

Explanatory Memorandum to:

The Regulated Services (Penalty Notices) (Wales) Regulations 2017

This Explanatory Memorandum has been prepared by the Health and Social Services Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

The Regulated Services (Penalty Notices) (Wales) Regulations 2017

I am satisfied that the benefits justify the likely costs.

Huw Irranca-Davies
Minister for Children and Social Care

18 December 2017

Part 1 – OVERVIEW

1. Description

The Regulation and Inspection of Social Care (Wales) Act 2016 (“the 2016 Act”) reforms the regulation and inspection regime for social care in Wales and provides the statutory framework for the regulation and inspection of social care services and the social care workforce. It enables the Welsh Ministers to put in place a number of items of subordinate legislation through the making of regulations, the publication of guidance and the issuing of codes of practice.

This Explanatory Memorandum relates to *the Regulated Services (Penalty Notices) (Wales) Regulations 2017* (‘the Regulations’) which will come into force in April 2018. These Regulations prescribe the details of a penalty notice system, whereby the regulator - the Care and Social Services Inspectorate Wales (CSSIW) - may issue a penalty to providers and responsible individuals of regulated services in lieu of prosecution, should certain regulatory breaches occur.

This Explanatory Memorandum and Regulatory Impact Assessment relate to penalty notices as they would apply to the regulated services within phase 2 of implementation. These are:

- Care homes services
- Domiciliary support services
- Secure accommodation services
- Residential Family Centres

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

No specific matters have been identified.

3. Legislative background

The powers enabling these Regulations to be made are contained in section 52 of the 2016 Act. The Regulations are being laid under the negative procedure. Section 52 is a regulation making power to enable Welsh Ministers to issue penalty notices in relation to offences committed under sections 47, 48 and 49 of the Act, and under regulations made under sections 45 and 46 of the Act (*the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017*¹ - ‘the Service Providers Regulations’). These are, as follows:

- section 47 - a person who makes false statements in relation to:
 - an application for registration as a service provider,
 - an application for variation or cancellation of registration,
 - an annual return under section 10,
 - responding to a requirement imposed by the Welsh Ministers under section 32(1);

¹ S.I. 2017/1264 (W. 295) <http://www.legislation.gov.uk/wsi/2017/1264/contents/made>

- section 48 - failure of a service provider to submit an annual return under section 10;
- section 49 - failure of a relevant person to provide information in response to a request under section 32. A “relevant person” for this purpose means:
 - a service provider;
 - a responsible individual (RI);
 - a person employed by or otherwise working for a service provider; and
 - any person who has held any of these positions.
- Regulations under section 45 of the Act detail which of the breaches of the requirements in the section 27 regulations – duties to be placed on providers – are prosecutable as criminal offences. Regulations under section 52 set out which of these offences may be discharged by the provider by paying a penalty. These are, as follows:
regulation 7(3), 7(5), 11(3), 12(1), 12(2), 19(1), 19(2), 19(3), 20(1), 35(1), 38(1), 59(1), 59(2), 59(3), 60(1), 60(2) and 60(4).
- Regulations under section 46 detail which of the breaches of the requirements in the section 28 regulations – duties to be placed on Responsible Individuals (RIs) – are prosecutable as criminal offences. Regulations under section 52 will set out which of these offences may be discharged by the RI by paying a penalty. These are, as follows:
Regulation 67(1), 74(1), 74(2), 75(1), 80(4), 81(1), 84(1), and 84(3).

The purpose of the penalty notice is to offer the recipient of the notice the opportunity to discharge any liability to conviction for the offence by paying the sum specified in the notice in accordance with its terms. If the person pays the sum specified in the notice in accordance with the terms, the person cannot be convicted of the offence to which the notice relates.

4. Purpose & intended effect of the legislation

The purpose of these Regulations is to set out the details of a penalty notice system, enabling CSSIW to issue a penalty notice to providers and responsible individuals of regulated services, should certain regulatory breaches occur. The intention is to create a more flexible system of regulation so that CSSIW has a full range of powers at its disposal to deal with continual non-compliance. The regulation-making power is contained in section 52 of the 2016 Act and allows both fixed and variable notices to be issued. Penalty amounts are limited to two and a half times level 4 on the standard scale. Prescribing the amounts according to a standard scale means the regulations will not need to be amended should the level change as a result of amendments to the Criminal Justice Act 1982. Level 4 is currently £2500.

