

Consultation Response Form

Your name:	Mary Wimbury
Organisation (if applicable):	Interim Chief Executive

PART 2: EXCEPTIONS

Q. 1. Are the proposed exceptions which have been identified in relation to regulated services appropriate? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Please explain:

Care Forum Wales agrees with the broad thrust of these exceptions, subject to the following two matters

1. We remain concerned about where the line is drawn between a domiciliary care agency and an agency providing personal assistants and providing management support for their employment. There are agencies, currently exempted for registering, who would continue to be so under Regulation 3(1)(a), simply by virtue of the PA being technically employed by the individual receiving care. However, the agency is matching the worker(s) to the person receiving care, and managing payroll and employment requirements. The only difference is that rather than a contract between the commissioner and the agency it is technically between the individual and the agency with the funding coming through the commissioner. While direct payments can provide beneficial greater flexibility to the person receiving care, they can also be used to undermine terms and conditions of the workforce, such as requirements for training, and we believe such agencies are undercutting domiciliary care agencies due to the lower requirements on them when they are effectively performing the same function. We suggest that such agencies should be brought within the requirement to register and be regulated, which would also provide greater protections to service users

2. The definition of 'care' under section 3 of the Act is much broader than previously. Because of the words 'relating to' and the circular definition of 'care'. For instance, care "relating to day to day physical tasks and needs of the person care for ..." could now include hairdressing and spa treatments. The exceptions under Regulations 2 and 3 do not clearly exclude these e.g. 15 weekends a year at a spa would be more than 28 days accommodation and 'care'. We presume these areas are not intended to be regulated, and the Regulations should make this clear.

PART 3: GENERAL REQUIREMENTS

Q. 2. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

Care Forum Wales wishes to raise two issues in relation to the statement of purpose.

First, with regard to the 28 days notice required to change the statement of purpose. While we accept this is reasonable for significant changes to the character of a provision we are concerned about the situation where a change in the needs of an existing resident, where in order to provide person-centred care and prevent an unnecessary change of home for that person emergency measures are put in place to meet their changing needs which are immediate but not covered in the current statement of purpose. This could leave the provider in the invidious position of being non-compliant unless they gave notice to that person, but they might be able to indicate they could return after 28 days. Another example would be the emergency admission of a person slightly outside the age range specified in the statement of purpose.

Second, whilst the existing Regulations helpfully have at Appendix 1 the list of matters to be dealt with in the statement of purpose, the new requirements are proposed to be included in the Schedule to a separate set of Regulations that have not yet been finalised (the Registration Regulations 2017). It would be better to have the list of requirements in these principal Regulations, as the statement of purpose is such a central document to compliance.

Care Forum Wales is also concerned about the requirement in regulation 9 for the service provider to notify the regulator if the Responsible Individual will be absent for more than 28 days. As we indicate elsewhere we do not believe a requirement on the RI to visit the service once a month is feasible.

We note the requirement for the RI to undertake appropriate training. It is difficult to comment on this without further detail we would want to be consulted on further developments.

Commissioning of care home services has traditionally been based on categories of residential, residential with EMI, nursing and Nursing EMI. The move to relying on the statement of purpose (regulation 7) needs to be carefully managed to ensure that specialist services are not downgraded and that payments to providers are not delayed by confusion over the levels of staffing and expertise required.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

No. The guidance for this part, and throughout, is at times very loosely worded, and even contradictory to the Regulations. For example, the issue discussed

above, where the Regulations say that “any change” in the statement of purpose must be notified at least 28 days in advance, the guidance seems to say that this applies only to ‘[significant] change’.

Under Regulation 8, the guidance tells the provider that if it needs professional / expert advice in relation to quality monitoring, that advice must be sought ‘immediately’. This is not appropriate. Some advice needs, in effect, to be put out to tender. Requiring the provider to rush to take advice from the first professional / expert who is ‘immediately’ available may not be in the best interests of the service.

A third example of poor wording of the guidance is again under Regulation 8, that the ‘care and support report’ “is made available to individuals using the service”. Any such report (under Regulation 76), if it is to be of any use to the service provider, is likely to contain details about specific individuals, whether service users or staff. This detail cannot be shared with service users, and any redacting process may either be extremely time consuming and / or make the report useless to service users. Oddly, the guidance under Regulation 76 does not say the report has to be shared. This suggests that the guidance has been published before being properly proofed.

