

Explanatory Memorandum to the National Health Service (Temporary Disapplication of Tenure of Office) (Wales) (Coronavirus) Regulations 2020

This Explanatory Memorandum has been prepared by Health and Social Services Group 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 The National Health Service (Temporary Disapplication of Tenure of Office) (Wales) (Coronavirus) Regulations 2020. I am satisfied that the benefits justify the likely costs.

Vaughan Gething AS

Minister for Health and Social Services

11 June 2020

PART 1

1. Description

These Regulations temporarily dis-apply the maximum overall term of tenure of office to enable the re-appointment of board or committee members to Local Health Boards (LHBs), Public Health Wales NHS Trust (PHW), Velindre NHS Trust Shared Services Committee (NHSSSC), the Welsh Health Specialised Services Committee (WHSSC), the Emergency Ambulance Services Committee (EASC) and Health Education and Improvement Wales (HEIW).

The Regulations temporarily dis-apply the following regulations:

- Regulations 6(5) and 7(5) of the Local Health Boards (Constitution, Membership and Procedures) (Wales) Regulations 2009
- Regulation 14(3) of the Public Health Wales National Health Service Trust (Membership and Procedure) Regulations 2009
- Regulations 6(5) and 7(4) of the Welsh Health Specialised Services Committee (Wales) Regulations 2009
- Regulation 8(5) of the Velindre National Health Service Trust Shared Services Committee (Wales) Regulations 2012
- Regulations 6(5) and 7(4) of the Emergency Ambulance Services Committee (Wales) Regulations 2014
- Regulation 4(3) of the Health Education and Improvement Wales Regulations 2017

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

The SI is being laid under the 'Negative Procedure' and is in response to the disruption to public appointments during the COVID-19 situation.

The Welsh Government, in consultation with the Commissioner for Public Appointments, has suspended all Ministerial Public Appointment campaigns until September 2020 in response to the COVID-19 situation (this date will be kept under review by the Welsh Ministers).

3. Legislative background

The Regulations will be made pursuant to powers conferred by section 203(9) and (10) of, and paragraph 4(1)(a), (b) and (e) of Schedule 2, paragraph 4(1)(a) and (f) of Schedule 3, and paragraph 5(a) of Schedule 5 to, the National Health Service (Wales) Act 2006 ('the 2006 Act').

Local Health Boards ('LHBs') in Wales are established under section 11 of the 2006 Act. Paragraph 4(1)(a) and (b) of Schedule 2 to the 2006 Act gives the Welsh Ministers the power to make regulations in relation to the appointment and tenure of office of the chair, vice-chair and other members of a LHB. Additionally, paragraph 4(1)(e) gives the Welsh Ministers the power to make regulations in relation to the appointment and tenure of office of the members of any committees of a LHB.

NHS Trusts in Wales are established under section 18 of the 2006 Act. Paragraph 4(1)(a) and (f) of Schedule 3 to the 2006 Act gives the Welsh Ministers the power to make regulations in respect of the tenure of office of the chair and directors of an NHS trust and the appointment, constitution and exercise of functions by committee and subcommittee of an NHS trust (whether or not consisting of or including members of the board).

Special Health Authorities ('SHA') are established under section 22 of the 2006 Act. Paragraph 5(a) of Schedule 5 to the 2006 Act gives the Welsh Ministers the power to make regulations as to the appointment and tenure of office of the chair, vice-chair and members of a SHA.

This instrument will be subject to the negative resolution procedure.

4. Purpose and intended effect of the legislation

The purpose of these Regulations is to dis-apply the maximum tenure of office contained in the specified regulations for NHS board/committee members for a time limited period in response to the COVID-19 pandemic.

Although the Commissioner for Public Appointments' Governance Code provides some flexibility to ensure the continued operation of NHS boards/committees, any person who is nearing the end of their maximum tenure of office, as prescribed in legislation, will be required to leave office as they will no longer be eligible for re-appointment. The current regulations, in most cases, restrict a person from being appointed for a period of no longer than four years and holding office as a member or an associate member for a total period of more than eight years.

A number of key appointments on health boards/committees are due to end their tenure during the next 9 months. Due to the current temporary suspension of all public appointments in Wales and the time required to re-start the appointment process when the restrictions are lifted, board and committees will have to carry key vacant positions. This will include a vice-chair position in one health board.

During such a critical and challenging period for the health sector in responding and recovering from the impact of COVID-19 it will be essential for the boards and committees not to carry vacancies in order to function properly and support good and effective board governance.

The Regulations will dis-apply the statutory maximum tenure of office to ensure any board or committee member who is nearing the end of their statutory maximum tenure of office is eligible for re-appointment. Any re-appointments will be in accordance with the Commissioner for Public Appointments' Governance Code which includes allowing an appointee to hold office for a maximum of ten years.