1. Section 52(6) of the Act states that Welsh Ministers may by regulations make provision –
 - as to the form and content of the penalty notices;

- as to the sum payable under a penalty notice and the time within which it is to be paid (including provision permitting a different sum to be payable in relation to different offences and according to the time by which it is paid);
- determining the way in which a sum may be paid;
- as to the records to be kept in relation to penalty notices;
- about the circumstances in which a penalty notice may be withdrawn, including provision about –
 - the repayment of any sum paid before a notice is withdrawn, and
 - the circumstances in which proceedings for an offence may not be brought despite the withdrawal of a notice.

2. The approach here is to provide clarity to both the regulator and the recipient of the penalty notice as to the way in which the scheme will operate.

5. Consultation

These Regulations, alongside the Service Providers Regulations were subject to a formal 12 week consultation between 2 May and 15 July 2017.

115 responses were received overall. No changes were made to *the Regulated Services (Penalty Notices) (Wales) Regulations 2017* as a result of feedback from respondents. A summary of the comments that were made and the Welsh Government's response to these is set out in the consultation summary report² published on the Welsh Government website on 21 November 2017.

² <http://gov.wales/consultations/healthsocialcare/regulation-and-inspection-act/?lang=en>

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option one: do nothing

Under this option, there would not be a penalty notice scheme for any offences under the 2016 Act and Regulations would not be created.

Option two: create regulations which provide detail about how the penalty notice scheme will operate

Under option two, the Welsh Government would operate a penalty notice scheme and regulations would be created that set out:

- the offences that can be dealt with via a penalty notice;
- the amount that can be charged for each of the offences;
- the form the penalty notice must take and the information that must be included in it;
- the payment methods that can be used to pay the penalty;
- the records CSSIW must keep in relation to issuing penalty notices;
- the circumstances in which a penalty notice can be withdrawn.

Costs

Option one: do not create regulations but rely on information on the face of the 2016 Act

Under option one there would be no costs to the regulator or the sector as this represents the “do nothing” option.

Option two: create regulations which provide detail about how the penalty notice scheme will operate

Under this option there would be obvious costs to providers and RIs that receive penalty notices as a result of non-compliance with certain requirements. The penalty amounts would be set out in the Regulations. Section 54 of the Act restricts the amount of the sum payable to two and a half times level 4 on the standard scale. Level 4 on the standard scale is currently £2,500.

The penalties listed in the regulations would range from one to two and a half times level 4 on the standard scale, which means the penalties would range from £2,500 to £6,250 at the moment. A list of the offences that would attract a penalty notice and the amounts are set out at Annex A.

The frequency of issuing such fines would depend on the way in which the regulator implements the scheme. This has not yet been fully established and would be a matter for CSSIW’s operational guidance. However, a proportionate approach will be applied. Therefore, it is anticipated that CSSIW will continue to apply the principles of its existing inspection process that enables providers the opportunity to remedy any non-compliance identified during an inspection before enforcement action is taken. To

gauge the number of fines that would be issued we have looked at the level of non-compliance for similar offences under the Care Standards Act 2000 (“the 2000 Act”) in 2016-17. The 2000 Act is the legislative framework currently in operation. The table below shows the provisions creating penalties under the 2016 Act against the closest corresponding regulations in the 2000 Act and the number of non-compliance notices issued against these regulations in 2016-17:

Provision creating offence in the 2016 Act	General nature of the offence	Amount of penalty	Existing closest corresponding Regulation under the 2000 Act	No. of non-compliance notices issued in 2016-17	No. of non-compliance persisting over 12 months	Amount, if penalty notice issued
Section 47 of the 2016 Act	Making false statements	An amount corresponding to two and a half times level 4 on the standard scale(1)	Adult care homes: regulation 7 Children's homes: regulation 6 Domiciliary support services: regulation 8	None	None	£0
Section 48 of the 2016 Act	Failure to submit an annual return	An amount corresponding to level 4 on the standard scale	N/A as this is a new offence	N/A as this is a new offence	N/A	£0
Section 49 of the 2016 Act	Failure to provide information	An amount corresponding to level 4 on the standard scale	Adult care homes: regulations 11, 38, 39,40 Children's homes: regulations 10, 29, 36, 37 Domiciliary support services: regulations 12, 26, 27, 28	4 for adult care homes	1 for adult care homes	£2500
Regulation 7(3) and (5) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the statement of purpose	An amount corresponding to two and a half times level 4 on the standard scale	Adult care homes: regulation 4 Children's homes: regulation 4 Domiciliary	1 for adult care homes 2 for children's homes 2 for domiciliary support	1 for adult care homes 1 for domiciliary support services	£12,500