The guidance is a completely different kind of document from the National Minimum Standards with which providers, managers, CSSIW and commissioners have been used to working. If it is to remain in this style, the wording needs to be much more rigorous and checked word for word against the phrasing of the Regulations. Otherwise, there will be much dispute and possibly litigation.

A further example is the guidance to Regulation 12, which says that acting in an open and transparent way includes “offering a apology for what has happened” “when things go wrong”. In our members’ experience, this will be interpreted by inspectors as meaning this is what should happen in all circumstances, as the guidance is so clear. However, service providers’ insurers may not consider such an approach to be appropriate in every case, and offering an apology may invalidate insurance cover. The wording of the guidance must be modified, both here and in multiple examples elsewhere.

We would also stress the importance of more detailed guidance to providers around the Statement of Purpose and welcome proposals from CSSIW to hold workshops on the subject. The use of an on-line template should also help to guide providers through the process.

We would also like guidance to inspectors to be clear that regulation 11 does not become a tick box exercise as has been the case in the past.

PART 4: REQUIREMENTS ON SERVICE PROVIDERS AS TO THE STEPS TO BE TAKEN BEFORE AGREEING TO PROVIDE CARE & SUPPORT

Q. 3. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

Care Forum Wales believes these requirements are appropriate as long as a test of reasonableness is applied and the provider is not held responsible for others withholding information from them about a potential clients' needs or presentation.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

Confirmation can only be given that the provider believes they can meet the individual's needs based on the information supplied. They cannot guarantee to meet their needs if information has not been disclosed.

This can be a particular problem with on-line bidding systems used by some commissioners, where the provider has to say how they will meet the individual's needs on the basis of limited information.

PART 5: REQUIREMENTS ON SERVICE PROVIDERS AS TO THE STEPS TO BE TAKEN ON COMMENCEMENT OF THE PROVISION OF CARE AND SUPPORT

Q. 4. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

We consider that the definition of 'personal outcomes' under Regulation 1 must be amended, as this phrase plays a great role in the Regulations and guidance. for example in this Part. Under Regulation 14 the personal plan 'must' set out how the individual 'will' be supported to achieve their personal outcomes. Of course people's wishes must be taken into account but failure to achieve them must not lead to liability on the part of the service provider if those wishes are unrealistic or outside the person's assessed needs e.g. someone who is no longer able to walk may wish to, someone may wish to be a famous singer but may lack the ability. There are also of course particular issues relating to children or those who may not have capacity. Wishes will also need to take into account the funding available to the provider to provide care and support by the commissioner of services. 'Personal outcomes' should refer to assessed needs.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

Further to the examples given under Part 3, there is an example of further poor drafting here in the guidance to Regulation 16. The Regulation requires only that the service provider 'keep a record of' the personal plan, any revised plan and the outcome of any review. The guidance says the provider must 'keep a copy', and

in a formal and language appropriate to the person's needs. For someone who requires an audio version, this could mean retaining dozens of audio recordings to comply with the guidance, whereas the Regulation requires only some sort of record of the plan and changes made.

PART 6: REQUIREMENTS ON SERVICE PROVIDERS AS TO THE INFORMATION TO BE PROVIDED TO INDIVIDUALS ON COMMENCEMENT OF THE PROVISION OF CARE & SUPPORT

Q. 5. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

Regulation 19 would require the service provider (a) to give the individual a signed copy of any framework agreement with commissioners, as these often deal in great detail with matters 'relating to ... the care and support provided to the individual'; and (b) 'ensure that individuals receive such support as is necessary to enable them to understand ...'. These framework agreements can be dozens of pages in length, are not always signed, and tax the understanding of providers and managers, let alone service users who may have impaired mental capacity.

This leads to a related point where, throughout the Regulations, the service provider is required to 'ensure' that staff and / or service users 'understand' XYZ. This is unrealistic. Service providers, responsible individuals and managers can be required to take reasonable steps to try to ensure that people 'understand', and perhaps to record evidence that suggests that people do understand, but they cannot be held accountable for situations where it appears that staff understand (but in fact it later transpires that they don't, or say they don't) or where service users show no interest in understanding, or insufficient ability to understand, despite reasonable and repeated efforts being made.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

See previous comments (under Part 3).

