

SL(6)388 – The National Health Service (Ophthalmic Services) (Wales) Regulations 2023

Background and Purpose

The National Health Service (Ophthalmic Services) (Wales) Regulations 2023 make provision for primary ophthalmic services under the National Health Service (“NHS”) in Wales. These Regulations supersede, consolidate and revoke previous Regulations in this area.

These Regulations replicate, in large part, the provisions of the revoked Regulations in respect of the arrangements to be made by Local Health Boards for general ophthalmic services (sight tests).

These Regulations also require Local Health Boards to make arrangements for the provision of eye examination services under the NHS in Wales. References in these Regulations to “primary ophthalmic services” refer to general ophthalmic services and to eye examination services.

Procedure

Negative

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

The following 22 points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 2, many of the definitions are defined by the meaning given to them in the interpretation provisions of other Acts or statutory instruments, or that are found later within these Regulations. However, many of these definitions fail to identify precisely where within a section or paragraph the definition can be found. This makes it more difficult for the reader to easily find the definitions. It also causes problems with defining the meaning of some of the terms where the imprecise references failed to distinguish between similar terms or concepts found in the cited provisions. This problem regularly occurs throughout the rest of these Regulations:

- a. both the definitions of “dispensing optician” and “optometrist” refer to a person registered in **“the register”** maintained under **section 7** of the Opticians Act 1989”



which suggests that there's a single register. However, it should state "section 7(b)" and "section 7(a)" respectively as there are separate registers for both professions to precisely identify and distinguish between them. For the same reason, the words in parentheses are incorrect as they should use the plural noun "registers of opticians" as found above section 7 of that Act because there are 2 registers.

- b. both the definitions of "eye examination" and "eye examination services" are given the meaning in "regulation 3". But, it should state "regulation 3(3)(a)" and "regulation 3(3)(b)" respectively to identify their location precisely and to distinguish between them;
- c. both the definitions of "general ophthalmic services" and "primary ophthalmic services" are given the meaning in regulation 4. But, it should state that they're found in "regulation 4(a)" and "regulation 4(b)" respectively to identify their location precisely and to distinguish between them;
- d. the definition of "Health Education and Improvement Wales" states that it means "the body established by the Health Education and Improvement Wales (Establishment and Constitution) Order 2017". It would be more precise to identify the specific provision in that Order - "established **under article 2** of the...Order 2017", as was done in the definition of "First-tier Tribunal";
- e. the definitions of "mobile practice", "originating events" and "the register" are all given the meaning found in Schedule 3 to these Regulations. Schedule 3 is a lengthy Schedule and it could be made clearer that they're all found in "**paragraph 18 of** Schedule 3".
- f. both the definitions of "ophthalmic list" and "supplementary list" are given the meaning found in regulation 10. This could more precisely state "in regulation 10(2)(a)" and "in regulation 10(2)(b)" respectively to identify their location and to distinguish between the different lists.

2. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 2, at the end of the definition of "employment", there is a list of other related terms that are to be interpreted according to the meaning of "employment". However, this would appear to be unnecessary as section 9 of the Legislation (Wales) 2019 provides that this is the case without any such provision. In addition, the term "employer" is already defined separately as a term in regulation 2. There is also another definition of "employee" found in paragraph 18(5)(c) of Schedule 4.

The same issue occurs in paragraph 18(5) of Schedule 4 where "employ" must be interpreted according to the meaning given to "employee".



3. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 4(a), the reference to “paragraph 23” fails to identify the precise location where it can be found as there’s no Schedule noted in the reference. It appears to be referring to paragraph 23 **“of Schedule 4”** to these Regulations.

4. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 7(4), there is a reference to “paragraph **(2)(n)** of that Schedule” but it fails to identify the specific paragraph in Schedule 1 to these Regulations. Presumably it is referring to “paragraph **1(2)(n)** of that Schedule” in which case the paragraph number “1” should appear in that reference.

5. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

In regulation 12, in the Welsh text, in the headings of Chapter 3, regulation 12 and of regulation 14, and in the body of regulation 12(3) and (4), and of regulation 28(1)(b) and (7), whenever the phrase “inclusion” is used the translation has added the words “the practitioner” to complete the grammatical sense and meaning of the sentences.

The same approach has also been adopted for the translation of “removal” in places such as the headings of Chapter 4, regulations 17 and 19, in the body of regulation 17(6) and (10) and the headings of Part 5 and of paragraph 12, 13 and 14 in Schedule 3, with the same consequence that “practitioner” rather than “qualified practitioner” is used in the Welsh text.

However, the defined term is “the qualified practitioner” and for that reason should have been used in the Welsh text.

6. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 13(5), the provision states that the Local Health Board must consider **“the factors”** set out in paragraph 10 of Schedule 3. However, paragraph 10 of that Schedule refers to **“the facts”** that must be considered although “factors” are referred to in paragraphs 14 to 17 of Schedule 3. Therefore, the drafting is not consistent with that found in paragraph 10 of Schedule 3, unless the reference itself is incorrect.

7. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Regulation 17(3)(c) refers to the removal of a qualified practitioner from an ophthalmic or supplementary list where they have been convicted in the United Kingdom of a criminal offence (other than murder), committed on or after 30 July 2002 in the case of an ophthalmic list, or on or after 1 February 2006 in the case of a supplementary list. Please could



clarification be provided as to why the inclusion of the specific dates of 30 July 2002 and 1 February 2006 have been considered necessary?

8. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.

In regulation 27(1)(a), the English text refers to “regulation 13” but the Welsh text refers to “regulation 15”.

9. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 27(2)(i) requires a local health board to notify the NHS Counter Fraud Authority where it makes a decision relating to “a fraud case within the meaning of section 107(3) of the [National Health Service (Wales)] Act [2006]”.

