

NATIONAL ASSEMBLY FOR WALES

REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

Proposed NHS Redress (Wales) Measure 2007

Standing Orders:

1. The Committee has the following powers under Standing Orders:

- Standing Order 15.6(ii) states that the Committee may consider and report on: “The appropriateness of provisions in proposed Assembly Measures ...that grant powers to make subordinate legislation to the Welsh Ministers.”
- Whilst it is not part of the Committee’s remit to comment on the merits of the proposal which the Proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on “any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.”

Consideration:

2. The Committee considered the NHS Redress (Wales) Measure during October 2007 and took evidence from:

- Alan Trench, Senior Research Fellow, University College London, on behalf of Tomorrow’s Wales (2 October);
- Kay Powell, Solicitor and Policy Adviser, The Law Society (9 October);
- Edwina Hart AM MBE, Minister for Health and Social Services (16 October).

3. Written responses were received from Tomorrow’s Wales and The Law Society; and correspondence was received from the Minister. These are attached at Annexes A, B and C; and the transcripts of the relevant proceedings are at Annexes D, E and F. The Committee held a general discussion on the evidence at a meeting on 23 October 2007.

Background:

4. The Proposed Measure derives from the framework power contained in section 17 of the NHS Redress Act 2006 under which the National Assembly for Wales (i.e. the Assembly as it was formerly constituted under the Government of Wales Act 1998) was enabled to make regulations for the purpose of enabling redress to be provided without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales and for connected purposes.

5. The National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007 converted the framework power to a power for the Assembly (as constituted under the Government of Wales Act 2006) to legislate on the matter. This was achieved by amending Part 1 of Schedule 5 of the Government of Wales Act 2006 to provide for a new Matter – Matter 9.1 - to be inserted into Field 9 as follows:

“Provision for and in connection with the provision of redress without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales”.

The General Nature of the Proposed Measure:

6. The Proposed Measure is a “framework” measure. It empowers the Welsh Ministers to establish an NHS Redress Scheme for Wales by Regulations.

7. The Proposed Measure sets very wide parameters for what the Regulations must contain, leaving the substance of the Scheme to be dealt with by the Regulations which will deal with matters under the following broad headings:

- Redress under the regulations
- Access to redress
- Potential application of redress arrangements
- Delivery of redress
- Provision of legal advice and the services of medical experts and other assistance for those seeking redress
- Functions with regard to redress arrangements

8. No draft Regulations are available at present and there is no certainty that any will be available before completion of the Proposed Measure’s consideration by the Assembly. Some of the Regulations which may be made by the Welsh Ministers under the Measure will be subject to affirmative procedure, others to negative procedure (see paragraph 15 below).

Key Issues:

9. In considering the appropriateness of provisions granting powers to Welsh Ministers, the Committee considered that two broad questions fell to be considered:

- i. Is the general approach of the Measure (its “framework” nature) appropriate?
- ii. Is the level of scrutiny by the Assembly of Regulations made by the Welsh Ministers under the Proposed Measure appropriate?

The Framework Approach:

10. The case for framework powers is set out in paragraph 5.2 of the Explanatory Memorandum:

“The detail of the policy in relation to NHS Redress is currently under development and NHS bodies and other interested parties are playing an active role in identifying what needs to change in the current processes and what arrangements need to be put in place for the future. A steering group, chaired by a Trust Chief Executive, has been established to oversee this work which will continue for some time before, during and after the introduction of the Measure. It is felt that such a process will be vital to the future success of any arrangements. For this reason, the regulation making powers set out in the Measure are widely drawn to enable the results of this work to be taken into account in the drafting of the regulations. Because of the timescales involved in this work, the draft regulations will not be considered alongside the draft Measure.”

11. In correspondence from the Minister, it was noted that some Working Groups of the ‘Putting Things Right’ Project would not conclude their work and report their conclusions until late 2008.

12. When giving evidence to the Committee, the Minister accepted the breadth of the powers which the Proposed Measure would grant to the Welsh Ministers but was of the view that this should not be regarded as a precedent. The Minister stressed that each case needed to be looked at individually.

Recommendation (1)

13. The Committee accepts that there are valid reasons why a ‘Framework’ Measure is justified in this case, but considers that the approach taken by this particular Proposed Measure should not set a precedent; and recommends that the Minister ensures that the level of scrutiny provided by the Proposed Measure in relation to different kinds of Regulations is as strong as possible.

Scrutiny of Regulations:

14. In considering whether the level of scrutiny by the Assembly of Regulations made by the Welsh Ministers under the Proposed Measure is appropriate, the Committee took into account that the Proposed Measure provided for three sets of powers to make subordinate legislation under the Proposed Measure:

- i. The general Regulation-making power under section 1(1) (which regulations will deal with a number of specific areas set out in sections 1, 2, 3, 4, 5, 6, 7 and 9);
- ii. The power under section 12 to make supplementary, incidental, consequential, transitional or saving provision (which includes a power

to amend primary or secondary legislation existing when the Measure is passed or passed during the same Assembly year);

- iii. The power under section 14 to bring the Measure into force by Commencement Order.

15. At present, the Proposed Measure provides for three different levels of Assembly procedure to apply to Regulations (or Orders) made under it by the Welsh Ministers:

16. **Affirmative procedure:** (requiring a draft of the regulations to be approved by vote of the Assembly in plenary)

17. This procedure would (as the Proposed Measure is drafted at present) apply to the first set of Regulations made under section 1 (i.e. the Regulations establishing the redress arrangements) and also to any Regulations made under section 12 if they include any amendment to an Act of Parliament or Assembly Measure.

18. **Negative procedure:** (under which the Welsh Ministers will be able to make the regulations without Assembly approval but under which the Assembly could, within 40 days – excluding recesses – annul the regulations even if they have already come into force).

19. This procedure would apply to all other regulations (but not to Commencement Orders – see below) and so would apply to any regulations amending the original scheme and any regulations under section 12 which do not amend Acts of Parliament or Assembly Measures.

20. The Minister, in her recent letter to the Chair of the Committee (see Annex C) confirmed when she gave evidence to the Committee (see Annex F paragraphs 17 and 19), made it clear that she accepted the need to amend the Proposed Measure to apply affirmative procedure instead of negative procedure to:

i) Any regulations specifying which services (i.e. "Qualifying services") to which the redress arrangements would apply - e.g. if the initial regulations excluded primary care from the scheme any amendment so as to add them would be subject to the affirmative procedure.

ii) All regulations dealing with the matters set out in section 3 (accessing redress).

21. **No Assembly procedure:** Any Commencement Order made under section 14 will not be subject to any Assembly procedure. This is in accordance with the normal approach taken by legislation. The discretion as to when to bring into force legislation passed by the legislature is a matter which is generally regarded as being suitable to delegate unconditionally to Ministers.

22. The Committee was also informed of the “**super-affirmative procedure**”, a relatively modern development in the kind of legislation which delegates wide powers to Ministers to legislate by regulations; see for example section 18 of the Legislative and Regulatory Reform Act 2006. The precise detail of such a provision can vary, but broadly it involves imposing a requirement on a Minister proposing to make Regulations to lay a draft before the legislature, typically for a period of 60 days, and to be required to take into consideration representations made by the legislature (or by a committee of the legislature) during that period and to consider whether, in the light of representations, to revise the draft which is actually laid before the legislature for approval.

Recommendation (2)

23. The Committee reserves the right to look again at this Measure when it is being considered at Stage 2.

Recommendation (3)

24. The Committee recommends that the first set of Regulations, which will set the scene for the foreseeable future, should follow the ‘super affirmative’ procedure; and subsequent Regulations should follow the procedures indicated in column 6 of the Table at Annex G.

Recommendation (4)

25. The Measure does not at present contain any specific duty to consult interested bodies in relation to any proposed Regulations. The Minister (see Annex C, Annex F paragraphs 5, 15, 23, 24 and 26 and Annex H) has assured the Committee that there will be full consultation before any Regulations are made. In relation to the inclusion of a duty to consult, the Committee accepts the Minister’s assurances.

ANNEX A

Contribution from Tomorrow's Wales

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

ANNEX B

Contribution from The Law Society

Consultation – Proposed NHS Redress (Wales) Measure Committee

I write in response to the Committee's call for evidence to inform their consideration of the Proposed NHS Redress (Wales) Measure. The Law Society plays an active role in law reform, the effective operation of legal institutions and access to justice in England and Wales and is pleased to comment on this the National Assembly's first Proposed Measure. The Law Society Wales Committee has monitored the progress of devolution in Wales and its impact on the profession as well as monitoring the programme of legislation of the National Assembly for Wales. We disseminate information on the activities of the National Assembly for Wales to the profession in Wales and inform solicitors in England of the impact of Welsh legislation.

Our aims in the Third Term of the National Assembly include ensuring access of both our members to legislation and the public to legal advice. The Proposed Measure raises concerns under both these aims: our views are outlined below.

Overview

The Law Society welcomes the basic aim of the Proposed Measure which is to make the process of obtaining redress following a medical accident more accessible and effective and to encourage a more pro-active response by health care professionals when things go wrong.

The Society's major concern at this stage is that the Proposed Measure does not go into sufficient detail as to how the scheme will operate relegating all of the substantive provisions to subordinate legislation. The Proposed Measure should include much more detail as to how the scheme will actually operate on a day to day basis and who will make particular decisions. Given the limited impact of the specific provisions in the Proposed Measure we have only four individual observations on the content of the Proposed Measure.

Time Limits

Unless there are specified time limits within which proceedings under the scheme must be completed there could be a tendency for matters to 'drift'. This would have a negative effect and will weaken or destroy any confidence that victims may have that proceedings under the scheme may be the most advantageous way to proceed. It will be very important for these victims to know that their claim will be dealt with in a reasonable time and this in turn will assist in creating greater confidence in the scheme.

As currently drafted the Measure does not provide for time limits for proceedings to be commenced or concluded. The Law Society considers the Measure should specifically provide for a time limit to be imposed for the conclusion of proceedings commenced under the scheme. Such a

fundamental provision should be included at the primary legislation stage and not by way of secondary legislation.

Legal Advice

The Law Society supports a redress arrangement providing there is sufficient access to free legal advice for victims and they remain entitled to seek redress through the courts where necessary. Furthermore, there must be sufficient provision for the disclosure of information to victims and their advisers in order to encourage the perception of openness, independence and impartiality.