5. Consultation

No public consultation was undertaken due to the urgency required to introduce this change of policy in direct response to COVID-19 restrictions. Engagement on the changes has taken place with the health bodies Board Secretaries

network and they are supportive as it was initially raised as a key concern in discussions on governance arrangements in responding to COVID-19.

The purpose of the instrument is to enable the provisions to come into effect in sufficient time to address imminent board and committee vacancies. Without the amendment regulations for NHS bodies, key non-executive positions would be left vacant thus compromising the balance of executives/non-executives on boards/committees and the capacity to effectively scrutinise decisions during these challenging times for health bodies.

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

Two options have been considered:

Option 1: -Do nothing, retain the existing regulatory position as currently in force.

Option 2: - Temporarily dis-apply the following Regulations:

- Regulations 6(5) and 7(5) of the Local Health Boards (Constitution, Membership and Procedures) (Wales) Regulations 2009
- Regulation 14(3) of the Public Health Wales National Health Service Trust (Membership and Procedure) Regulations 2009
- Regulations 6(5) and 7(4) of the Welsh Health Specialised Services Committee (Wales) Regulations 2009
- Regulation 8(5) of the Velindre National Health Service Trust Shared Services Committee (Wales) Regulations 2012
- Regulations 6(5) and 7(4) of the Emergency Ambulance Services Committee (Wales) Regulations 2014
- Regulation 4(3) of the Health Education and Improvement Wales Regulations 2017

Option 1: Do nothing, retain Regulations as currently in force

Appointments made by the Welsh Ministers to NHS bodies come within the remit of the Commissioner for Public Appointments (apart from NHSSSC Vice-Chair, WHSSC Vice-Chair and non-executive members and EASC-Vice Chair). The appointments must be made in accordance with the Public Appointments Code and the legislation relating to the particular body.

In March 2020 the Welsh Government suspended all Ministerial Public Appointment campaigns until September 2020 in response to COVID-19 (this date will be kept under review by the Welsh Ministers). The priority is to protect staff, assessment advisory panel members and candidates involved in the campaigns. In doing so, the Welsh Government has committed to ensuring that public bodies are able to continue to function by taking steps provided in the Code for Public Appointments, keeping boards and committees quorate and stable. The Code and its principles will be adhered to as usual.

A key aspect of the Code is that appointments must be made following fair and open competition and that there is a strong presumption that no individual should serve more than two terms or serve in any one post for more than ten years. However, the Code recognises that there are circumstances where an appointment may be made without competition or for additional terms to be served.

The Commissioner for Public Appointments was consulted in respect of the Welsh Ministers' decision to suspend public appointment campaigns in Wales and issued a statement confirming that during the period of suspension, the Code allows the Welsh Ministers to extend existing members' appointments or to make an appointment without competition until the situation improves. See Annex A for the full statement published by the Commissioner on 23 March 2020.

The flexibility provided by the Public Appointments Commissioner addresses the issues that may arise following the suspension of public appointments as it allows:

- a person's term to be extended where their appointment was for a shorter period than the maximum allowed under the relevant regulations (maximum is generally 4 years);
- a person who is nearing the end of their first term to be reappointed by the Welsh Ministers without competition for a second term.

However, persons who are nearing the end of their tenure and have reached the maximum overall term as prescribed in legislation will be required to leave the role as they will no longer be eligible for re-appointment. These positions in NHS bodies will have to remain vacant until the temporary suspension on public appointments is lifted. There is currently no certainty of when these will be lifted and vacancies will also remain until a successful appointment process is completed and this can take up to six months. This may result in potentially a number of key vacant posts on boards and committees during this critical and challenging period for the health sector.

Without amendment regulations the risk is NHS bodies may not be able to comply with their statutory obligations relating to board/committee member tenure.

Should the suspension of public appointment campaigns continue beyond September 2020 the backlog could also result in a number of board/committee members departing at the same time causing potential instability and loss of rigour in governance.

Option 2: - Temporarily dis-apply the maximum term of office

The objective of the Regulations is to dis-apply the maximum overall term of tenure until 31 March 2021 to enable the re-appointment of NHS board and committee members reaching the current limit during the COVID-19 pandemic and the initial recovery period.

The effect of this approach will be to enable existing board/committee members reaching their maximum tenure to be re-appointed for a new term. The re-appointments will still be in line with Public Appointments Code and in some cases, for example re-appointment for a third term, approval would also need to be sought from the Commissioner for Public Appointments.

The duration of the re-appointment will be assessed individually for each board/committee member having regard to the performance and attendance of the individual, the end dates of other appointments on the board/committee and the need to maintain effective governance/stability. The duration of any re-appointments made under the Regulations would also be set in line with the Code

which sets out a strong presumption that no individual should serve in any one post for more than ten years.

The Commissioner's recent statement in light of the COVID-19 pandemic reflects this provision. It states that all public appointments in Wales have been suspended temporarily and makes clear that the Code allows the Welsh Ministers to extend existing members' appointments or to make an appointment without competition until the situation improves.