PART 7: REQUIREMENTS ON SERVICE PROVIDERS AS TO THE STANDARD OF CARE AND SUPPORT TO BE PROVIDED

Q. 6. Are the requirements in this part right for all service types and age

groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree

Tend to agree

Tend to disagree

Disagree

Regulations:
Please explain:

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

The guidance currently says “the service recognises, makes or works towards actively offering a service in the Welsh language to individuals whose first language is Welsh”. This is badly written and unclear. Providers will need to make clear whether they can provide a fully bilingual service, some services in Welsh as well as English, some incidental Welsh or an English only service. Indeed we are already receiving some queries from members about how CSSIW is inspecting delivery of the Active Offer. In an ideal world all services would be able to offer a first language Welsh speaker a service delivered entirely through the medium of Welsh, however we know that in some areas it has proved impossible to recruit and retain Welsh-speaking care staff. While work can be undertaken to improve the Welsh language skills of staff such services will not become fully bilingual easily or quickly. Commissioners will have to continue to balance the provision of a Welsh language service against other criteria or needs when deciding who to commission. Providing a service is clear about what it can or cannot provide it should not then be penalised because it is not able to offer a fully bilingual service but has still been judged the best available service for an individual. If this is the case more work needs to be done by the commissioner to shape the market in this area.

There also needs to be a recognition of the fact that providers with Welsh speaking staff may not be able to provide a fully bilingual service in terms of written materials, as translation of documents usually requires higher level knowledge. What matters to the person receiving the service must be key not what matters to commissioners and inspectors: this is more often Welsh-speaking staff than Welsh language documents.

PART 8: REQUIREMENTS ON SERVICE PROVIDERS - SAFEGUARDING

Q.7. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree

Tend to agree

Tend to disagree

Disagree

Regulations:
Please explain:

The wording of Regulation 26 sets an almost impossible standard: the service provider must provide the service ‘in a way that **ensures** that individuals are safe and protected from abuse ...’ The dictionary definition of ‘ensure’ is ‘make certain’. There is no 100% abuse-proof system, and this Regulation must be amended. If a particular service never suffers any issues of abuse or improper treatment, that is in part a matter of good fortune as well as good systems. A service provider who has good, robust systems that are operated well but who nonetheless suffers an instance of abuse or improper treatment will – under this wording - be committing an offence under Regulation 81(3) & (4).

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

No. As another example of the problems highlighted at Part 3, the guidance on Regulation 28 in the first bullet point refers at one point to “how individuals will be supported, including opening and managing individual bank accounts ... “ and two sentences later requires service providers to ensure that staff etc “are precluded from involvement with individuals’ financial affairs”. It is difficult to support someone to open a bank account without having some ‘involvement’ in their financial affairs. The Regulation is clearer, saying no more than “so far as practicable” staff etc do not act as an individual’s agent (although again the guidance contradicts this by stating an absolute ban).

Similarly, the guidance requires that, “Arrangements are in place for individuals to access independent support and advice [in relation to financial matters].”

‘Arrangements’ suggests that links have been made with providers of Will writing services and / or that people are lined up to come to the service to meet with individuals if requested. This is not what the Regulation requires, which is simply that the service provider has ‘a policy and procedures in place’ e.g. if X is needed, we will do Y. The difference between the two positions – arrangements in place, or policy only – can be substantial in terms of the amount of work for the service.

As indicated at Part 3, the guidance throughout must be reviewed with legal advice to ensure that, in paraphrasing or attempting to offer practical guidance, it does not inadvertently contradict or go beyond the proper scope of the Regulations.

PART 9: REQUIREMENTS ON SERVICE PROVIDERS WHICH ONLY APPLY WHERE ACCOMMODATION IS PROVIDED

Q.8. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

No. A further example of unhelpful drafting is the guidance on Regulation 32. The wording of the Regulation is clearly limited to service offered by healthcare professionals (including GPs and dentists). The guidance goes significantly beyond this to require the service to have 'arrangements in place' for individuals to access leisure centres and fitness classes. Such facilities may be needed for certain individuals in certain regulated services, but 'arrangements' should not be required as a matter of course in every service.

The guidance also says that "individuals are assisted and supported to attend and participate in health checks". Residents are usually accompanied to medical appointments by family members, as this is usually their preferred option and commissioned fees are not normally sufficient to cover the costs of additional staff. Most providers will see this as good practice, but their first obligation has to be to retain sufficient staff in the care home. We would suggest that the guidance be qualified to say "where possible". We want to encourage community health services to come into care homes and provide equality of access.