			support services: regulation 4	services		
Regulation 11(3) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the financial position of the service	An amount corresponding to level 4 on the standard scale	Adult care homes: regulation 26(2) Children's homes: regulation 35 Domiciliary support services: regulation 25	None	None	£0
Regulation 12(1) and (2) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements to have in place specified policies and procedures	An amount corresponding to level 4 on the standard scale	Adult care homes: regulation 13(2), 23(1) Children's homes: regulation 17, 11	3 for adult care homes: 2 for children's homes	None	£0
Regulation 19(1), (2) and (3) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the provision of information about the service	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 5 Children's homes: regulation 4 Domiciliary support services: regulation 5	None	None	£0
Regulation 20(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the provision of a service agreement	An amount corresponding to level 4 on the standard scale	Adult care homes: regulation 5(1)(c) Children's homes: regulation 4 Domiciliary support services: regulation 5	None	None	£0
Regulation 35(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the fitness of	An amount corresponding to two and a half times level 4 on the standard scale	Adult care homes: regulation 19 Children's	6 for adult care homes 6 for domiciliary support	None	£0

	staff		homes: regulation 26 Domiciliary support services: regulation 15	services		
Regulation 38(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the provision of information for staff	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 18(4) Children's homes: regulation 27 Domiciliary support services: regulation 16	None	None	£0
Regulation 59(1), (2) and (3) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the making and maintenance of records	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 17 Children's homes: regulation 28 Domiciliary support services: regulation 20	1 for adult care homes	None	£5000
Regulation 60(1), (2), and (4) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to notifications to the service regulator	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulations 11, 38, 39,40 Children's homes: regulations 10, 29, 36, 37 Domiciliary support services: regulations 12, 26, 27, 28	None	None	£0
Regulation 67(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the duty of a responsible individual to appoint a manager	An amount corresponding to two and a half times level 4 on the standard scale	N/A as this is a new offence	N/A as this is a new offence	N/A	unknown

Regulation 74(1) and (2) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the duty of a responsible individual to report the adequacy of resources	An amount corresponding to two times level 4 on the standard scale	N/A as this is a new offence	N/A as this is a new offence	N/A	unknown
Regulation 75(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the making by a responsible individual of other reports to the service provider	An amount corresponding to two times level 4 on the standard scale				
Regulation 80(4) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the preparation by a responsible individual of a report in respect of a quality of care review	An amount corresponding to two times level 4 on the standard scale	[this is applicable currently to the registered person] Adult care homes: regulation 25 Children's homes: regulation 33 Domiciliary support services: regulation 23	[this is applicable currently to the registered person] 9 for adult care homes 3 for children's homes	None	£0
Regulation 81(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the preparation by a responsible individual of a statement of compliance with the requirements as to standards of care and support	An amount corresponding to two times level 4 on the standard scale	Adult care homes: regulation 27 Children's homes: regulation 32 Domiciliary support services: regulation 23	11 for adult care homes	1 for adult care homes	£5000
Regulation	Contravention	An amount	N/A as this is a	N/A as this is a	N/A	

84(1) and (3) of the Service Providers Regulations	of, or failure to comply with requirements in relation to the responsible individual's duty to make notifications to the service regulator	corresponding to two times level 4 on the standard scale	new offence	new offence		
				Total = 50		£25,000

The table shows that the total amount for fines for all services³ over a year would be £25,000, if CSSIW focussed on non-compliance that persisted over 12 months. However, this does not take into account some of the new offences under the 2016 Act. Due to the lack of data it is not possible to estimate the level of non-compliance against these requirements.

There would also be a small administrative cost to the regulator in issuing the penalty notices. The penalty notices will be issued via the Welsh Government's SAP finance system, which is normally used to generate invoices. An estimate of the cumulative time it takes to generate one invoice, process a payment and undertake the necessary filing, is around 2 hours. This task is likely to be carried out by a Team Support. The average salary of a Team Support is £19,350. This means two hours would cost roughly £20. If we use the information in the table which shows that 7 fines would be issued over the course of a year, this would equate to an administrative cost of £140.

Benefits

Option one: do not create regulations but rely on information on the face of the 2016 Act

For some providers there would be cost savings in not having to pay fines for non-compliance of certain requirements. For CSSIW, there would be a small saving in terms of staff time, as the regulator would be able to focus their efforts more strongly on inspecting services and spend less time on administering a penalty notice system. However, implementing a penalty notice scheme could arguably reduce the number of prosecutions brought forward, as providers may opt to pay the penalty rather than go through the lengthy process of criminal proceedings.