For the new arrangements to protect the interests of victims effectively, it is vital that victims must retain their rights to access the Courts. The Society is pleased to note that the Proposed Measure does not appear to restrict this (see Section 5(6)). We also note that there is a “waiver” requirement restricting the bringing of subsequent legal proceedings where there has been a settlement under the scheme. This is logical, providing that the Proposed Measure makes it mandatory that the victim has received proper legal advice in respect of the consequences of signing a waiver.

Furthermore, the Proposed Measure should provide that such a waiver will not preclude the applicant from taking further action in the event there is a significant change in his/her condition which was not originally foreseen (e.g. an injury which has deteriorated far beyond that originally anticipated or an injury which had not originally been diagnosed).

The Law Society welcomes the proposal in Section 7(1)(a) that any victim of a medical accident, or person representing that victim, will be able to obtain appropriate legal advice without charge. However, the Proposed Measure remains unclear about the extent of such advice. Whilst the Society agrees that every effort should be made to reduce the costs of resolving clinical disputes so far as is reasonably possible, this should not result in victims of medical accidents having their right of access to justice eroded. Victims who qualify to make a claim under the scheme should therefore be entitled to legal advice without charge at key stages throughout the process. The Society accepts that the question of proportionality with regard to legal costs will have to be addressed.

The Society believes that persons requiring legal advice in relation to the redress arrangements must be given the opportunity to exercise their fundamental right of freedom of choice of solicitor. The Society does, however, recognise that due to the special nature of such disputes, only those Solicitors who have sufficient and relevant expertise in dealing with clinical negligence matters should agree to undertake such work. The Society maintains a panel of such Solicitors and Action against Medical Accidents (“AvMA”) is an association made up entirely of experienced clinical negligence lawyers. In order to join either body Solicitors have to demonstrate a level of knowledge and skill in clinical negligence matters.

It is proposed that the list referred to under section 7(3) be drawn from solicitors accredited under the Clinical Negligence Accreditation Scheme (now the responsibility of the Solicitors Regulation Authority) or the AvMA only to ensure so far as is possible that victims would receive expert legal advice from a specialist.

The specific cost of providing legal advice is not considered in the Explanatory Memorandum. If it is the intention that the funding of legal advice under the scheme will be available from the Legal Services Commission, a full assessment should be undertaken to ascertain the extent of the effect on the fund, and, if this is in excess of the current spend on clinical negligence, annual reimbursement should be made to the legal aid fund.

Disclosure of Evidence

The Proposed Measure should require that the redress arrangements provide for the disclosure of information and evidence (including medical evidence) obtained during any investigations carried out under the scheme, in order to provide greater openness between patients and medical establishments and also to enable appropriate legal advice to be given.

Legal advisers will not be in a position to assess the appropriateness of an offer made through the redress arrangements without access to documentation including an independent medical report and an independent report on the evidence on which the claim is based. The Law Society believes that these are fundamental requirements to the success of any arrangements. Anything less will not have the trust or confidence of potential applicants.

Complaints

As a matter of access to legislation it would be simpler to include a separate section on Complaints to be made by regulation under the Proposed Measure rather than referring back to the Health and Social Care (Community Health and Standards) Act 2003. The NHS Redress Act 2006 contained a section on complaints with power to the Secretary of State to make the relevant regulations. As a matter of access to legislation it would be simpler for the Proposed Measure to include a power to regulate a complaints procedure to keep all new legislation relating to this wholly new procedure within the NHS together rather than add the redress arrangements to a list under an Act which predates the Government of Wales Act 2006.

The First Measure of the National Assembly for Wales

In the new term of the National Assembly the first Measure to be passed will be a landmark in devolution of law making to Wales. At best the Proposed Measure is itself little more than a framework power giving the Welsh Ministers full power to amend the redress arrangements in the future.

As no draft regulations are available to consider alongside the Proposed Measure decisions regarding what provisions should appear in the primary

legislation as opposed to the regulations are more difficult to make. Consequently the Proposed Measure is drafted to give broad discretion and in open language so as not to restrict the regulations which will be proposed once the Welsh Assembly Government (“the Government”) has finalised its own policy and knows what it wants to achieve. It could not have been anticipated that the Government would introduce its first Proposed Measures in an area where it has no clear policy and on a subject which has not previously been subject to consultation and scrutiny by stakeholders.

The approach to law making in Wales has followed an open and inclusive process. The Government has prided itself on its consultation procedures. However this Government Proposed Measure does not follow this strong practice. As it stands the Welsh Ministers will be given full discretion under the Proposed Measure: such a provision could have been included in a Westminster Act. Law making powers have been devolved so that the National Assembly can do just that and not itself devolve power to the Executive without robust scrutiny of government policy and stakeholder views.

It is asserted that scrutiny of this Government Proposed Measure should await a full report of its policy from the Government with evidence of stakeholder views as well as the full text of the proposed regulations so that the matter can be considered as a whole. The Government is in a unique position with regard to proposing legislation and as the new Assembly develops its procedures for scrutiny of legislation the Government should develop its own approach. The Government is acting with undue haste to propose its first Measure at the expense of good law making.

We should be pleased to expand on our comments and provide further evidence to the Committee as required.

E Kay Powell

ANNEX C

(a) Letter from the Minister for Health and Social Services Edwina Hart AM MBE to the Chair of the Subordinate Legislation Committee Dr Dai Lloyd AM

Edwina Hart AM MBE

Y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Our ref: EH/06328/07

Your ref:

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October 2007

Thank you for your letter of 26th September. I am happy to accept your invitation and I believe that my office has already been in contact to confirm that I will attend the meeting of the Subordinate Legislation Committee on 16th October.

I am aware that there have been quite a number of concerns expressed about the Measure, by Cymru Yfory amongst others. So it might be helpful if I were to make several points in Advance of the meeting that Committee Members may wish to consider and which we might pick up on the 16th.

1. The extent of the powers being sought for Welsh Ministers under the Measure

The Subordinate Legislation Committee is quite rightly seeking to ensure that excessive or inappropriately wide powers are not conferred on Welsh Ministers in Measures and I fully support that aim. Given that this is the first Assembly measure it is not surprising that this aspect is being looked at closely.

I note the discussions that have taken place about the use of the affirmative and negative procedures for future sets of regulations. As you know, as currently drafted, the Measure provides for the first set of regulations under

Section 1(1) or any regulations under section 12 that amend or repeal the text of any Act of the UK Parliament or an Assembly Measure, to be dealt with under the affirmative procedure. Otherwise, the Measure currently provides that subsequent regulations would be made using the negative procedure. I understand the concerns that have been expressed about how this could potentially allow Ministers to put through substantial changes in policy under future regulations using the negative procedure.

The example that is being widely quoted is that of extending the arrangements to primary care practitioners. I can assure the Committee that I would have no intention of making such a far reaching decision without full consultation and involvement, however, I would like to go further in attempting to allay these concerns. I would like to offer to propose a Government amendment at Stage Two on the following basis.

Regulations made under Section 1(5) of the Measure, which refers to Welsh Ministers' power to specify the qualifying services, and Section 3 which refers to provision about accessing redress, would be made subject to the affirmative procedure in all cases. This would ensure that the ambit of the arrangements, in terms of the services covered and entitlement to access it, could not be altered in subsequent regulations without the approval of the Assembly. This would respond directly to the specific concerns expressed, given that the Welsh Ministers would have a significant degree of discretion as to future changes in these respects. It would mean in particular that if the first set of regulations did not extend to primary care practitioners (or to any specific services, such as dentistry or optical services), then any subsequent regulations which did extend the arrangements to those services would still be subject to Assembly approval.

The remaining regulation making powers in the Measure do not offer the same degree of discretion. They enable the Welsh Ministers to set who should operate the arrangements and how it should operate, including more detailed rules. Once the first set of regulations has been made to establish the arrangements, further amendments under the remaining powers would be likely to be technical or updating ones. I believe that in principle the negative resolution procedure, under which subordinate legislation is still subject to scrutiny by your committee, is a proportionate level of legislative oversight for administrative provisions of this nature.

2. Lack of detail concerning how the powers will be exercised

I am aware that Members feel that they do not have a clear idea of how I am intending to use the powers in the Measure and I can fully understand that they wish to know more. One of the issues appears to be what sorts of cases might be dealt with under new arrangements, i.e. what constitutes a 'less serious case'. In some respects this is difficult to answer because of the fact that all cases of potential negligence are different. However, in general, they will need to be cases which are capable of being settled locally, within the expertise of local teams. In most such cases, a single joint expert report might be commissioned, instead of multiple reports.

By way of illustration, cases settled for lower values under the existing Speedy Resolution Scheme (which is a quicker version of the normal litigation process and which deals with cases valued at £15,000 or less), have been connected to failure to diagnose fractures; development of pressure sores, etc. There has never been any intention to use this Measure as a way of settling higher value claims, for example, babies damaged at birth – I noted the comments made by Cymru Yfory on this matter when they gave evidence to the Committee last week. To do so would be highly inappropriate because such cases often reveal complex trains of event and require assessments of damages which need considerable expert clinical and legal advice to resolve.

Some Members have asked to see draft regulations alongside the Measure. Whilst this is not going to be possible within the current timetable, I am committed to ensuring that as much of the detail as possible is put before Members as it develops. The Details is currently being developed as part of *the Putting Things Right* project where three working groups are looking at how these processes could working practice. I am attaching a background not, which sets out the group, their membership and terms of reference. I am also sending this (and a copy of this letter) to Jonathan Morgan, Chair of the NHS Redress Measure Scrutiny Committee as he has asked to have this detail also. As you will see, the groups are being chaired, not by Welsh Assembly Government officials, but by stakeholders who are involved in this area of work as part of their day to day roles. The membership is similarly drawn. The Groups are expected to make their interim recommendations in January. I therefore hope to be able to refer to the emerging findings in the debate on the Measure in Plenary on 22nd January, and that the Measure Committee will be able to consider them during its further consideration of the Measure in Stage Two.

3. Consultation

It has been pointed out to the Committee that there is no requirement for Welsh Ministers to consult on future sets of regulations. Cymru Yfory has also expressed concerns that the way the legislation is presented is precluding proper democratic involvement in the law-making process. Members may recall that I said on 3rd July in my speech introducing this Measure that it is my intention to develop the ensuing regulations with the advice and involvement of the health leads from the other parties. I have already referred to the working being done under the *Putting Things Right* project. It is also my intention that there would be full public consultation on any regulations before they are made.