PART 10: REQUIREMENTS ON SERVICE PROVIDERS AS TO STAFFING

Q.9. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

Care Forum Wales is supportive of the majority of regulations in this part with a number of significant provisos. We support the relaxation of the requirement for nurses to be present 24/7 in nursing homes instead requiring nurse presence appropriate to the needs of the residents and as laid out in the statement of purpose. However, this should not and cannot be used as an excuse by Health Boards not to provide or pay for nursing care appropriate for the residents in that home. In this respect, and many others in the Regulations (for instance, the point about assessment information above), there is a missed opportunity to ensure that requirements on service providers that require active participation from public sector commissioners, are backed up by complementary regulations that bind those public bodies.

We support the removal of the requirement for managers to register twice with both CSSIW and Social Care Wales. Members continue to raise the issue of nurse managers having to dual register with NMC. This will become even more of a barrier to recruitment when nurses are required to register with Social Care

Wales as care practitioners. Given the lack of suitably qualified managers, we would like to see more flexibility built into the regulations to allow people who are training towards the qualification to be registered.

We are in principle supportive of registration, and thus professionalisation, of workforce. However, we are concerned about the timescales currently proposed when the sector is under significant pressure and is finding recruitment and retention challenging.

We are particularly concerned that the requirement to register is coupled with the requirement for annual DBS checks of staff. We are not aware of any incidents where people's care has been adversely affected by annual DBS checks not being undertaken. We assume the expectation is that the vast majority of workers should be registered with the annual update service. However, anecdotal evidence indicates this is not currently the case and imposing the additional cost and bureaucracy at the same time as registration on a sector that is struggling to recruit and retain seems perverse and to contradict the stated aim of proportionate requirements.

There should also be an impact analysis on the ability of the DBS to cope with the potential increase in referrals least the requirement creates additional delays within the system.

Whilst we fully endorse the need for providers to maintain adequate service levels (Regulation 33) we would like to see some acknowledgment of the difficulties in recruiting staff, especially nurses, or we are setting providers up to fail. We have reports that some services have been unable to obtain cover even from agencies in emergency situations due to the national shortage.

We would also like to see the requirement to provide appropriate staffing balanced with a requirement to ensure service sustainability in the same way as local authorities are also required to balance the costs of care and wider use of resources when setting care fees.

We assume that 34 (1) (c) excludes contractors but that is not clear.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

These regulations will make the Social Care Wales induction framework mandatory. This framework is not yet finalised and we are concerned to ensure that it is fit for purpose, not aimed at a totally different workforce to that currently recruited into the sector.

It also seems to specify that supervision must always be with the direct line manager but it may also sometimes for good reasons be with other managers or team leaders.

The guidance under Regulation 38 requires the provider to have disciplinary procedures in place that includes the arrangements for suspension. This could be a good opportunity to stress that the arrangements should be in accordance with employment law. At present there is a disconnect between employment law

and the instructions given to providers by investigating bodies. It is common for providers to be instructed to suspend an individual without being made aware of the full background to the alleged offence and without being allowed to conduct their own investigation. Yet it is the provider who carries the risk of claims of unfair dismissal.

PART 11: REQUIREMENTS ON SERVICE PROVIDERS AS TO PREMISES, FACILITIES AND EQUIPMENT

Q.10. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

The regulations as currently drafted are likely to lead to the demise of shared rooms and also the demise of the small number of care homes, often in rural areas, who still have significant numbers of shared rooms.

Shared rooms serve a purpose – for example in accommodating a husband and wife together but also sometimes others (e.g. those who have only a ‘personal relationship’ within the definition at Regulation 5) who wish to share a room. Care Forum Wales does not believe it is for the state to determine whether individuals cannot share a room where they choose to do so. While it is stated that the sharing of rooms by non-relatives will not immediately be prohibited, given the reducing length of stay of care home residents we do not expect their provision to last long. A small number of existing care homes are only viable because of the use of shared rooms. If that provision is forced to close people will be faced with travelling to another care home – a choice that is currently available to them but that they are choosing not to make.