Option two: create regulations which provide detail about how the penalty notice scheme will operate

Establishing a penalty notice scheme provides CSSIW with a more flexible and proportionate system of regulation so that the regulator has a full range of powers at its disposal to deal with regulatory breaches. Sometimes there may be a need for prosecution as an alternative to civil enforcement, to deal with more serious offences under the 2016 Act. At other times there may not be an overriding desire to pursue

³ All services with phase 2 of implementation (care home services, domiciliary support services, secure accommodation services and residential family centre services).

prosecution which is expensive and consumes valuable time and resources in preparing for prosecution. In these circumstances, the regulator can opt to issue a penalty notice which sends a clear message to providers and RIs who are failing to comply with their duties; this goes further than the issuing of a non-compliance notice under civil enforcement powers. Creating regulations about penalty notices would add clarity about the way in which the penalty notice system would operate. It would benefit both CSSIW and service providers who would have a better understanding of the circumstances in which it would be appropriate to issue a penalty notice, the amount that can be charged, the time limit within which to pay the penalty and the information the notice should contain.

Risks

Option one: do not create regulations but rely on information on the face of the 2016 Act

Without a penalty notice scheme there is a risk that unscrupulous providers who continually fail to comply with the regulations will not make the necessary improvements because the current enforcement mechanisms do not act as a sufficient deterrent to non-compliance.

Option two: create regulations which provide detail about how the penalty notice scheme will operate

There is a risk that providers could challenge the penalty notices issued which would result in CSSIW having to take forward criminal proceedings, which is costly and time-consuming. The risk will be mitigated by developing operational guidance about how the scheme will be implemented in practice. This guidance would set out the circumstances in which it would be appropriate to issue a notice – for example, if there were consistent levels of non-compliance against a particular regulation and this had not been resolved within a certain period of time.

Annex A

Provision creating offence	General nature of the offence	Amount of penalty
Section 47 of the Act	Making false statements	An amount corresponding to two and a half times level 4 on the standard scale(1)
Section 48 of the Act	Failure to submit an annual return	An amount corresponding to level 4 on the standard scale
Section 49 of the Act	Failure to provide information	An amount corresponding to level 4 on the standard scale
Regulation 7(3) and (5) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the statement of purpose	An amount corresponding to two and a half times level 4 on the standard scale
Regulation 11(3) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the financial position of the service	An amount corresponding to level 4 on the standard scale
Regulation 12(1) and (2) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements to have in place specified policies and procedures	An amount corresponding to level 4 on the standard scale
Regulation 19(1), (2) and (3) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the provision of information about the service	An amount corresponding to two times level 4 on the standard scale
Regulation 20(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the provision of a service agreement	An amount corresponding to level 4 on the standard scale
Regulation 35(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the fitness of staff	An amount corresponding to two and a half times level 4 on the standard scale
Regulation 38(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the provision of information for staff	An amount corresponding to two times level 4 on the standard scale
Regulation 59(1), (2) and (3) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the making and maintenance of records	An amount corresponding to two times level 4 on the standard scale
Regulation 60(1), (2), and (4) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to notifications to the service regulator	An amount corresponding to two times level 4 on the standard scale
Regulation 67(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the duty of a responsible individual to appoint a manager	An amount corresponding to two and a half times level 4 on the standard scale
Regulation 74(1) and (2) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the duty of a responsible individual to report the adequacy of resources	An amount corresponding to two times level 4 on the standard scale
Regulation 75(1) of the Service	Contravention of, or failure to	An amount corresponding to two

Providers Regulations	comply with, requirements in relation to the making by a responsible individual of other reports to the service provider	times level 4 on the standard scale
Regulation 76(8)(4) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the preparation by a responsible individual of a report in respect of a quality of care review	An amount corresponding to two times level 4 on the standard scale
Regulation 81(1) of the Service Providers Regulations	Contravention of, or failure to comply with, requirements in relation to the preparation by a responsible individual of a statement of compliance with the requirements as to standards of care and support	An amount corresponding to two times level 4 on the standard scale
Regulation 84(1) and (3) of the Service Providers Regulations	Contravention of, or failure to comply with requirements in relation to the responsible individual's duty to make notifications to the service regulator	An amount corresponding to two times level 4 on the standard scale