Welsh Government is asked whether this requirement should also apply in relation to a fraud case within the meaning of regulation 17(3)(d).

10. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 42, there appears to be a change in terminology throughout the regulation where the term “person” is used, rather than the defined term “qualified practitioner” in relation to inclusion on a Local Health Board’s ophthalmic list or supplementary list. Both lists are defined in regulation 10(2) as only including “qualified practitioners”. The term “qualified practitioner” is defined by regulation 2 and other regulations throughout these Regulations use that term in relation to those lists, rather than “person”. Clarification is requested as to why the term “person” is used in regulation 42, rather than the defined term “qualified practitioner”.

11. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

In regulation 42(11)(a), the English version of the Regulations reads, “...received an application for inclusion in its previous ophthalmic list or previous supplementary list...”. However, the Welsh language version of regulation 42(11)(a) has added the word “*practitioner*” to complete the meaning of the same sentence, meaning that there is a difference in meaning between the English and Welsh text. In other words, the Welsh text appears to be restricted to the inclusion of “*practitioners*”, whereas the English text does not include this restriction. It is also noted that the rest of regulation 42 in the Welsh text uses “*person*”, rather than “*practitioner*”. An explanation is requested in relation to these apparent inconsistencies.

12. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation



In Schedule 1, in paragraph 1(2)(c), in the English text, the title of the SI, “the National Health Service (**Travel Expenses** and Remission of Charges) (Wales) Regulations 2007” is incorrect. It should be state “**Travelling** Expenses” rather than “**Travel** Expenses” in the title of the SI. The correct SI reference is provided in paragraph 1(9) of Schedule 1.

13. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 1, in paragraph 1(7)(b), “family” is given a meaning “in paragraph (g)”. However, “family” doesn’t appear to be used in paragraph (g). Therefore, this requires further explanation as to whether the reference is incorrect and should be referring to another paragraph (possibly paragraph (i)).

14. Standing Order 21.2(vii) - that there appear to be inconsistencies between the meaning of its English and Welsh texts

In Schedule 2, in paragraph 3(7), there is a difference between the English and Welsh text. In the English text, it refers to “the qualifications **and experience** prescribed by paragraph 1”. However, in the Welsh text, the words “**and experience**” are missing from the translation.

15. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 2, in paragraph 4, there is a definition of “the health service” for “this Schedule”. However, this term is only used on one occasion in the Schedule, in paragraph 1(1)(a)(i). Therefore, it should be included in the existing interpretation provision of paragraph 1(3) which defines another term for “this paragraph” rather than for the entire Schedule.

16. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 3, in paragraph 1, the terminology varies between “person” in sub-paragraphs (a) to (d), and “qualified practitioner” in sub-paragraphs (e) to (i). Is there a reason for the change in terminology or should they use the defined term “qualified practitioner” especially when referring to individuals who are included in the ophthalmic list. The same varying of terms takes place in paragraph 2 in relation to the supplementary list.

17. Standing Order 21.2(v) - 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 3, in paragraph 6(a), it refers to “the information **and document**, if applicable, required by regulation 16.” However, we believe this should state “**and certificate**” rather than “**and document**” because it is referring to an enhanced criminal record certificate in regulation 16(3).

18. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.



Paragraph 10(1)(b) of Schedule 3 refers to an “offence, incident, **conviction** or investigation” (emphasis added). Paragraph 10(1)(a), (c), (d) and (e) refer (in various configurations) to an “offence, investigation or incident”.

Welsh Government is asked to explain why the additional word “conviction” is included in paragraph 10(1)(b). The same question arises in relation to paragraph 15(2)(b) of Schedule 3.

19. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

In Schedule 4, in paragraph 10(3)(a)(iii), there is a slight difference between the English and Welsh text. In the English text, it states “**when and** as required under paragraph 9(3)” but it has been translated as meaning “as required under paragraph 9(3)”. Paragraph 9(3) uses the phrase “when required to do so” in both language texts.

20. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 4, in paragraph 15(1), it states “the **information** the contractor provided in accordance with **paragraph 7 of Schedule 3**”. Should this state “**the declarations**” rather than “the information” as paragraph 7 of Schedule 3 deals with declarations unless the reference itself is incorrect as information is provided in accordance with other paragraphs of Schedule 3.

21. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 4, in paragraph 22(2)(b)(i), the term “the practitioner” is defined, and is used in paragraph 22. However, in paragraph 22(3), the term “the qualified practitioner” is used at the end of that paragraph. Is this intentional as “qualified practitioner” is also a defined term in these Regulations or should it refer to “the practitioner”?

22. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 4, in paragraph 27(2)(b), it states that nothing prevents “a body corporate from using the name by which it is enrolled **in the register maintained** under the Opticians Act 1989”. However, there are several registers maintained under the Opticians Act 1989, and “the register” isn’t defined as a term for the purposes of Schedule 4 (only for Schedule 3). Therefore, should this provision specify the register and is it referring to the register of bodies corporate maintained under section 9 of the Opticians Act 1989? If so, should the defined term “corporate optician” rather than “body corporate” be used in the provision?

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.



23. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

It is noted that throughout these Regulations, various incorrect references for provision divisions and sub-divisions are used. As an example, in paragraph 7(2) of Schedule 6, a reference is incorrectly described as “paragraph (b)”, rather than the correct description of “sub-paragraph (b)”. The Welsh Government is reminded of the importance of using the correct references for divisions and sub-divisions when drafting subordinate legislation.

Welsh Government response

A Welsh Government response is required in relation to points 1-22.

Legal Advisers

Legislation, Justice and Constitution Committee

12 October 2023



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Welsh Parliament

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