EXPLANATORY MEMORANDUM TO

THE WELSH MINISTERS (TRANSFER OF FUNCTIONS) ORDER 2008

2008 No.

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. **Description**

This draft instrument makes provision for the transfer to the Welsh Ministers of functions of a Minister of the Crown relating to section 86 of the Mental Health Act 1983 and section 259 of and Schedule 21 to the National Health Service Act 2006.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

This draft instrument is the first instrument to be made under section 58 of the Government of Wales Act 2006 ("GOWA 2006").

4. **Legislative Background**

4.1 This draft instrument is the first instrument to be made under section 58 of GOWA 2006.

4.2 Section 58 of the 2006 Act provides that Her Majesty may by Order in Council:

(a) provide for the transfer to the Welsh Ministers, the First Minister or the Counsel General of any function so far as exercisable by a Minister of the Crown in relation to Wales;

(b) direct that any function so far as so exercisable is to be exercisable by the Welsh Ministers, the First Minister or the Counsel General concurrently with the Minister of the Crown: or

(c) direct that any function so far as exercisable by a Minister of the Crown in relation to Wales is to be exercisable by the Minister of the Crown only with the agreement of the Welsh Ministers, the First Minister or the Counsel General.

4.3 The main changes from the equivalent procedure under section 22 of the Government of Wales Act 1998 ("GOWA 1998") are:

(a) functions will no longer be transferred to the National Assembly for Wales, but may be transferred to the Welsh Ministers, the First Minister or the Counsel General, (normally functions will be transferred to the

Welsh Ministers, rather than the First Minister or the Counsel General); and

(b) the National Assembly for Wales does not need to be involved in the process of making a Transfer of Functions Order (TFO) – under section 22(4)(b) of GOWA 1998, a TFO that varied or revoked a previous TFO had to be approved by a resolution of the National Assembly for Wales.

5. **Extent**

This draft instrument extends to England and Wales.

6**. European Convention on Human Rights**

The Secretary of State for Wales has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

"In my view the provisions of the draft Welsh Ministers (Transfer of Functions) Order 2008 are compatible with the Convention rights".

7. **Policy background**

Section 86 of the Mental Health Act 1983

7.1 Part 6 of the Mental Health Act 1983 ("the MHA 1983") provides powers under which certain categories of detained patients and patients subject to guardianship may be moved between England and Wales and any country abroad. The MHA1983 requires the Secretary of State to authorise the transfer of such patients from England (and currently Wales) in this way.

7.2 Section 86, within Part 6 of the MHA 1983, provides the Secretary of State with powers for removing a patient, who is receiving treatment for a mental illness as a hospital inpatient (this will be a 'mental disorder' from commencement of paragraphs 15(2) of Schedule 1 of the Mental Health Act 2007, which amends section 86 of the MHA 1983), from England and Wales to a country abroad.

7.3 Section 86 powers apply to patients detained under both Part 2 and Part 3 of the MHA 1983, including 'unrestricted patients' under Part 3 of the Act. Part 3 of the MHA 1983 relates to patients concerned in criminal proceedings or under sentence; Part 2 patients are often referred to as 'civil' patients, with detention in hospital being a process that does not involve the courts. This applies where the patient is neither a British citizen nor a Commonwealth citizen having the right of abode in the United Kingdom. Before exercising the function under section 86 the Secretary of State must first be satisfied that proper arrangement has been made for the patient's care or treatment in the other country and that it is in the best interests of the patient to remove him or her to that country. The power cannot be exercised without the advice and

agreement of the Mental Health Review Tribunal (MHRT) being sought, but ultimately it is the decision of the Secretary of State. The patient does not have a right of appeal to the MHRT against their decision; the role of the MHRT is advisory.