Regulation 40(11) requires all accommodation-based services to provide sleeping accommodation for staff. This should be amended to reflect the position in the current regulations (regulation 24(3)) which makes clear that such accommodation is required only where staff need to sleep at work in connection with their work.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

Please see earlier examples of drafting issues with the guidance, further examples of which apply under this Part.

Again we would also like to see a commensurate duty on commissioners to recognise providers costs in providing a renewal programme for fabric and decoration.

PART 12: ADDITIONAL REQUIREMENTS ON SERVICE PROVIDERS IN RESPECT OF PREMISES – NEW ACCOMMODATION

Q.11. Are the requirements in this part right for all service types and age groups? Is anything missing or unnecessary?

We would welcome particular consideration as to:

- ! the level of flexibility which would be desirable around en-suite facilities, and whether they should be required for all rooms or just a percentage of rooms;**
- ! whether there should be a more prescriptive approach to en-suite facilities in currently registered and occupied stock, and, if so, how this might be phased in over time;**
- ! whether the proposed minimum room sizes are sufficient;**
- ! whether the other requirements in Part 12 should apply to all accommodation-based regulated services, including currently registered and occupied stock and, if so, how this might be phased in over time.**

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

As indicated in the consultation document en suites are not appropriate for all client groups accommodated in care homes. A nursing home, for example, may cater for a client group who are nursed in bed, unable to use a toilet and wheeled down the corridor to be hoisted into a bath rather than use a shower – installing en suite showers and toilets in all rooms for such a group could be wasteful in the extreme. Each ensuite room effectively reduces the size of the main bedroom, yet it would be better for an individual with high level nursing needs to have plenty of space in the bedroom for the additional equipment and comfort. Alternatively residents with dementia may be unable to cope with an en suite shower and this then becomes a health and safety hazard. Requiring all new build, extensions and re-opened care homes to have an en suite including a shower and toilet in each room seems disproportionate and likely to lead to a lack of development. We know of providers who have taken out en suite bathing and showering facilities from rooms as they were not being used and were therefore not the best use of space.

Some providers looking at new build will include anyway to future-proof but others may not, dependent on the client group they have in mind. Levels of investment in Wales in the state-funded market are not at such levels that if they are thought to be viable without all rooms having showers and toilets we should prevent them being built. In our experience, physical standards are far less important to individuals than the continuity and quality of staffing. Many are happy when given the choice to pay a lower fee for a room without ensuite.

We are not clear whether an extension means a new build or could include a reconfiguration of an existing building to include more rooms for residents? If the latter requiring the installation of a lift or an extension to the communal space would seem disproportionate and likely to lead to such an extension not

happening. This would be particularly unfortunate if it were to lead to the closure of a home who would otherwise have replaced capacity being lost under the double rooms requirement.

Similarly, suppose a home were needed in the area, but badly run in a way which resulted in closure. A new owner would be required to install lifts and en suites and possibly completely reconfigure to meet the communal space requirements. This would be much more costly than simply re-opening the home as was and would be significantly less likely to happen. This could lead to a loss in capacity in the area and the potential for this might create perverse incentives not to close homes even temporarily.

With regard to the requirements on communal space in relation to an extension we are not clear whether the new requirements would apply to the whole home, part of the home or proportionately.

While these issues primarily affect those looking to build, extend or re-open there are also concerns amongst existing providers that these changes could reduce the value of their existing provision as it would be seen to have less investment potential for the future. This could affect loans and repayments on current provision.

Given what we have said above it will be no surprise that we do not believe the extension of these provisions to existing stock will be viable in the short to medium term. We see no reason why the general but detailed principles set out in Part 11 cannot be applied to new, extended and reopened stock, as much as to continuing stock. It is notable that despite 15 years of registering and regulating the 'two tier' system (old stock and new stock), CSSIW has not produced any evidence to justify not only its continuance, but the translation of physical standards from statutory guidance (the National Minimum Standards) into legislation.

Our legal adviser comments that the wording of 'Category C' under Regulation 45(2) is particularly opaque and odd, and likely to generate litigation if it remains in that form.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

As explained above, if Part 12 is to remain (which we hope it does not as it is unnecessary given the detail in Part 11), we need clarity on what comprises an extension and what that means in terms of communal space.

PART 13: REQUIREMENTS ON SERVICE PROVIDERS AS TO SUPPLIES, HYGIENE, HEALTH AND SAFETY AND MEDICINES

Q.12. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree

Tend to agree

Tend to disagree

Disagree

Regulations:
Please explain:

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

See previous comments about the way the guidance has been drafted.