I hope that the above points will be of assistance to Committee Members and I look forward to meeting you on 16th October.

(b) Attachment to the letter from from the Minister for Health and Social Services Edwina Hart AM MBE to the Chair of the Subordinate Legislation Committee Dr Dai Lloyd AM



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



PUTTING THINGS RIGHT

Project Progress Report

Update on Working Groups

Legal Advice Working Group

The group has been informed by the scoping work that has been undertaken around current small claim management arrangements in NHS Trusts in Wales and the way in which these arrangements are viewed by those who manage them and those who are affected by them.

Group Membership

Anne Louise Ferguson (chair)	Welsh Health Legal Services
David Rudd	Walker Smith and Way Solicitors
Yvonne Agnew	Leo Abse & Cohen Solicitors
Trish Gaskell	Welsh Risk Pool
Donna Few	Claims manager, North Glamorgan NHS Trust
To be confirmed	Finance
Kate Montague	Welsh Assembly Government

The terms of reference relate to their consideration and reporting responsibilities:

Issues to be addressed

- Options available to offer legal advice, free of charge to the patient
- Appropriate stages for provision of advice
- The level of skill necessary to provide such advice

- The need for and means by which such advice be seen as independent and trustworthy by all parties
- The need for such advice to be accessible
- Managing the need for the process to be acceptable to those providing the advice
- The cost implications for the provision of such advice
- Financial limits for compensation under the arrangements
- Appropriate reference for that limit e.g. total payment out, payment in respect of pain and suffering
- Potential tariff system for quantifying damages
- Status of documentation prepared during the process, i.e. disclosability etc
- Obtaining medical expert reports, including:
 - Identifying experts
 - Instructing experts
 - Cost of obtaining reports
 - Suspension of the limitation period, point at which the clock stops and starts running, time limits for accepting offers, etc

This list is not exhaustive and the group, on meeting, may identify other issues that need discussion and invite guests to provide further expertise if required.

The first meeting of the group was 2 October 2007. It is envisaged that the group will meet monthly and will provide an interim report to the Board by mid January 2008.

Investigations and Process Working Group

This group has been set up to review the investigation processes that are currently undertaken into complaints, claims and incidents by NHS Trusts in Wales and make recommendations; to consider the merit of developing a single point of entry to streamline investigations and to make recommendations to the Welsh Assembly on the way forward by May 2008.

Proposed Membership

Adam Peat (Chair)	Public Services Ombudsman for Wales
Dawn Davies	Head of Governance Support Unit, Bro Morgannwg NHS Trust
Julie Parry	Patient Safety Manager North Wales, NPSA
Hazel Abbott	Risk Manager, Swansea NHS Trust
Sue Gregory	Nurse Director, Cardiff & Vale NHS Trust
Lynne Ryan	Head of Regulation, Health Inspectorate Wales
Gren Kershaw	Chief Executive, Conwy & Denbighshire NHS Trust
Pat Vernon	Head of PPI Branch, Welsh Assembly
Piera Cassettari	Project Manager, Welsh Assembly
Stephen Hunter	Medical Director, Gwent Healthcare NHS Trust

Issues to be addressed:

The group will consider the current processes separately and will then consider an overall approach:

Complaints Management

- Review the results of the questionnaires sent to NHS Trust Complaints Managers, CHC Advocates and Complainants over the summer which sought views on how effective Local Resolution and Independent Review are currently and suggested improvements.
- Determine what, if any, further scoping work needs to be carried out in this area to build a full picture of how complaints are currently investigated.
- Consider scope for improvement to current Local Resolution procedures within the NHS complaints process and make recommendations
- Consider whether the independent stage of the NHS complaints process continues to have a role and make recommendations.

Claims Management

- Review the results of questionnaires sent to NHS Trust Claims Managers on the effectiveness of the claims investigation process.
- Determine what, if any, further scoping work needs to be carried out in this area to build a fuller picture of how complaints are currently investigated.
- Consider scope for improvement to current claims management procedures and make recommendations.

Incident Management

- Review the results of the questionnaire sent to NHS Trust Risk Managers on incident management.
- Determine what, if any, further scoping work needs to be carried out in this area.
- Advise on whether and how incident management could be included in any new arrangements.
- Consider scope for improvement to current incident management procedures and make recommendations.

Overall

- Consider whether a single initial investigation process should be developed. If so:
- Explore the detail of such an investigation process.
- Look at examples of good practice across all investigations to determine if they can be shared.
- Consider how recommendations for improvement and change to existing processes can be incorporated.

- Agree what advice, guidance and support would need to be available to NHS Trusts to ensure that they act appropriately when things go wrong, including:
 - What new arrangements would broadly look like
 - Provision for vulnerable groups
 - Appeals
 - Links to other processes (e.g. HIW, CSSIW)
 - Cross border issues
 - monitoring and data collection
 - potential barriers to such developments

Determine how the NHS Redress arrangements for low value clinical negligence claims could be incorporated into the investigation process.

- Consider if separate guidance is needed for primary care.
- Consider and make recommendations on skills and training needs.
- Contribute to the financial assessment of any potential new arrangements.
- Make full recommendations to the Welsh Assembly.
- Advise and assist the Assembly in the development and issue of subsequent guidance and training.

Meetings of the group have been arranged for 17 October, 21 November and 12 December 2007.

The group will undertake to provide an interim report to the Board by mid January 2008 on the current position and proposed way forward and final recommendations by 30th May 2008.

Advocacy and Assistance Working Group

It has been decided that the working group looking at support and assistance for individuals seeking redress will be convened slightly later than the two other groups. This was felt sensible to allow work undertaken in the other working groups to inform the group in their considerations.

Proposed Group Membership

Cathy O'Sullivan (Chair)	Gwent CHC
Hugh Williams	AvMA
Kate Montague	Welsh Assembly Government
TBC	NHS Trust Patient Experience Manager
TBC	Patient Representative
TBC	Independent Complaints Facilitator
TBC	Age Concern
TBC	Citizen's Advice Cymru

Terms of Reference

- **The group will consider the issues outlined below with reference to the Measure and the wider project “Putting Things Right”**
- The group will be responsible for reporting recommendations back to the Project Board of Putting Things Right
- Communication between members will be in the form of group meetings and e-mail communication
- There will be provision to invite individuals in to provide advice on specific issues
- The group will undertake the work within six months of commencement
- WAG will provide administrative support to the group.
- The group will undertake to provide an interim report to the Board by

Issues to be addressed

- Consider and make recommendations about the extent of the support and assistance to be provided.
- Consider and make recommendations about the extent of the support and assistance to be provided.
- Consider the options for providing such support and assistance and make recommendations about the most suitable
- Consider the cost implication of such recommendations
- Consider the need for such support to be accessible to all
- Consider through the potential impact which the provision of free legal advice would have on this issue.

It is anticipated the group will meet for the first time in November 2008.

ANNEX D

Extract from the transcript of the Subordinate Legislation Committee meeting 2 October 2007 - Discussion with Tomorrow's Wales

Mesur Arfaethedig ynghylch Gwneud lawn am Gamweddau'r GIG (Cymru) 2007: Trafodaeth gyda Cymru Yfory Proposed NHS Redress (Wales) Measure 2007: Discussion with Tomorrow's Wales

[1] **David Lloyd:** Symudwn ymlaen yn awr at brif eitem y cyfarfod hwn, sef trafod ymhellach y Mesur arfaethedig ynghylch Gwneud lawn am Gamweddau'r GIG (Cymru) 2007. Byddwn yn trafod y mater ac yn cymryd tystiolaeth gan sefydliad Cymru Yfory.

David Lloyd: We will now move on to the meeting's main item, namely our further discussion on the Proposed NHS Redress (Wales) Measure 2007. We will discuss the matter and take evidence from Tomorrow's Wales.

[2] I olrhain y cefndir, bydd pobl yn ymwybodol bod y Mesur ynghylch gwneud iawn am gamweddau'r GIG yn caniatáu i iawn gael ei ddarparu heb ddwyn achos sifil. Dyna'r feddylfryd. Bydd Aelodau'n cofio i ni drafod hyn yn y Siambr cyn yr haf, ac yr oedd cytundeb bras â'r syniad o gyflymu'r broses o sicrhau ymddiheuriad neu iawndal mewn achosion llai, heb ymyrraeth—neu, fel y dywedais yr wythnos diwethaf, heb gymorth—cyfreithwyr. Mae pwyllgor Mesur hefyd yn trafod y Mesur hwn ac, unwaith eto, croesawaf Gadeirydd a chlerc y pwyllgor hwnnw i'r cyfarfod hwn, felly bydd rhywfaint o gydweithio rhwng y ddau bwyllgor.

To give you the background, people will be aware that the NHS redress Measure will permit redress without the need to bring a civil action. That is the thinking behind it. Members will remember that we discussed this in the Chamber before the summer, and there was broad agreement for the idea of speeding up the process of securing an apology or compensation in smaller cases, without the interference of—or, as I said last week, without the assistance of—solicitors. A Measure committee is also discussing this Measure and, once again, I welcome the Chair and the clerk of that committee to this meeting. There will be a certain amount of co-operation between both committees.

[3] Yr ydym wedi cael papur tystiolaeth, a heddiw yr ydym i glywed tystiolaeth gan Cymru Yfory. Bydd Aelodau'n cofio'r drafodaeth a gawsom yr wythnos diwethaf pan gytunwyd y byddem yn cymryd tystiolaeth bellach am bwyntiau deddfwriaethol yn unig, oherwydd dyna bwrpas y pwyllgor hwn. I'r

We have received an evidence paper, and today we will be taking evidence from Tomorrow's Wales. Members will remember the discussion that we had last week when we agreed that we would take further evidence on legislative points only, because that is the purpose of this committee. To that end, we have invited Tomorrow's

perwyl hwnnw, yr ydym wedi gofyn i Cymru Yfory i gyflwyno tystiolaeth ac ateb cwestiynau. Yn hwyrach, bydd y Gweinidog yn dod ger ein bron, i gael ei harchwilio ynglŷn â manylion y Mesur hwn. Heb ymhelaethu ymhellach, cyflwynaf gynrychiolydd Cymru Yfory—Tomorrow's Wales i chi, sef Alan Trench. Mae'n gymrawd ymchwil hŷn anrhydeddus yn uned cyfansoddiadol Coleg Prifysgol Llundain ac yn ysgol y gyfraith, Prifysgol Caeredin, ac y mae hefyd yn gyfreithiwr anweithredol yng Nghymru a Lloegr. Estynnaf wahoddiad i Alan roi cyflwyniad byr ac i fy nghyd-Aelodau i ofyn cwestiynau wedi hynny.

