

PROPOSED NHS REDRESS (WALES) MEASURE 2007

Submission of Cymru Yfory – Tomorrow's Wales to the Proposed NHS Redress (Wales) Measure Committee's consultation on the proposals contained in the legislation.

Introduction

The Assembly Committee seeks the views of interested parties on a number of questions relating to this proposed measure. This submission is from Cymru Yfory, Cymru Yfory, a body Chaired by the Most Rev. Dr Barry Morgan, Archbishop of Wales that was set up in 2004 to encourage wider discussion of the Richard Commission recommendations on the powers of the National Assembly for Wales, and to campaign for their implementation.

In particular the submission refers to question 2 (Does the proposed Measure achieve the policy objective?) and question 5 (Is it appropriate that so much be done by regulations?). We consider that the issues raised by this proposed Measure are important in themselves, and have significant and far-reaching implications.

Summary

Cymru Yfory has considerable concerns about the provisions of this draft Assembly Measure. We consider that, if passed, the Measure would constitute an excessively generous grant of powers by the Assembly to the Assembly Government; powers which should be exercised by the Assembly itself. Such provisions would not be considered acceptable if the UK Government sought such powers from Parliament at Westminster, and they do not appear to meet the objectives of the White Paper on *Better Governance for Wales* as they prevent the Assembly engaging fully with civil society despite its commitments (and those of the Assembly Government) to do so.

Problems arising with the proposed Measure

This is the first Measure to be presented to the Assembly for its consideration. The extensive delegation of powers to the Welsh Ministers for which it provides is matter of considerable concern to Cymru Yfory. The extent of our concern is such that we consider in its present form that it should not be proceeded with, for the following reasons:

1. The Assembly is being asked to agree to legislation without knowing how the Assembly Government proposes to implement its provisions. The Explanatory Note from the Assembly Government's Minister of Health gives no clear statement of intentions in this respect. The Assembly is entitled to expect the Assembly Government to have, and set out, clear plans for the use of powers to be conferred on it, especially when the powers proposed to be conferred are so broad.
2. The flexibility of the powers which the Assembly Government seeks would result in the Assembly Government being able to change its policy under the Measure without adequate accountability to the Assembly for such changes. The proposed Measure only

requires that the first set of regulations made under it have to be positively approved by the Assembly – not any subsequent ones. This is an excessive delegation of its powers by the Assembly.

3. Without an adequate mechanism for approval of regulations by the Assembly, and given other pressures of work on the Assembly, it will be difficult for the Assembly to scrutinise properly the application of the policy set out in the regulations.

4. The Standing Orders of the Assembly encourage civil society to participate in the making of the Assembly's legislation, an aspect which is often emphasised by the Presiding Officer and Assembly Members. A draft measure which lacks any specific content prevents this.

5. Full consideration is particularly important for a Measure which can affect individual legal and civil rights. This Measure could affect individuals' entitlements through the making of regulations which affect existing provisions in common law and statute, by creating a parallel system to the present jurisdiction of the courts. Such matters need the widest discussions before being implemented. This is not possible given the framework nature of the draft Measure.

6. Moreover, it is necessary to go beyond wide consultation before introducing a Measure such as this. Such a significant change to the present system of seeking damages needs other forms of preparatory work before it is implemented. In particular, it needs to be carefully examined to get a clear idea of how the new system will work in practice. This is best done by an Assembly Committee meeting in public and bringing before it expert advice about the manner of implementation. It may even be appropriate to test the new system by some sort of pilot project. If the new system should not work satisfactorily, not only will it fail in its policy objectives, but there will be considerable criticism not only of the Assembly Government, but also of the Assembly for allowing such a situation to arise.

7. To allow an Assembly Measure of this nature to pass into law sets a precedent for the provisions of future measures. If the Assembly does not seek in any way to control wide and flexible executive powers, it raises the question of why legislative devolution is necessary.

8. The UK Parliament is very aware of the dangers of giving wide undefined subordinate legislative powers to the executive (see below). It is Parliament that will decide the nature and scope of the legislative powers of the Assembly. If this measure is passed by the Assembly in its present form, this could result in Parliament granting more restrictive legislative powers to the Assembly in future. This might mean that the general enabling powers in the first five matters sought in the recently-published draft Legislative Competence Order (no. 3) on Social Welfare would not be considered acceptable by Parliament.

Compatibility with the principles underlying the Assembly's legislative powers

Paragraph 1.22 of the 2005 White Paper *Better Governance for Wales* (Cm 6582) states that :

“Once executive powers are conferred directly on Assembly Ministers, their accountability to the Assembly will no longer depend on the delegation of those functions. *It is important, therefore, that Assembly Members have a significant role in deciding the legislative framework under which Assembly Ministers operate.*” (emphasis added)

More recently, the Assembly’s Presiding Officer has elaborated on this, in the *Western Mail* of 16 August 2007:

“The quality and effectiveness of such a body of law [Assembly-made law] will depend on pre-legislative scrutiny of any proposals....It will also depend on clarity of drafting and provision of full public information of what powers will be enacted.

“One of the most important elements of the Government of Wales Act is the opportunity for everyone in Wales to take part in the legislative process.”

In Cymru Yfory’s view, the provisions of the draft NHS Redress (Wales) Measure fall short of such standards.

Views of the House of Lords

Draft legislation conferring broad framework powers on Ministers has been criticised at Westminster on the ground that the type of powers given to the executive are too ill defined and too wide. Such concerns led, in 1992, to the establishment of a specialist committee of the House of Lords, in response to “considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (The Report of the Jellicoe Committee. Session 1991-92, HL Paper 35-I, para 133).

Indeed, powers similar to those sought in this draft Measure were considered by the present form of that Lords Committee, the Delegated Powers and Regulatory Reform Committee, when the NHS Redress Bill came before Parliament in the 2005-06 session (before the Government of Wales Act 2006 was passed). The Committee expressed considerable concerns about the provisions of the Bill relating to Wales; it considered that Clause 17 of the bill (which became section 17 of the Act) “is so wide that, if conferred on a Minister of the Crown in relation to England, it would be inappropriate even if subject to affirmative procedure” (House of Lords Committee on Delegated Powers and Regulatory Reform, Session 2005-2006, 6th report, HL paper 64, paragraph 16). The Committee noted that the Bill’s provisions were not limited to hospital services only, were not limited to acts or omissions of health care professionals only, did not relate only to the liability of specified bodies (para. 12). It also considered that the power granted was problematic because “the power can also be used to override the common law and amend or repeal Acts of Parliament in their application to Wales” (paras. 13-14).

If the House of Lords considered such problems arose with the Bill, the Assembly and Assembly Government should have compelling reasons for acting otherwise. If they have such reasons, they have not sought to make them public.

END