The flexibility provided by the Public Appointments Commissioner addresses many of the issues that may arise following the suspension of public appointments as it allows:

- a person's term to be extended where their appointment was for a shorter period than the maximum allowed under the relevant regulations (maximum is generally 4 years);
- a person who is nearing the end of their first term to be reappointed in the usual way, but for a shorter period to cover the suspension period; and
- re-appointments beyond a second term are likely to be considered more favourably by the Commissioner given the exceptional circumstances that COVID-19 presents and that the suspension to public appointments by the Welsh Ministers during this time was agreed with the Commissioner.

However, this does not address the situation whereby a NHS board/committee member reaches their maximum tenure. Irrespective of the flexibility provided by the Commissioner, without dis-applying the maximum term of tenure specified in the relevant regulations, those board and committee members reaching their maximum tenure could not be re-appointed or have their appointments extended without being in breach of the regulations.

Using the ability in the Code for Ministers to appoint a candidate without a competition (mostly through re-appointments) in exceptional cases and dis-applying the maximum term in regulations ensures all appointments which are nearing the end of their tenure during the period of COVID-19 restrictions and initial recovery period can be covered, whilst at the same time making only the minimum change to existing regulations necessary to achieve this.

The period the Regulations will remain in effect will ensure all appointments which are nearing the end of their tenure during the period of COVID-19 restrictions and the initial recovery period are covered, allowing the NHS boards and committees to function properly, retain experience during the current crisis, support good and effective board governance, and meet their legal requirements.

Without this change there is a risk of potentially a key number of vacant posts on the boards and committees of these NHS bodies. Should the suspension of public appointment campaigns continue beyond September 2020, there is a serious risk of a backlog of appointments, with potentially a large number of NHS Board and Committees members departing at the same time causing potential instability and loss of rigour in governance.

7. Costs and benefits

Option 1: Do nothing, retain the relevant Membership Regulations as currently in force

There are no additional costs nor potential for costs savings associated with this option.

However, this option does not achieve any of the stated policy benefits associated with amending the relevant Regulations and poses significant risks in loss of key skills and expertise on boards/committees during these challenging times. This could result in Welsh Government in some cases needing to provide advisory support for board/committees with key vacancies that could result in additional costs compared to payments under public appointments arrangements.

Option 2: Temporarily dis-apply the maximum term of office

Dis-applying the relevant regulations in the way proposed in Part 1 does have the potential to incur very minimal opportunity costs for the Public Appointments Commissioner's office as the Welsh Ministers will need to seek approval before appointing a member to a third term.

There may be some minimal short-term cost savings to the Welsh Ministers associated with this option, in not undertaking public appointments exercises during the period of the amendment regulations.

No additional costs are foreseen for NHS bodies.

It will allow the NHS boards and committees to function properly, retain experience during the current crisis, support good and effective board governance, and meet their legal requirements.

8. Consultation

No public consultation was undertaken due to the urgency required to introduce this change of policy in direct response to COVID-19 restrictions.

9. Competition Assessment

On completion of the Competition Filter test it was determined that there are no effects on competition.

10. Post implementation review

The effect of these Regulations is inherently time limited to less than three years so no review is necessary.

ANNEX A



OCPA statement on public appointment processes in Wales during social distancing public health provisions due to COVID-19. 23 March 2020

- The Welsh Government is suspending all Ministerial Public Appointment campaigns with immediate effect until further notice. The priority is to protect staff, assessment advisory panel members and candidates involved in campaigns.
- Welsh Government will ensure public bodies are able to function by taking steps mandated in the Code for Public Appointments, keeping boards quorate and stable. The Code and its Principles will be adhered to as per usual. The following steps have been agreed with the Commissioner for Public Appointments.
- Ministers will suspend public appointments competitions due to take place in the next 6 months, and will resume them in September 2020. This resumption date will be kept under review as the public health response to COVID-19 develops.
- For bodies whose campaigns have been suspended, and that cannot legally carry a vacancy or a vacancy would destabilise the board, ministers are able, in line with the Governance Code, to extend existing members or to make a direct appointment without competition, until a competition can be held.
- Extensions in these cases will be for up to 12 months (31 March 2021), allowing for Welsh Government to stagger the resumptions of campaigns if desired. The Code's provisions on extensions in Section 3.5 continue to apply.
- The Commissioner will continue to be notified of proposed extensions made to members in their second or subsequent terms, or to those who have served ten years, in line with Section 3.6 of the Code.
- Any proposed direct appointments will be brought to the Commissioner for consultation before announcement in line with Section 3.3 of the Code.
- When campaigns resume from September 2020 onwards (this date will be kept under review by Welsh ministers), any members/chairs who have been extended/appointed under Sections 3.3 and 3.6 due to campaign suspension, should vacate their positions as soon as a substantive appointee has been found and is able to take up the role.

PJR Riddick

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