Wales to give evidence to us and to answer our questions. Later on, the Minister will also appear before this committee to be scrutinised on the details of this Measure. Without further ado, allow me to introduce the representative of Tomorrow's Wales—Cymru Yfory, Alan Trench. He is an honorary senior research fellow at the University College of London's constitution unit and at the law school at the University of Edinburgh, and he is also a non-practising solicitor in England and Wales. I invite Alan to give a brief introduction and I invite my fellow Members to ask questions after he has finished.

[4] **Mr Trench:** Thank you very much, Mr Chairman. May I say what a pleasure it is to be here, even at this hour of the morning? [*Laughter.*] It is a great honour to be the first person to give evidence to this committee, and to do so on the first Measure to come before the Assembly. I ought to emphasise at the outset that I am speaking in a personal capacity. The nature of Tomorrow's Wales means that we are not the sort of organisation that has a collective position, because we are a group of people with varying interests. I am fairly confident that pretty much everything that I have to say would be endorsed by most members of the group—and we had a discussion on this at our last executive meeting—but I ought to note that I am speaking for myself, and that the reason I have come here is because I have a background in these sorts of matters that not all members of the committee have in such detail.

8.30 a.m.

[5] I ought to emphasise that our concerns are to do with the legislative nature of this proposal, not the principle of finding alternative redress or the policy that is involved. Indeed, at the root of our concerns is the fact that we do not really know what the Assembly Government is substantively proposing to do. What has been proposed is essentially a framework Measure, which will enable the policy to change substantially without any further need for primary legislation in this place, and with limited scrutiny by, and accountability to, the Assembly.

[6] That is the first of our three major concerns about the Assembly Government's proposals, namely that this constitutes an excessive delegation of powers that properly belong to the Assembly as a legislature to the Assembly Government. That is important in itself and because of what it indicates about the nature of representative democratic government in Wales. The second concern is that what is proposed would raise serious concerns if it

were to be proposed at Westminster. Those concerns would be taken into account by what is now the Delegated Powers and Regulatory Reform Committee of the House of Lords. Thirdly, this may have implications for subsequent conferrals of legislative powers on the National Assembly by the UK Parliament at Westminster.

[7] I do not want to go into the detailed history of this, but, to elaborate a little, there is a long history in British constitutional practice relating to the nature of delegation of powers to the executive and its assumption of powers. This is the root of disputes between Parliament and Tudor and Stuart monarchs in the sixteenth and seventeenth centuries; it is the root origin of the civil war of the middle of the seventeenth century, which was essentially won by Parliament in what is known as the Glorious Revolution of 1688-89. In practice, during the twentieth century, that line shifted somewhat from the purist position that Parliament legislates and Government executes laws passed by Parliament, because it is simply impossible to run the sorts of public services that we now have without a degree of flexibility to shape regulation according to particular circumstances. However, that still leads to an ongoing set of skirmishes about where exactly the line is drawn, and this has resulted in a complex set of understandings—not always mutual—at Westminster, between Parliament on the one hand and Government on the other, about where the line should be drawn. That led to the establishment of what is now the Delegated Powers and Regulatory Reform Committee in the House of Lords, following the 1992 report of the Jellicoe committee.

[8] It seems that part of the issue here is where exactly that line gets drawn in Wales. In many respects, we would argue that this piece of legislation draws that line much too far in favour of the Assembly Government, leaves the Assembly Government too much discretion to make and to change the arrangements that are introduced in Wales, which should be determined first and foremost by the Assembly, and to reshape those arrangements over time. That is particularly important because the procedures for changing any regulations made will come before the Assembly in the form of negative resolution instruments—annulment procedure instruments—rather than affirmative procedure ones.

[9] One must note that, in many respects, the proposed Measure does something similar to what the NHS Redress Act 2006 does in relation to England, but I would draw attention to the rather different context of the provisions that apply in England. England is much larger than Wales, and it has a much more complex health service than Wales. There is, for example, a variety of hospital provision: foundation hospitals; ordinary NHS trust hospitals; treatment centres; and private sector provision at the expense of the NHS. So, the context is different and, because England is so much larger, greater flexibility is needed by the Executive in order to achieve a sensible policy. I would argue that that is not so much the case in Wales, as it is much smaller and has a simpler set of arrangements, which makes it possible to have greater explicitness, not less, in the legislation that is put to you.

[10] Secondly, the Government in Wales is much closer to the general

public and to individual citizens. Part of the purpose of devolution was to bring it closer still. To move away from that and to simply stick to what has been established as the norm in England would amount to a failure to live up to the aspirations of devolution. As this Measure, in some ways, gives greater power to the Executive than the English legislation does, it is, in that sense, a rather regressive move.

[11] This Measure does not simply apply to hospital services, as the English legislation does. The English legislation expressly excludes primary care, while the legislation proposed here does not. I think that that is a significant area of concern.

[12] I would also say that the provisions for England of the NHS Redress Act 2006 are not a shining example of good legislative practice at Westminster. That is a piece of legislation, in my view at least, that would stretch the envelope of granting powers to the Executive quite a long way. These clearly caused the Lords' Delegated Powers and Regulatory Reform Committee some concern. Those concerns were mitigated by the fact that the English legislation only applied to hospital services, by the extensive flexibility that already exists for the NHS in England in the hands of the Secretary of State, by the fragmented nature of existing powers and arrangements in the area, and by having a clear memorandum in front of them, which explained what was needed and why and how the Government proposed that the system would work. I think that the system here differs from that in three respects. The first is the point about primary care, which I have already mentioned; the second is that quite a lot of legislation has been made for Wales since 1999 that has altered how the NHS is run here, puts it on a less flexible and less discretionary footing and places it in a more formal legislative and legal context; and the third is that the sort of clarity of explanation of what is proposed is not applied here to anything like the same degree.

[13] Beyond that, I should note that the delegated powers committee is extremely sceptical when it is confronted with what it calls 'skeleton Bills', which is essentially what is the case here. In very recently issued guidance—I found it a couple of days ago, although it is dated October 2007—from the committee, it says that

[14] 'If a bill is, in effect, a skeleton bill (so that the real operation of the Act would be entirely by the regulations made under it), the Committee will expect a full justification for the decision to adopt that structure of powers'.

[15] I would suggest that at least that standard, if not a higher one, is probably what should apply in Wales.

[16] None of this is to say that Westminster standards should be applied in Wales, but I would suggest that if different standards are applied, they should be more and not less stringent. There should also be greater clarity, precision and transparency in legislation so that the Government can be brought to the public at large until society can take part in the legislative process, instead of granting the Executive greater freedom.

[17] I wish to refer to a slightly different point, which I am not sure has been drawn to your attention. It is worth asking why this piece of legislation comes to you in the form of an Assembly Measure, rather than in a set of regulations. A very definite policy decision has been made that that should be the case. I think that that rather begs the question of why a piece of skeleton legislation then emerges. The NHS Redress Act 2006 conferred powers on what I will call the old National Assembly—the Assembly established under the Government of Wales Act 1998. Those powers automatically transferred to the Welsh Assembly Government, not to the Assembly, when the Government of Wales Act 2006 came into force. I understand that that caused some concern in the Welsh Assembly Government and the Wales Office in London, because the point was that the framework powers were to be legislative framework powers and would therefore be in the hands of the Assembly. So, a piece of legislation was made that transferred these and other similar powers and converted them into appropriate matters, in this case within field 9 of Schedule 5 to the 2006 Act. That piece of legislation—the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007—is what is being used, and it appears to have assumed, on the basis that the Assembly would actually legislate, not having been granted legislative powers, that it would hand them straight back to the Assembly Government to use as it saw fit.

8.40 a.m.

[18] Finally, these issues cannot be considered as purely black-letter issues in a vacuum, because they will also affect the development of the relationship between Wales and Westminster, particularly when it comes to the conferral of legislative powers. Several parliamentary committees—the Welsh Affairs Committee in the House of Commons and the Constitution Committee in the House of Lords, at Westminster—expressed concerns about the quality of legislative scrutiny when considering, in the first case, ‘Better Governance for Wales’ White Paper, and, in the latter case, the Bill that became the Government of Wales Act 2006. A failure by the Assembly to scrutinise the Assembly Government properly and to have in place arrangements to do that may have the effect of making Westminster and Whitehall look less favourably rather than more favourably on future conferrals of legislative powers. I would, therefore, suggest that the committee seeks greater precision from the Assembly Government about the nature of the scheme that it intends to introduce. It should seek, in particular, to establish whether or not that scheme extends to primary healthcare—and it should seek a great deal of clarity about that—if not legislative provision relating to it. You ought to insist, at all events, that any regulations made under this Bill are made by an affirmative procedure rather than an annulment procedure so that the legislature has an adequate degree of control.

[19] **David Lloyd:** Diolch yn fawr i Alan Trench am gyflwyniad a oedd yn arbennig yn ei fanylder a'i arbenigedd. **David Lloyd:** I thank Alan Trench for his detailed and expert presentation, which was excellent.

[20] Mae llwyfan i gwestiynau yn awr oddi wrth Aelodau. There is now an opportunity for Members to ask questions.

[21] **Eleanor Burnham:** If we are going to take Mr Trench's advice, what is the next step?

[22] **David Lloyd:** I think that I will wrap that up at the end of the question-and-answer session. Is that all right, Eleanor? The next step is to have the Minister here, but I will dwell on that later on.

[23] **Eleanor Burnham:** Okay. The other thing is that most of the legislation that we have looked at this morning comes under the negative procedure. What provision do we have for insisting that most of the legislation that comes before us under the affirmative procedure rather than the negative procedure?

[24] **Ms Jackson:** Of what we have considered this morning, the Assembly and the Ministers are constrained by the provisions of the parent Act. The primary legislation, generally, will indicate which procedure is to apply, and there are specific provisions in the Government of Wales Act 2006 that deal with the application of a procedure in respect of powers that were granted to the previous Assembly in primary legislation, post 1999. So, other than when a determination is made in a Measure as to what procedures are to be used, we have to look back to the primary legislation to identify the appropriate procedure.

[25] **David Lloyd:** Diolch yn fawr, **David Lloyd:** Thank you, Joanest. Joanest.