PART 14: OTHER REQUIREMENTS ON SERVICE PROVIDERS

Q.13. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree

Tend to agree

Tend to disagree

Disagree

Regulations:

Please explain:

Regulation 59(2) is odd, specifically excluding medical practitioners but no other profession which might provide services to individuals e.g. lawyers, accountants, bankers, investment brokers, beauticians. We have had concerns raised by members that where specific medical experience is needed and is not widely available this prohibition may make it impossible to provide appropriate care. It feels like a situation where one individual case is likely to make bad law.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

See previous comments about the way the guidance has been drafted. In this instance, the guidance in relation to Regulation 59(2) seeks to clarify that 'financial interest' includes receiving any financial benefit or remuneration. We are aware of instances in England where GP practices have charged care homes for providing what they call 'enhanced services', which includes visiting the home to see patients. Should such practices exist or evolve in Wales, this interpretation

of the provision would effectively block access to GP services.

PART 15: REQUIREMENTS ON RESPONSIBLE INDIVIDUALS

Q.14. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

Care Forum Wales agrees with the exemption allowing small services providers to continue as both the Responsible Individual and the Manager. As stated in the consultation document it would not be viable for such services to do otherwise. Who the responsible individual can be is set out in statute but they are required to be a director of the company 'or similar officer'. We request written clarification of how the latter phrase will be interpreted in practice. We suggest that it should include 'operations directors / managers', even if they are not a formal Company Director or Company Secretary i.e. a senior manager not involved in the day to day management of the service. Or similar levels of delegation should be allowed by other organisations as within local authorities. This would be a delegation of action not of responsibility.

While Care Forum Wales understand the desire to ensure a line of sight between the company directors and the provision we need to be realistic about the requirements place on the RI and the regulations must be appropriate to the size and structure of all companies and the other responsibilities of RIs. We believe that given all this the requirement to visit each service and talk to staff and service users "at least monthly" is likely to be too onerous for potential RIs in some existing services to fulfil either on a regular or a one off basis. For example we would not want a couple who have successfully run a care home for twenty years not to be allowed, having made appropriate management arrangements, to take a six week cruise to celebrate a big birthday or wedding anniversary. Alternatively in a large company with oversight of a significant number of care homes you might create an RI who was able to do little else but undertake the visit requirements.

Overall we are concerned that the stringent requirements on who can be an RI couple with the proposed duties will make it harder to invest in Wales and discourage the development of much needed new stock. Such an effect would then have a knock on effect on the value and saleability of other existing provision.

There will also be an immediate impact on current provisions as some will be forced to re-structure to satisfy the regulations without adding extra value. Alternatively, they may not wish to make the current RI a director of the firm and will replace them, resulting in a loss of knowledge and experience. Establishing line of sight should not be allowed to dilute the quality of care provided.

We also anticipate considerable issues for charities where Trustees will not want to take on the role.

We suggest that there should be clarification in the Regulations, in relation to Parts 15-19 generally, as to what duties – if any – the RI can responsibly delegate to another person (in the same way that not everything for which the service provider can be held responsible is done personally by the partners / directors / trustees etc of the provider organisation). The way the Regulations and guidance are currently drafted, it appears to be an entirely non-delegable responsibility, except in the case of ‘absence’ (although absence from what or where is not defined in Regulation 9(3)).

We are also concerned that the concept of the RI as an agent apparently independent of the service provider has not been fully thought through. For instance, s/he cannot ‘appoint’ a manager under Regulation 63. S/he can recommend the appointment of a specific person, but it is for the service provider (as the employer) to make the appointment. The service provider has employment law obligations that must be fulfilled, as well as these sector regulatory obligations. In that respect, the RI can only ever be a servant or agent of the service provider.

Does the statutory guidance adequately support service providers in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

In relation to the guidance on Regulation 69, we assume that:

o Talking to, with consent and in private, individuals using the service and their representatives (if applicable) and staff. For domiciliary support services, this may include visiting individuals in their own home.

o Inspecting the premises, selection of records of events and any complaints records.

... does not mean all such individuals and all such records on a monthly basis.

Otherwise, see above as to general comments about the drafting of the guidance.

