

# Subordinate Legislation Committee

(SLC(3)-21-08)

## SLC198

### Subordinate Legislation Committee Report

**Under Standing Order 15.2 the Assembly is invited to pay special attention to the following instrument.**

#### **Title: The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008**

These Regulations contain provisions about the arrangements for the appointment of Independent Mental Health Advocates ("IMHAs") together with provisions about who may be appointed to act as an IMHA.

#### **Procedure: Negative**

The Assembly is invited to pay special attention to this instrument on the grounds set out in Standing Order 15.2(ii) (unusual or unexpected use of the powers conferred by the enactment under which it made) for the following reason:-

No person may act as an IMHA unless he or she is approved by a Local Health Board or is employed by a provider of advocacy services to act as an IMHA (regulation 3(3)).

Section 130A of the Mental Health Act 1983 (as amended) enables the Welsh Ministers to make regulations providing that appointment of an IMHA is to be subject to approval in accordance with the regulations. Regulation 4(1) provides that the appointment requirements are that a person has "appropriate experience or training or an appropriate combination of experience and training". Regulation 4(2) and (3) provide that in determining whether a person satisfies the criteria specified in regulation 4(1) that regard will be had to "standards in guidance that may from time to time be issued by the Welsh Ministers (regulation 4(2)) and that for the purposes of regulation 4(2) "Standards may include any qualification that the Welsh Ministers may determine as appropriate" (regulation 4(3)).

Before approving a person to act as an IMHA a Local Health Board must be satisfied that a person satisfies the approval requirements set out in regulation 4.

The references to guidance and qualifications to be issued or determined by the Welsh Ministers is considered to be an unusual use of the enabling power as it would be expected that where approval is to be "in accordance with the regulations" that the regulations themselves would contain at least some criteria upon which a judgement could be made.

The Assembly is also invited to pay special attention to this instrument under Standing Order 15.3(v) (that it imperfectly achieves its policy objectives) in that :-

Regulation 3 provides that Local Health Boards are to make arrangements to enable IMHAs to be available to qualifying patients (as defined in the Mental Health Act 1983) but the regulation also provides that a Local Health Board is not responsible for making arrangements in respect of a qualifying patient if that qualifying patient is usually resident in the area for which that Local Health Board is established and is liable to be detained in a hospital or registered establishment which is not in the same area in which he or she is usually resident.

On the understanding that policy is that IMHA services are to be available to all qualifying patients there would appear to be a lacuna in provision as it is unclear as to where the responsibility lies for arranging IMHA services where detention is to be outside the Local Health Board's area.

#### **Legal Advisers**

**Subordinate Legislation Committee**

**October 2008**

#### **Government have responded as follows:-**

Reg 4(2) and (3):

The Government has indicated that it accepts the aforementioned point and responds as follows:

Work is currently being done to develop a National Advocacy Qualification and the policy intention is that all persons should achieve this qualification before they may act as an IMHA. This has created some difficulty in drafting a clause in anticipation of this qualification. It is therefore proposed that no guidance will be issued under regulations 4(2) and (3). When the National Advocacy Qualification becomes available the regulations will be amended to include this qualification as an appointment requirement.

Reg 3(6);

The Government does not accept the aforementioned point and responds as follows.

There should not be a lacuna in provision and the effect of Reg 3(1) should ensure that the Government's policy objectives are achieved. Each LHB is under a duty to make available services to patients detained in hospitals in its area. It is anticipated that LHBs will enter into joint commissioning arrangements for the provision of IMHA services but the duty to provide the service will still rest with each LHB. Reg 3(6) was inserted to ensure that there was no duplication of responsibility for providing an IMHA. If provision of an IMHA were to be regarded as a function of the LHB for the purposes of the Function Regulations then by operation of Reg 2(2) possibly it could be argued that the LHB was responsible for providing an IMHA to people usually resident in its area but detained in a hospital in another area. In these circumstances it is the LHB for the area in which the hospital was situated that should be responsible not the LHB where the person is usually resident. A Welsh patient detained in a hospital in England is a qualifying patient for the purposes of s.130C(5)(a) and responsibility for providing an IMHA rests with the Secretary of State. LHBs will be responsible for providing services to patients usually resident in their area where they fall under reg 3(1)(b) and (c).