[26] I am looking to drill down into Mr Trench's excellent statement. Sandy is next.

[27] **Sandy Mewies:** Thank you, Mr Trench, for that very erudite and detailed piece of evidence. Do you disagree with the purpose of this proposed Measure?

[28] **Mr Trench:** If you mean the purpose of securing alternative redress, of course not. That would not be a matter for coming to you with evidence about anyway.

[29] **Sandy Mewies:** So, it is about the procedure.

[30] **Mr Trench:** It is about the procedure and the legislative arrangements that the proposed Measure puts in place, and the way in which it is drafted.

[31] **Sandy Mewies:** Fine. I heard you say that we should be asking why this is coming as an Assembly Measure and not in any other form. You also suggested that it would be considered as being in skeleton form. I think that what you were saying is that it will probably be rejected. So, I will throw that question back to you. Why do you think that it is coming to us in this form? Do you think that it will be rejected or is that something of which you are 50 per cent sure?

[32] **Mr Trench:** I am not entirely sure that I can answer the first question; I could only speculate.

[33] **Sandy Mewies:** Can you speculate then, because you threw out this hint of what we should be doing with no reason why?

[34] **Mr Trench:** I am aware that the First Minister has put a great deal of emphasis on this as a priority for the Assembly. A combination of the political pressure that that has led to and a desire to ensure that a piece of legislation is in place quickly has led to an undue degree of haste.

[35] On the second point, in many respects, this piece of legislation—the proposed Measure—is a replication of what was enacted at Westminster for England. The difference is the different context in Wales, namely the different set of expectations that underpin devolution in terms of the relationship between Government and the public at large—that Government would be closer to the public rather than further away—and the fact that England is operating in a much more complex environment where greater flexibility is needed. That is why something different should be done in Wales. However, it is clear that, as far as England was concerned, similar provisions were passed with a report from the House of Lords Delegated Powers and Regulatory Reform Committee that I would characterise as being neutral or very guardedly supportive. That committee clearly had a great deal of information in front of it about what in fact was going to be done as well as the broad skeleton that was put to it.

[36] **Sandy Mewies:** I still have some questions. I think that what you were saying is that the situation in England is different—it is more complicated because of how it is structured. You also mentioned that ophthalmic services and dentistry should be scrutinised more clearly. However, do you think that primary measures should be included?

[37] **Mr Trench:** It is not for me to express a view on that; that is a policy matter.

[38] **Sandy Mewies:** So, this is entirely on procedure?

[39] **Mr Trench:** Yes, and on the legislative framework that is being put in place. There may be good reasons for doing that. I would note that the House of Lords committee was concerned about the potential inclusion of primary measures in relation to Wales—what became section 17 of the Act, namely the framework power for Wales. The fact that primary services were excluded for England was evidently, from its report, a material factor in its willingness to be neutral or guardedly supportive of the Westminster legislation.

[40] **Sandy Mewies:** Of course, there is no guarantee that that view will be the same in future. However, it seems to me that the thrust of what you are saying, particularly one of the last points you made about affirmative rather than negative amendments, is a scrutiny issue.

[41] Finally, you say that this was presented to us as a paper from Tomorrow's Wales, but you have made it quite clear today that this is not a group view from Tomorrow's Wales.

[42] **Mr Trench:** The paper is the group's view; the paper was considered by the members.

[43] **Sandy Mewies:** Has it gone through?

[44] **Mr Trench:** Yes.

[45] **Sandy Mewies:** Therefore, I do not understand the point that you made in the beginning: if this is the group's view, then it is the group's view.

[46] **Mr Trench:** Given that this is an area of legal and legislative expertise and that I am one of the specialist advisers to Tomorrow's Wales, I cannot say that every member of Tomorrow's Wales would necessarily endorse my comments on the legal matters.

[47] **Sandy Mewies:** You are the man who knows, but this is the group view.

[48] **Mr Trench:** The broad group view is in the written submission.

[49] **Janet Ryder:** On Sandy's point on your reference to primary care, the only reason that I could detect for you referring to it was that it is not included in the legislation for England. However, that does not give me any reason why it should not be included here, if we have the powers to do so. Can you elaborate on that?

[50] **Mr Trench:** It is no reason not to do it; it is a reason to ensure that there is clarity about what is involved and because, in practice, I would suspect that—and this is where one does start to talk about policy matters—quite a substantial number of the claims that are likely to be handled under such a system would arise from primary care rather than from hospital care. That is a good reason for ensuring a close degree of control by the Assembly, rather than simply allowing the Assembly Government to take over this area.

8.50 a.m.

[51] I have not looked at detailed information about how exactly these sorts of claims arise, and what the numbers are, but, as I say, I would suspect that a large number of the potential claims are likely to arise from primary care. Therefore, the scope of what will be enacted will be much broader if primary care is included.

[52] **Janet Ryder:** If we were to deal with this as a series of regulations, could they be expanded piece by piece, as the Assembly saw fit to expand them? The power exists now, vested in the Assembly to do that.

[53] **Mr Trench:** I am not sure that I understand your question.

[54] **Janet Ryder:** Instead of vesting it in the Minister, if we retained more power in the hands of the Assembly, and dealt with it through a series of regulations, it is within our power to extend those regulations as we see fit, and when we see fit to do so.

[55] **Mr Trench:** It would be within your power to pass Measures, as you saw fit; it would be for the Assembly Minister, as I understand it, to propose regulations, and to frame regulations. There is a difference between primary legislation made as an Assembly Measure, and secondary legislation made by Ministers subject to a degree of Assembly control.

[56] **Janet Ryder:** Are you suggesting that the power is vested in the Minister, but clearly defined, and then that a series of regulations are brought, or that the power is not vested in the Minister, that it remains in the Assembly, and that we deal with it in another way?

[57] **Mr Trench:** I would prefer to see these powers vested in the Assembly, on the principle—from my understanding of how the separation of powers should work—that as these are legislative powers, vested in the Assembly, they should remain with the Assembly, and be exercised by the Assembly, not by the Assembly Government. However, if the Assembly wishes to delegate them, and allow Ministers to exercise them instead, that is a perfectly proper thing for the Assembly to decide to do. However, I would suggest strongly that the Assembly needs to ensure a close degree of scrutiny in that case; it should not simply allow Ministers to be able to do what they wish.

[58] **Alun Davies:** Thank you for your presentation. On a philosophical approach, I agree with where you are coming from in terms of us as a legislature giving as few powers as is necessary to Ministers to act in an executive fashion; that is probably a good thing in terms of principle. There are other issues regarding the proposed NHS Redress (Wales) Measure. If you look at the discussion that we had in the Finance Committee two weeks ago, the information that we were given by the Government on the legislation's financial implications was woefully inadequate. I do not believe that the Measure can continue until greater information is provided by the Government to enable us to take reasoned decisions. That is not the case at present.

[59] On scrutiny, you seem to be saying that the issue is an excessive delegation of power to the Executive, without the necessary scrutiny. Are you saying that this is not being scrutinised by the appropriate committee that is dealing with this Measure?

[60] **Mr Trench:** Of course not—I believe that it is meeting later today. It is a question of the effectiveness of that scrutiny, and of the ability to scrutinise not only what is being put to you now, but what may come to you in six months, a year, five years, eight years, or 20 years' time, when the Government decides to alter the basis on which this scheme has been made. Again, I hesitate to mention Westminster, but the experience there is that the Government will commonly use powers that were conferred on it many years before to do something unexpected a long time later, because it is the quick, convenient or expedient way to do it. That is the point that must be watched, and this committee is the watchdog that must keep an eye on that.

[61] **Alun Davies:** I am not sure that I agree with that. I agree with your point about a subsequent Government making different use of particular powers. In terms of principle, it is always better for a Government to seek new powers to act differently or to certainly go to the legislature, be it at Westminster or here, to seek those powers.

[62] In terms of what we do on this Measure, I do not feel that we have a Measure yet before us, because it has not been through the scrutiny process or a process of amendment. It would be in order, for example, for the Minister to bring amendments to the committee, which is beginning its work at the moment, to quite fundamentally change the Measure that we see today in order for it to comply with the philosophical approach that you are proposing here. I actually quite like Westminster experience, because they have more experience than we do of legislation, and one thing that we have all found in recent years is that Government legislation changes fundamentally through scrutiny, which is a good thing, surely.

[63] **Mr Trench:** It is, indeed; no question at all.

[64] **Andrew R.T. Davies:** Thank you for your informative presentation. I am a new Member from the May intake and, as such, drafting and creating law is quite different to what I used to do before, which was basically to shovel a lot of the proverbial on the farmyard, as it were. Some people might say that the two are one and the same thing, mind. [*Laughter.*]

[65] **Alun Davies:** You are as eloquent as ever.

[66] **Andrew R.T. Davies:** Listening to what you have said today, I think that we all agree with the aspirations of this Measure, as such, in that it will take out the trauma for many people who are seeking redress, especially in the case of smaller claims. However, it seems that the aspiration has got ahead of the practicalities of delivery within the Measure, especially with regard to the transfer of powers between the Assembly and the Government. What worries me from your remarks is the difficulty of this Measure getting through Westminster and the transfer of that power. There is a danger then of further Measures just being bogged down. Is it your understanding, from how this has been drafted and pursued, that it has no chance of getting through?

[67] **Mr Trench:** I would not say that, and it would not be for me to say it, either, because it is for you, as Assembly Members, to decide whether it will get through or not. As I said, we know that something rather similar was passed at Westminster, but in the very different context of how the NHS operates in England. It clearly did not have the smoothest of rides.

[68] **David Lloyd:** Mae gennyf rai cwestiynau o'r gadair. Cawsom un ddatl ar y Mesur hwn yn y Siambur cyn yr haf, ac yr oedd cytundeb sylweddol rhwng pob plaid ynglŷn â bwriad y Mesur hwn, a'i fod yn syniad

David Lloyd: I have some questions from the chair. We have debated this Measure once already in the Chamber before the summer, and there was substantial agreement between the parties with regard to the

iawn, er bod pawb, yn naturiol, yn poeni am y manylion. Yr ydym yn sôn yma am Fesur sy'n caniatáu iawndal mewn achosion llai. A oes diffiniad, naill ai mewn deddfwriaeth yn Lloegr neu mewn man arall, o'r hyn a olygir gan achos llai? A oes diffiniad o uchafswm yr iawndal, er enghraifft, a ganiateid o dan y fath Fesur?

intention of the Measure, and that it was a good idea, even though we all, naturally, worry about the details. We are talking about a Measure that will permit redress in smaller cases. Is there a definition, either in English legislation or elsewhere, of what is meant by smaller claims? Is there a definition of a maximum for redress, for example, permitted under such a Measure?