PART 16: REQUIREMENTS ON RESPONSIBLE INDIVIDUALS

Q.15. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

See above about delegation etc.

Does the statutory guidance adequately support service providers and responsible individuals in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

Another example of how the guidance takes the Regulation beyond its apparent boundaries appears in the guidance to Regulation 74. Whilst there are electronic document systems in use in some care services to which individual staff can be given personal digital logins (which then allow timed, dated and named audit trails), not every provider has such a system or is going to be in a position to purchase or change to such a system. However, the guidance appears to make it compulsory. It is not enough to say that the guidance allows providers some other way to fulfil the Regulation; the example given is so specific – and is the only guidance given about Regulation 74 – that most commissioners and indeed CSSIW inspectors will assume that this is the starting point for compliance, not an example of ideal practice.

PART 18: REQUIREMENTS ON RESPONSIBLE INDIVIDUALS FOR MONITORING, REVIEWING AND IMPROVING THE QUALITY OF THE REGULATED SERVICE

Q.17. Are the requirements in this part right for all service types and age groups? If you think there is anything missing or unnecessary, please explain within the box below.

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

See previous comments about delegation etc.

Does the statutory guidance adequately support providers and responsible individuals in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

See previous comments about the need thoroughly to review and rework the guidance.

PART 19: OTHER REQUIREMENTS ON RESPONSIBLE INDIVIDUALS

Q.18. Are the requirements in this part right for all service types and age groups? Is anything missing or unnecessary?

Agree	Tend to agree	Tend to disagree	Disagree
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Regulations:

Please explain:

See previous comments about delegation etc.

Does the statutory guidance adequately support providers and responsible individuals in how they may comply with the requirements in this part? If you think there is anything missing or unnecessary, please explain within the box below.

Guidance:

Please explain:

The guidance to Regulation 79 includes the phrase “offering a apology for what has happened” seems to imply this should happen whatever the circumstances and whether appropriate or not. (See comment earlier about the same phrase in

relation to Regulation 12.)

PART 20: OFFENCES

Q.19. Is the approach taken in relation to offences sufficient and proportionate? If not, please explain below.

Agree	Tend to agree	Tend to disagree	Disagree
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Please explain:

No. More work and explanation is needed in our view. We say this for two reasons.

The offences for responsible individuals will add a very significant layer of risk that will need to be reflected in insurance arrangements, for instance. No doubt, some responsible individuals (particularly if they are not directors or shareholders) will also expect to be remunerated commensurate with the additional personal risk they are taking, as the new RI structure 'pierces the corporate veil' in relation to incorporated entities, and is intended to do so. This could add to costs (which would in turn be borne by commissioners and self-funders) and also make it more difficult to recruit or persuade existing senior managers to take on the RI role.

The reasons why certain Regulations and not others have been picked out to create offences is not always obvious. For instance, the staff information requirement (Regulation 37(1)) is both an offence, and liable to a Fixed Penalty Notice of £5,000, whereas (for example) the requirement to have a disciplinary procedure under Regulation 38 is not an offence. For the avoidance of doubt, we do not consider that either matter is appropriate for criminal prosecution or FPNs.

PART 21 SERVICE PROVIDERS WHO ARE LIQUIDATED ETC OR WHO HAVE DIED

Q.20. Are the requirements placed on appointed persons and personal representatives reasonable? If not, please explain below.

Agree	Tend to agree	Tend to disagree	Disagree
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Please explain:

PART 22: REGULATIONS UNDER SECTION 21(5) – DESIGNATION OF RESPONSIBLE INDIVIDUAL BY WELSH MINISTERS

Q.21. Are the circumstances in which responsible individuals may be designated by the Welsh Ministers, rather than the service provider,

sufficient and appropriate? If not, please explain below.			
Agree	Tend to agree	Tend to disagree	Disagree
Please explain: We are not sure what the insurance arrangements would be if an RI were imposed on a service provider.			

