discussions between Welsh Government and local government about funding and other relevant issue such as workforce.

Option 3 – commence, bring regulations into force, and also amend the Partnership Regulations

The specific risks around requiring local authorities and Local Health Boards to produce these reports on a regional basis, as part of the RPB, are mainly to do with governance and what happens in the case of disagreement between partners (particularly the statutory partners) over the assessments of sufficiency and market stability. These are issues that can be addressed in the code of practice and particularly in the statutory guidance on partnership arrangements; and the approach will be similar to that taken in the code and guidance on population needs assessments (the Part 2 code).

Concerns were also expressed during the consultation that a regional report would not contain enough local information to be useful to the local authorities in the RPB area. Individual local authorities are the primary commissioners of care and support, even where this is co-commissioned with the Local Health Board, so local authorities need to have local market information to inform their commissioning decisions. The code of practice will emphasise the need for the regional market stability reports to include local authority level information as well as taking a regional overview.

Post-implementation review

Section 144B and the regulations require local authorities to submit the market stability reports for their region to be submitted to the Welsh Ministers at the time they are published. Welsh Government, working with Care Inspectorate Wales, will use the regional market stability reports, along with other relevant sources of data, to build up a national overview of the sufficiency of care and support, and of the shape and stability of the market for regulated services in Wales. This will help inform Welsh Government policy on commissioning, resourcing and reshaping care and support.

This will also assist Welsh Government and Care Inspectorate Wales develop a proportionate and appropriate approach to market oversight, in place of the statutory market oversight regime that would be required were sections 59-62 of the 2016 Act to be implemented. Because section 56 of the 2016 Act (inserting section 144B into the 2014 Act) was intended to work in conjunction with the market oversight provisions in sections 59-62 of the 2016 Act, the decision to commence section 144B

in part means that Welsh Government will need to keep the decision not to implement those sections under review.

The code of practice requires local authorities to undertake an annual review of their market stability reports, and to send to the Welsh Ministers any revised reports or addendums that are published as a result. Welsh Government will use this information to update the national picture.

Market stability reports will be produced every five years, in parallel with the population needs assessments. Welsh Government will review the code of practice and statutory guidance in the light of RPBs' experience of producing their first reports, and consider the need for updated guidance in subsequent cycles. It is hoped that any subsequent changes can be made through amending the code and guidance rather than by amending the regulations.