[69] **Mr Trench:** I could not speak about England with any degree of precision, but it is obviously the case that this Measure does not propose a maximum level. There is nothing in principle that I can see in this Measure that would inherently stop the scheme from being applied to the very largest claims—the type of claims that deal with catastrophic damage caused by medical negligence during childbirth, for example. Whether such claims would, in fact, go through this system is another matter, but there is nothing to stop it being able to do so.

[70] **David Lloyd:** Tynnu'r cyfreithwyr o'r busnes yn gyfan gwbl yw bwriad y Mesur hwn. O ystyried y bwriad hwnnw, cymerwn na fyddem yn delio â materion mawr neu gymhleth. A oes diffiniad yn rhywle arall—mae'r Mesur hwn yn rhwym o fod yn gweithio rhywle arall—o achos llai lle bo modd trin a thrafod a mesur iawndal a sicrhau ymddiheuriad yn absenoldeb cyfreithwyr? Dyna yr ydym yn ceisio ei wneud—sicrhau iawn i bobl heb ymyrraeth cyfreithwyr.

David Lloyd: The purpose of this Measure is to remove the lawyers from the whole business. Given that intention, we can assume that we will not be dealing with major or complex issues. Does a definition exist elsewhere—this Measure is bound to be in operation somewhere else—of a smaller claim in which it is possible to evaluate and measure redress and obtain an apology in the absence of lawyers? That is what we are trying to do—ensure redress for people without the intervention of lawyers.

9.00 a.m.

[71] **Mr Trench:** That is true, although it is worth noting that both the English legislation and the proposed Measure contain provisions for enabling assistance of various kinds to be provided to applicants or potential claimants, so that they are aware of their rights. That is a very important part of the legislative scheme, because it is a way of ensuring that people are not induced to use the scheme set up under the new legislation to their serious detriment, so that they are able, at Government's expense, to obtain the sort of advice that they would otherwise get from lawyers. It may be that lawyers will be the people giving that advice, at least in certain cases, as well as doctors and other experts. After all, lawyers are the people with established expertise about the amount of damages that you pay to people who have experienced certain sorts of loss. There is copious information available

through legal databases and legal reference books that will give you the price of the damages that can be expected for practically any sort of injury that you can envisage.

[72] **David Lloyd:** Diolch am hynny. O gofio'r wybodaeth honno, a oes uchafswm iawndal sy'n gallu arwain rhywun i feddwl fod hwn yn achos llai ac felly yn cwmpo o fewn y Mesur hwn, neu bod yr achos yn rhy fawr ac felly yn gorfod dilyn y llwybr traddodiadol o ddelio â chwyn?

David Lloyd: Thank you for that. Bearing that information in mind, is there a maximum redress that could lead someone to think that this was a smaller claim and would therefore fall within this Measure, or that the claim was too large and must therefore follow the traditional route of dealing with a complaint?

[73] **Mr Trench:** The problem is that we do not know. Given that we are confronted with a skeleton Measure in this case, we do not know what the ceilings would be and how they might change, because, apart from anything else, one would expect the ceilings to change over time with inflation and an appropriate ceiling now would be inappropriate in 15 or 20 years' time. I have not seen any information to suggest what that ceiling would be initially or in due course, or whether or not it would be necessary to have a ceiling. I have experience from work done by former colleagues that there may be cases where liability is not an issue, and the issue is simply to work out quantum, where it would be appropriate to use a mechanism such as this to resolve part or all of a major claim.

[74] **David Lloyd:** O'r profiad yn Lloegr, sut mae'r ddeddfwriaeth sydd yn debyg i'r Mesur hwn yn gweithio yn Lloegr? A ydyw'n cwmpasu achosion llai yn unig, neu, fel yr ydych wedi crybwyll, a oes hyblygrwydd yn y system sy'n caniatáu achosion mwy lle nad oes anghytuno ynglŷn â beth ddigwyddodd?

David Lloyd: From the experience in England, how does the legislation similar to this Measure work in England? Does it only cover smaller claims, or, as you suggested, is there flexibility in the system which allows larger claims when there is no disagreement about what occurred?

[75] **Mr Trench:** I am afraid that I am not an expert in how the system works in England, so I cannot answer that question.

[76] **David Lloyd:** Mae fy nghwestiwn olaf i'n cyfreithwyr. Pe bai'r is-ddeddfwriaeth fydd yn tarddu o'r Mesur hwn yn cael eu gwneud o dan y weithdrefn negyddol, yr wyf yn cymryd y byddai'r rheoliadau hynny yn dod ger bron y pwyllgor hwn bob tro i graffu arnynt.

David Lloyd: My final question is to our lawyers. If the subordinate legislation that will arise from this Measure were to be made under the negative procedure, I assume that those regulations would always come before this committee to be scrutinised.

[77] **Ms Jackson:** Byddant yn dod gerbron y pwyllgor, ond byddant wedi

Ms Jackson: They would come to this committee, but they would have

cael eu gwneud cyn hynny, yn yr un modd â'r rheoliadau a welsom y bore yma.

[78] **David Lloyd:** I gadarnhau, ac er gwybodaeth i bawb, mae cyfle i ni wneud rhywbeth amdanynt fel Aelodau o fewn pa amser?

[79] **Ms Jackson:** Pedwar deg diwrnod.

[80] **David Lloyd:** Felly, gallem newid pethau o fewn 40 diwrnod, er y bydd y rheoliadau wedi cael eu pasio yn y cyfamser cyn inni graffu arnynt yn y pwyllgor hwn.

[81] **Ms Jackson:** Mae gennyf bwynt bach ar hynny. Y tro diwethaf i mi edrych, nid oedd y rheoliadau sy'n creu'r cynllun wedi dod i rym yn Lloegr eto.

[82] **David Lloyd:** Diolch am hynny. Yr oeddwn o dan yr argraff eu bod wedi dod i rym, a dyna pam y gwneuthum holi am y profiad yn Lloegr. Os nad yw pethau wedi dod i rym yn Lloegr, nid oes profiad ohono yn y fan honno ychwaith. A oes unrhyw gwestiynau eraill?

[83] **Karen Sinclair:** The powers were vested in the Government at separation—we cannot have our cake and eat it, and have the cherry on top. There must be a decision about which way it is done, and the decision has been made. What do you see as the benefits of everything going through the positive procedure? The negative procedure would flag it up and there would then be an opportunity for it to go to the floor and for Assembly Members to vote something down, which would mean that the Government would have to go back and rethink anyway.

[84] **Mr Trench:** I know what the answer would be at Westminster. The answer at Westminster would be that practically all statutory instruments made using the various negative procedure routes never get anywhere near receiving the attention of the floor of either House of Parliament. They attract minimal attention, even from the relevant committees; I think that there has been one vote, once, in the last 20 years on a negative procedure instrument on the floor of the House. However, I appreciate that that Westminster

been made prior to that, in the same way as the regulations that we saw this morning.

David Lloyd: To confirm, and for everyone's information, within what timescale do we as Members have an opportunity to do something about them?

Ms Jackson: Forty days.

David Lloyd: So, we could change things within 40 days, despite the fact that the regulations will have been passed in the meantime before we scrutinise them in this committee.

Ms Jackson: I have a small point on that. The last time I looked, the regulations to create the scheme had not yet come into force in England.

David Lloyd: Thank you for that. I was under the impression that they had come into force, which is why I asked about the experience in England. If things have not come into force in England, then there is no experience of it there either. Are there any other questions?

experience does not really apply here because the circumstances are different: you have a different volume of legislation and, of course, you are, to a substantial degree, since May, a new institution, having to find and develop new ways of working with new Standing Orders. Therefore it is a question of how these things will in fact work here and how vigilant the Assembly is able to be in practice in dealing with that sort of legislation, which, in itself, depends partly on the volume of legislation that is made by the Assembly Government, using the various powers that are delegated to it.

[85] **Karen Sinclair:** So, what you are saying—*[Inaudible.]*—less vigilant than they should be, their scrutiny will not be good enough. That may be what you are saying.

[86] **Mr Trench:** There is a hazard, a danger that scrutiny will not be perfect. That is certainly the case, I must say, at Westminster. I would hope that it would not be the case here.

[87] **Karen Sinclair:** Presumably your organisation would be scrutinising everything anyway because you have been set up as the body to do so.

[88] **Mr Trench:** I very much doubt that we would have the resources to do that, nice as it might be to envisage that happening.

[89] **Eleanor Burnham:** It seems to me that we are in a new mode that is very difficult to compare with anywhere else, because we are neither fish nor fowl. We do not have primary legislative powers and therefore it does not appear to me that we can be compared easily with elsewhere. Could you tell us about the Scottish situation? Are more affirmative or negative statutory instruments laid before the Scottish Parliament? Will you tell us again whether you think, because of what the Richard commission asserted, that we do not have enough spare capacity for proper scrutiny? Due to the insufficient number of Assembly Members outside of the Government, are we going to have problems if we do not take great care?

[90] **Mr Trench:** I could not draw lessons from the Scottish experience; I would need to investigate that. As far as concerns about scrutiny go, you are quite right that the Richard commission did raise those issues. The Assembly was not increased in size in the 2006 Act despite a number of people, including me, calling for that—I ought to add that I was not an adviser to Cymru Yfory at that time. I remember looking at the size of roughly comparable legislatures and elective bodies, dealing with similar populations to Wales, and found that the membership of legislatures in German Länder, like Rheinland-Pfalz or Schleswig-Holstein, was about 50 per cent higher, if not more. They had around 90 to 100 members whereas the Assembly was kept at 60 Members. Even if it had gone to 80, it would still have had slightly fewer Members, proportionately, than those middle-ranking German Länder, which have very limited legislative powers, one should note. To that extent, I think that there must be some concern, simply because of the numbers, about the quality of scrutiny that the Assembly can offer. That is a reason for particular vigilance on behalf of individual Members and the Assembly's

committees because this is clearly an issue, not merely in and for Wales, but at Westminster as well.

9.10 a.m.