7.4 The devolution settlement under the GOWA 1998 gave the National Assembly for Wales responsibilities for mental health matters, including for patients detained under the MHA1983, except for those patients who are subject to restrictions which remain the responsibility of the Home Office. The functions set out in section 86 also remained the responsibility of the Home Secretary but were transferred to the Secretary of State for Health (in respect or unrestricted patients) and to the Secretary of State for Justice (in respect of restricted patients) by machinery of government changes in 2007.

7.5 The Mental Health Act 2007 does not alter the powers of the Secretary of State in relation to section 86 of the MHA 1983.

7.6 Where it is necessary to consider removing a patient who is receiving treatment for a mental illness from Wales to a country abroad, the Welsh Ministers are, therefore, dependent on the Secretary of State to exercise these powers. Now that the function has been transferred to the Secretary of State for Health and is administered by the Department of Health it is appropriate that Welsh Ministers should exercise this function in relation to Wales given that health falls within their devolved competency. Most of the functions that are exercisable by the Department of Health in England are exercisable by Welsh Ministers in relation to Wales.

7.7 Furthermore, if the function remains with the Department of Health this can produce an untidy and potentially confusing position in relation to Wales particularly for mental health service providers. Any arrangement to remove a patient would necessitate the involvement of health service bodies in Wales which are part of NHS Wales and therefore the responsibility of Welsh Ministers. The Department of Health would therefore be exercising a function based on the advice and support of health services over which they had no statutory control. For Hospital Managers in Wales the benefits would be a consistency with other areas within the MHA 1983 which involve functions previously undertaken by the Secretary of State, and which are now (by virtue of a previous Transfer of Functions Order) exercised by the Welsh Ministers in relation to Wales.

7.8 Functions relating to section 86 for patients who are subject to a restriction order or direction under section 41 or section 49 of the MHA 1983, or a hospital and limitation direction under section 45A of that Act will remain with the Secretary of State for Justice, who will continue to exercise such functions in relation to both England and Wales.

Section 259 of and Schedule 21 to the National Health Service Act 2006

7.9 Subject to certain exceptions, the sale of goodwill of medical practices is prohibited under section 259 of the National Health Service Act 2006. Schedule 21 to that Act makes it an offence to sell goodwill contrary to section 259. It provides that any person proposing to be a party to a transaction which they think might amount to the sale of goodwill of a medical practice has to ask the Secretary of State for Health for a certificate. This is to confirm that the transaction does not involve the giving of valuable consideration in respect of the goodwill

7.10 The function of granting a certificate to any person proposing to be a party to a transaction they think might amount to the sale of goodwill of a medical practice is currently undertaken by the National Health Service Litigation Appeal Authority Unit on behalf of the Secretary of State for Health for both England and Wales.

7.11 The intention is that the Transfer of Functions Order will transfer the function of granting a certificate, in relation to medical practices in Wales, to the Welsh Ministers.

7.12 If a GP Practice purchases another GP Practice's premises the contractor's patient list size would be inherited, that is the number of patients. This would be a major factor in deciding whether to buy the premises as the number of patients on the list influences the level of funding the GP Practice will receive. Whether these patients reside in England or in Wales does not make any difference to the function proposed for transfer.

7.13 The Department of Health has confirmed that they agree with the proposed transfer of that function to the Welsh Ministers.

8. Impact

Section 86 of the Mental Health Act 1983

8.1 The proposed transfer will rectify the anomaly that exists in the way that powers under the MHA 1983 have been transferred to the Welsh Ministers. It will enable the Welsh Ministers to remove a person receiving treatment under the Mental Health Act from hospital in Wales to a country abroad, when doing so is in that person's best interests. .

8.2 There are no significant issues regarding costs relating to this section of the MHA 1983.

Section 259 of and Schedule 21 to the National Health Service Act 2006

8.3 The proposed transfer of the functions in relation to the sale of goodwill of medical practices would give Welsh Ministers the responsibility and power to decide on the issue of certificates stating that no goodwill has been sold.

8.4 The small additional administrative costs in dealing with cases will be funded from existing resources.

9. Contact

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