<u>The Regulated Services (Penalty Notices) Regulations 2017</u>			
Q.22. Is the approach in relation to penalty notices sufficient and proportionate? Are the levels of penalty set out in the draft regulations appropriate? If not, please explain below.			
Agree <input type="checkbox"/>	Tend to agree	Tend to disagree	Disagree
Please explain: The draft Regulations follow the approach used by CQC in England, including the absence of any right of appeal. In practice, CQC allow providers to make representations why the fixed penalty notice should be withdrawn. If CSSIW intend to operate a fair and transparent system that is not just an income generator, this option should be made clear and included in the Regulations and in the required wording for the FPN (under Regulation 9). In effect, a factual accuracy process. The levels of fine are high, and may be disproportionately so, particularly as there is no discretion as to amount such as “up to £XXX”. For instance, Regulation 34(1) can be subject to a FPN. However, if as a matter of fact the service provider does not have two written references (one from the last employer) under Schedule 1, Part 1, then this appears to be a strict liability offence and CSSIW will be entitled to issue an FPN. There is no legal obligation on an employer to supply a reference, which means that both future employers and candidates have no control over this aspect. Regulated service providers may therefore find themselves in a position where they have to refuse employment to a good candidate who has asked his/her former employer to supply a reference but that employer has declined to do so. Otherwise, if the candidate is offered the post, CSSIW could then issue a FPN for £6,250. Whilst the equivalent wording under the current Regulations (i.e. Regulation 19 of Schedule 2) is almost identical, and is likewise an offence, CSSIW would be unlikely to prosecute just for a failure to have two references given the public interest test. However, the Penalty Regulations – without further qualifying or threshold words – make it very easy for CSSIW to (in effect) issue a bill at the end of each inspection. Unless the wording of the individual offences is amended so as automatically to include an appropriate degree of discretion, then the Penalty Regulations should include a public interest / proportionality threshold before CSSIW can issue an			

FPN.

Other Questions

The Welsh Government is interested in understanding whether the proposals in this consultation document will have an impact on groups with protected characteristics. Protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.

Q23. Do you think that the proposals in this consultation will have any positive impacts on groups with protected characteristics? If so, which and why/why not?

Q24. Do you think that the proposals in this consultation will have any negative impacts on groups with protected characteristics? If so, which and why/why not?

We would like to know your views on the effects that these proposals would have on the Welsh language, specifically on

- i) opportunities for people to use Welsh and
- ii) on treating the Welsh language no less favourably than English.

Q25. What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

See comments relating to the guidance under question 6.

Q26. Please also explain how you believe the proposed policy could be formulated or changed so as to have:

- i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and**
- ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.**

Q27. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to tell us about them.

a.i.1. We have given many examples where the Regulations appear to be poorly worded, or the guidance, or both. However, there were many more examples picked up by our members, and by our legal adviser in particular. We request the opportunity to have further detailed input on the revised Regulations and guidance, as the organisation in Wales with the greatest representative experience on behalf of the types of service provider to be regulated. The experience of 15 years of working with the Care Standards Act 2002, and the regulations and National Minimum Standards issued under it, tell us that a lot can turn on individual phrases and therefore it is important to get them right.

a.i.2. We are not clear whether the Welsh Government has committed to undertaking a Regulatory Impact Assessment for these Regulations (and the related Regulations, such as those concerning registration, annual returns etc). For the avoidance of doubt, Care Forum Wales considers the measures set out in the consultation Regulations and guidance to represent a major change of policy that necessitates an RIA. For example:

- b.** the shift in accountability from provider + manager, to provider + RI;
- c.** the proposed and significant expansion in the application of enhanced physical standards; and
- d.** the increased costs likely to arise out of proposals in relation to annual DBS checks, the supply of equipment and electronic recording systems.

The relatively fragile state of the provider market in Wales has been accepted by CSSIW and was referenced in the PPIW report and the Interim report of the

Parliamentary Review. We are aware of an increasing number of nursing homes either closing, or deregistering their nursing beds. It is in our view essential that the Welsh Government properly and fully assesses the likely practical impact of the policy changes and their affordability for providers, commissioners and self-funders. The aim is to improve the quality of services for the individuals who use them, and hold accountable those who fail to exercise proper care in delivering those services. Care Forum Wales supports both those aims, provided they are delivered proportionately. If the new legal structure is likely to result in unnecessary reduction of services at a time of rising demand, commissioners, providers and service user organisations should at least be forewarned.

We have also heard anectodally that many Registered Managers feel that the emphasis on the Responsible Individual devalues their own position and reduces accountability too much. The value of the RM and clarity regarding demarcation of roles will need to be made very clear in future training programmes designed by Social Care Wales.

Responses to consultations may be made public – on the internet or in a report. If you would prefer your response to be kept confidential, please enter YES in the box.	
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