[91] **David Lloyd:** Diolch yn fawr. Mae ein hamser ar ben, yn sylfaenol. Mae Gwyn wedi mynd am fod pwyllgorau eraill yn dechrau yn awr, gan gynnwys y pwyllgor sy'n edrych ar y Mesur hwn o'r ochr polisi. I fynd yn ôl at gwestiwn cyntaf Eleanor, cadarnhaf y ffordd ymlaen. Byddwn yn cymryd tystiolaeth ychwanegol gan wahanol fudiadau sydd wedi bod yn ysgrifennu atom. Bydd ein cyfreithwyr, y clerch a'r dirprwy glerc yn cydweithio gyda chlercod y pwyllgorau eraill, fel y pwyllgor Mesur, ac, yn dilyn yr hyn a ddywedodd Alun Davies, cysylltw'n â chlerc y Pwyllgor Cyllid hefyd, o ran tystiolaeth sydd wedi cael ei rhoi o flaen pwyllgorau eraill.

David Lloyd: Thank you very much. Our time has essentially come to an end. Gwyn has left because other committees are about to start, including the committee that is looking at this Measure from a policy perspective. To return to Eleanor's initial question, I confirm the way forward. We shall take additional evidence from various organisations that have written in. Our lawyers, clerk and deputy clerk will be working with the clerks of other committees, such as the Measure committee, and, following Alun Davies's comments, we will also contact the clerk of the Finance Committee, in terms of evidence that has been presented to other committees.

[92] **Alun Davies:** There are two things that we can do immediately on this. First, we can follow your suggestion and talk to the Government about how Measures are introduced. I do not see this as a conspiracy, but more a learning curve. In some ways, it might well be that the Government, in putting forward its legislation, is still on something of a learning curve, and it would be useful if the Chairs of the different committees scrutinising this legislation communicated to the Government the experience of this first tranche of legislation following our accruing of the new powers. My second suggestion is that we write to the relevant committee considering this Measure with information about our deliberations this morning and invite it to discuss that further as part of the process of making amendments to the legislation.

[93] **David Lloyd:** That would be the expectation. In addition, I confirm today that the Minister will be attending this committee in a fortnight's time to present evidence and answer questions. So, we will have every possible collaboration that we can between all the various committees, be they Measures committees or finance committees, and the clerk will also track down evidence on the details of the legislation that applies in England, even though it has not kicked in yet. That is just for confirmation as regards the nuts and bolts of that procedure. So, in terms of presenting the Government with evidence, we will work together as Chairs and as clerks of the various committees to make sure that as full a brief as possible is given to the Government. As I said at the start, we are basically all in agreement about this Measure, and we need to ensure that we can also agree with the nuts and bolts—the details. I concur with Alun that this is a learning curve for the new

Assembly, and it is important that we get it right.

I thank Mr Trench for an excellent presentation and question-and-answer session, which I am sure have greatly informed the Members of this committee and those seated in the public gallery, notwithstanding all those watching this committee on live television throughout the United Kingdom.
[Laughter.]

ANNEX E

Extract from the transcript of the Subordinate Legislation Committee meeting 9 October 2007 - Discussion with The Law Society

Y Mesur Arfaethedig ynghylch Gwneud lawn am Gamweddau'r GIG (Cymru) 2007—Trafodaeth â Chymdeithas y Cyfreithwyr NHS Redress (Wales) Measure 2007—Discussion with the Law Society

[1] **David Lloyd:** Prif drafodaeth y bore yma yw'r drafodaeth bellach ar y Mesur Arfaethedig ynghylch Gwneud lawn am Gamweddau'r GIG (Cymru) 2007 a heddiw cawn dystiolaeth gan Gymdeithas y Cyfreithwyr. Fel cyflwyniad, bydd pawb yn ymwybodol bod y Mesur hwn yn caniatáu iawn i gael ei ddarparu heb ddwyn achos sifil. Dyna'r meddylfryd sydd y tu ôl i'r Mesur hwn yn y lle cyntaf. Bydd Aelodau'n cofio trafodaeth yn y Siambr pan oedd cydnabyddiaeth a chytundeb trawsbleidiol bod hwn yn sylfaenol yn beth da. Yr oedd pawb yn cytuno gyda'r syniad o gyflymu'r broses o sicrhau ymddiheuriad ac iawndal mewn achosion llai difrifol heb ymyrraeth neu gymorth cyfreithwyr.

[2] Bydd pobl yn ymwybodol ein bod wedi penderfynu cymryd dystiolaeth fel pwyllgor ar briodoldeb y pwerau i wneud Gorchmynion a rheoliadau sy'n cael eu darparu o dan y Mesur arfaethedig hwn. Fe gofiwch i ni gymryd dystiolaeth gan Alan Trench o Gymru Yfory yr wythnos diwethaf. Heddiw, hoffwn gyfarch a chroesawu Kay Powell, sy'n gyfreithiwr ac yn gynghorydd polisi i Gymdeithas y Cyfreithwyr, i ddarparu dystiolaeth gerbron a hefyd i ateb cwestiynau. Byddwch wedi cael copi caled o gyfraniad Cymdeithas y Cyfreithwyr i'r drafodaeth ar y Mesur hwn. Yn naturiol, byddwch i gyd wedi ei ddarllen yn drwyadl ac yn gallu seilio eich cwestiynau arno. Felly, gyda'r

David Lloyd: The main discussion this morning is the further discussion on the NHS Redress (Wales) Measure 2007 and today we will hear evidence from the Law Society. By way of introduction, you will all be aware that this Measure allows for redress to be provided without taking a civil case. That is the thinking behind the Measure in the first instance. Members will recall the discussion in the Chamber when there was acknowledgement and cross-party agreement that this was fundamentally a good thing. Everyone agreed with the idea of speeding up the process of ensuring an apology and redress in less serious cases without the interference or help of lawyers.

People will be aware that we have decided to take evidence as a committee on the appropriateness of the powers to make Orders and regulations provided under this proposed Measure. You will recall that we took evidence from Alan Trench, from Tomorrow's Wales, last week. Today, I welcome Kay Powell, who is a solicitor and policy adviser to the Law Society, who will provide us with evidence and also take questions. You will have received a paper copy of the Law Society's contribution to this discussion on this Measure. Naturally, you will all have read it in great detail and can base your questions on that evidence. So, with those words, Kay, the floor is

geiriau hynny, Kay, cymerwch y llawr. yours.

[3] **Ms Powell:** I will start by pulling together the main points and explaining to you the interests of the Law Society. The Law Society Wales responded to the Measure committee. As a consequence of those comments, I have been invited here today. The Law Society plays an active role in law reform and the effective operation of legal institutions and access to justice in England and Wales.

[4] Since devolution, the Law Society's Wales committee has monitored the progress of devolution in Wales and its impact on the profession as well as monitoring the programme of legislation of the National Assembly for Wales. We disseminate information on the activities of the Assembly to the profession in Wales and to inform solicitors in England of the impact of Welsh legislation. We lobbied on the Government of Wales Bill in relation to access to legislation, as problems of access to subordinate legislation made by the Welsh Assembly Government had arisen. That is part of a better law-making programme, which looks at the process of law-making through the preliminary and consultation stages through to the publication and implementation of new legislation.

[5] Our aims in the third Assembly include ensuring that our members have access to legislation and that the public has access to legal advice. We will give evidence to the Measure committee next Tuesday on specific matters, but here I outline the issues that we feel arise out of the lack of any limitation on the power granted to the Government under the Measure. Members are now aware that the proposed Measure, while outlining power to establish redress arrangements, does not make a single substantive provision. Every provision will require explanation and determination through regulations. This is our main concern—access to the law is compromised by the lack of solid provisions.

[6] We are discussing the first Measure to be made by the National Assembly for Wales. The new Standing Orders set out the Measure procedure and prescribe the content of an explanatory memorandum. The explanatory memorandum addresses the points required, but does not provide satisfactory commentary. For example, on costs, we have a variation from a saving of £750,000 to a cost of £3 million. It is stated that these figures must be treated with caution as they are very early estimates.

[7] Two further comments in the explanatory memorandum raise concerns. For example, the Government admits in paragraph 4.1 that there has been no formal consultation on the policy objectives and that that will take place in 2008 subject to the Measure being passed. In referring to the point that the Measure provides a wide-ranging power to make consequential amendments to Acts of Parliament, the Government asserts that this is needed for when the policy—to be set out in the regulations—is fully developed and consulted upon. In isolation, this is a careless approach to law-making. As no draft regulations are available to consider alongside the proposed Measure, decisions regarding what provisions should appear in the

primary legislation, as opposed to the regulations, are more difficult to make. Many questions of principle remain outstanding, such as what NHS services are covered. The framework power and thus the Measure are wider than the Act for England, in that primary care services can be included. However, there is no indication of whether they will be. Questions also arise over secondary services such as laboratory services and breast cancer screening and whether these will be included.

[8] The Government has established an advisory body drawing together members of the health and legal professions to look at the redress arrangements, but the group has not made any useful contributions yet. It could not have been anticipated that the Government would introduce its first proposed Measure in an area on which it has no clear policy and on a subject that has not previously been subject to consultation and scrutiny by stakeholders. The approach to law-making in Wales has followed an open and inclusive process. The Government has prided itself on its consultation procedures, but this Government proposed Measure does not follow this strong practice. As it stands, Welsh Ministers would be given full discretion under the proposed Measure. Such a provision could have been included, and indeed it was, in the Westminster Act.

[9] Law-making powers have been devolved to the National Assembly so that the Assembly can do just that, and not so that it can devolve power to the Executive without robust scrutiny of Government policy and stakeholder views. Ultimately, it will be the individual Assembly Members who will experience the consequences of any deficiencies in the Measure and the later regulations as the public will approach Assembly Members when problems arise. Our message is that the Measure has been brought to the National Assembly too early. The Government is acting with undue haste to propose its first Measure at the expense of good law making. The Government is obviously keen to exercise its power to propose legislation; the obligation now falls to the National Assembly to exercise the new law-making powers in a responsible way, knowing that the first laws will set a precedent and create a historic milestone in devolution in Wales. I hope that this outline of the underlying issue is helpful.

[10] **David Lloyd:** Diolch, Kay, am y dadansoddiad trwyadl a graenus hwnnw. Mae Keith Bush, prif gynghorydd cyfreithiol y Cynulliad, wedi ymuno â ni. Gwelaf fod pawb yma yn cymryd nodiadau ar y manylion yn awyddus. Gwahoddaf gwestiynau gan Aelodau.

David Lloyd: Thank you, Kay, for that thorough and expert analysis. Keith Bush, the chief legal adviser to the Assembly, has also joined us. I can see that you are all keenly taking notes on the details. I invite Members' questions.

[11] **Eleanor Burnham:** What exactly do you envisage to be the best way forward in view of your concerns and the weaknesses that you mentioned?

[12] **Ms Powell:** The Government already has in place a system to consult. As I said, there has been no formal consultation with stakeholders. We, and

the British Medical Association, for example, are concerned that that consultation has not taken place. Because of the nature of the redress arrangements and the nature of legislation that we put in place, the regulations are exceedingly important, because that is where we will have the detail of the types of cases that will be caught, if they are indeed small cases, as is the intention, although there is nothing currently in the Measure to restrict that. Therefore, the draft regulations need to be laid at the same time as the Measure, and it is only by doing that that we, as a nation with close links and a fairly rigid national health system, will be able to draw together the primary, as opposed to the secondary, legislation. Moving into the third Assembly, it is important that the National Assembly gets that right from day one and effectively exerts its authority in terms of the legislature turning policy into law, as opposed to allowing the Government to continue with its policy and to change it over time without any checks.

[13] **Eleanor Burnham:** We also have ahead of us the minefield of negotiation with Westminster to get approval. Have you discussed this with anybody beyond Wales? For instance, have you been invited to the Select Committee on Welsh Affairs to give your opinion?

8.30 a.m.

[14] **Ms Powell:** We have not. This Measure will go through the National Assembly, so we are in the arena of the scrutiny of that. Our real concern is that this needs to be right the first time. A process is also developing on how the Measures are going to come into the Assembly. We are aware of the Standing Orders, and of the process through the Standing Orders, but, in terms of how that is undertaken on the ground, we are expressing our concerns early on in this matter.

[15] **David Lloyd:** Diolch. A oes **David Lloyd:** Thank you. Are there any other questions?

[16] **Sandy Mewies:** You have expressed quite a few concerns there, but they seem to be about the detail as much as anything else. You say that it is not specific in the detail, for example in relation to the costings of up to £3 million. Do you not think that being too prescriptive might restrict the Measure in some way, or do you think that it has to be more prescriptive in what it does? You also mentioned that the covered services are not detailed enough. You gave two examples, but are there other services that are not covered in your opinion? What needs to be done and what needs to be included in that detail in your opinion? You mentioned some things in your paper, but can you be a bit more specific in what you think needs to be done?

[17] **Ms Powell:** As I mentioned, we are at a stage where the National Assembly, as a legislature, is turning policy into law. So, the Government has effectively brought to you—I hesitate to say a half-baked policy—a policy that is supported by you, as you have had cross-party discussions in Plenary, and supported by the British Medical Association and the Law Society, in terms of the concept and the idea of having a redress arrangement. The operation now

is for the National Assembly to know its position in terms of making legislation and not simply, as the current Measure does, to pass over the regulation-making power to the Government.

[18] This is a very difficult first Measure for the National Assembly to deal with, because, of course, it comes under a framework power derived from a Westminster Act. That framework power was originally given to the pre-2007 National Assembly, but the power is now given to Welsh Ministers. So, this Measure need not have occurred, but, following the Order-making powers, a conversion Order now places it in the arena of the National Assembly. So, the National Assembly is not in the position that it will be in future for making Measures, which will be following legislative competence Orders. We are in a situation today where most of the provisions would naturally fall within regulations. However, because we have the legislature and the system of bringing forward the regulations, it is important that the Government does not try to ignore the legislature by saying that there is a lot to be decided and that everything can, and possibly should, pass over to us.

[19] So, from the point of view of law making, it is important for the National Assembly to be live to all the current issues, including finance, which is a major concern in terms of policy and law making. You need to be aware of the provisions' costings before you can approve, or at least sensibly discuss, giving power to the Government. As the provisions are so broad, there will be no way outside the first regulations for the National Assembly to easily restrict the application. As you say, the papers show that the redress situation is there for the smaller claims; it is not for the major claims or for claims where there is an issue or question of negligence liability. So, it will be easier to describe them, but we feel that they have not even been described in the papers that support the request for the Measure.

[20] You mentioned the various services covered. This is a much broader matter for Wales because of the broader definition of services and of the tort liability, and there are people other than healthcare professionals who may be brought within the redress arrangements. So, we cannot even look to England to see where people are being brought in. We can only look to what the Welsh Assembly Government has given us, and our view is that that is too light for a sensible decision to be made in relation to the Measure by the National Assembly as a whole.

[21] **Janet Ryder:** I accept your concerns about where power should lie—with the Government to bring forward these Measures or with the Assembly in retaining more power—but, were the Government to come forward with those definitions of the sizes and types of claims and the services to be included, would the Law Society be more amenable to seeing this go through or would you still have concerns?

[22] **Ms Powell:** In its current form, I feel that the National Assembly is not able to make a true decision on where the primary legislation should extend to. There are no draft regulations, so there is nothing to draw alongside the current Measure. Were there draft regulations, they could, effectively, be

passed as a package, so that the National Assembly would be aware of where the first stage was, for example, for the size of the claims that would be caught. So, on day one, the National Assembly would be passing over to the Government a system that it understood and everyone would be aware of where that system began from, whereas, currently, the Government, effectively, has carte blanche. It will come back for the regulations to be scrutinised, but the danger is that you will miss, in terms of the Measure, ensuring that all Assembly Members are aware of what the Government is able to do under the Measure, simply because it is so broad currently. I am not saying that it needs to be restricted and that there need to be conditions; I am simply saying that, currently, there is not sufficient information or policy from the Government to support the Measure as it stands.

[23] **Janet Ryder:** You would be happy, then, if that clarification came forward.

[24] **Ms Powell:** Were that to come forward and be considered, and if it did support it, then we would take a view at that stage, but our point is that, in terms of good law-making, the Government has not led with good and solid policy in this area, in order to lead the Measure through the National Assembly.

[25] **Janet Ryder:** I will play devil's advocate, if I may, and be a little cynical. All the way through this paper, there seems to be mention of recourse to advice from solicitors. My understanding of the reasons behind introducing such a system was that, where possible, with small claims and claims that were easily identifiable, it was an attempt to make it a clear system where perhaps we did not even need solicitors and that people would be happy to accept that. Am I being a little too cynical here or is there some vested interest?

[26] **Ms Powell:** Not at all. We have made comments about legal advice, and legal provision—legal aid and so on—is another issue that is not really covered in the policy. The reason for my coming here today is to discuss the law-making process, and the Law Society Wales office has historically been involved. As I said, in terms of the Government of Wales Act 2006, we lobbied very hard in relation to access to legislation, which is access for all. There are also concerns, in relation to access to this legislation, that the provisions in the Measure are not terribly clear. So, if a member of the public wanted to read them, they would not necessarily be clear. We have, in terms of our better law-making programme, a wider public interest in law reform.

[27] **David Lloyd:** Diolch, Janet a **David Lloyd:** Thank you, Janet and Kay. A oes unrhyw gwestiynau eraill? Kay. Are there any other questions?

[28] **Andrew R.T. Davies:** I have a point to raise, if I may. Thank you for your presentation this morning, Ms Powell; it is much appreciated. As a layman, I find that it is always good to get the professional view on things. You use quite strong language in relation to the Measure: 'half-baked', for example—I have never before heard that used around a committee table

when something is being commented on.

[29] **Ms Powell:** I apologise.

[30] **Andrew R.T. Davies:** No, it is best to be blunt. From what I heard in last week's evidence and from this week's evidence, it is almost as if the brake should be pulled on this and far more information provided for people to take these issues on board. Both you and last week's witness are very unhappy with what has been put forward. I do not profess to be a legal expert in any shape or form, and we all agree with the sentiment of what is trying to be achieved here, and there is provision, from my reading of the Finance Committee's report, for legal representation. That is an integral part of it—anyone can seek legal advice, free of charge. However, does the Law Society believe that this should be stopped in its tracks and that far more evidence should be brought forward before it progresses any further and there is more blood on the carpet?

8.40 a.m.

[31] **Ms Powell:** We certainly feel that, in terms of the National Assembly's approach to passing a Measure, there is currently insufficient solid policy being led by the Government.

[32] **Andrew R.T. Davies:** So, you would be happy for it to be stopped in its tracks as it stands. I see that you are nodding.

[33] **Karen Sinclair:** I would not be happy with that, and, let us be fair, the vast majority of people wants the proposed NHS Redress (Wales) Measure and I welcome it wholeheartedly, so I am slightly worried by what you said, Andrew. In 2003, there was full consultation on this policy and the way that we wanted to go. This might not be 2003, but this issue was absolutely and fully explored at that time, so I would hate for people to get the idea that the Measure needs to be stopped, because it does not. It will make a huge difference, because an awful lot of people are not aiming for millions of pounds when they want redress from the NHS; they want an acknowledgement that things went wrong. It is because of litigation that the NHS will not apologise, and because of the morass in which it can find itself through the process of law. You can look at this through a completely different window.

[34] You say that things will not come to Assembly Members, but anything going through the negative procedure can be brought to Plenary. Do you not see that that is a backstop measure that will ensure that there are checks and balances?

[35] **Ms Powell:** It is a backstop measure, but, for example, we touched on the explanatory memorandum, and the issue of redress has been looked at over a period of time, but the Government has not led solid policy in that area—it has referred to various matters. The better approach, in our opinion, would have been to lay the draft regulations with the Measure. As I said, in

that case, the debates and so on in relation to the Measure and the first regulations could have occurred side by side; they could have been taken on as a package. Then, the backstop of the affirmative procedure would not have been such a concern, because the initial regulations would have been considered alongside this Measure.

[36] **Eleanor Burnham:** So, you have two concerns. First, you are suggesting that we are giving carte blanche to Ministers, who, in your view, have not done their homework. Are you also concerned about the costings? You mentioned that aspect, so I wondered whether you would like to say a few extra words on that.

[37] **Ms Powell:** I have not looked at the costings in terms of any savings; I have simply taken an example from the explanatory memorandum, where the costings varied greatly and nothing was done in order to try to draw them together. The costing of the new law being made is an issue that should concern the National Assembly when it is giving power to Ministers. However, I cannot comment specifically in relation to costs.

[38] **Paul Davies:** I have a quick point. Is there a wider issue here? Is the Law Society trying to make the wider point that the framework, not just for this legislation but any future legislation, is too broad?

[39] **Ms Powell:** The point in relation to this Measure is that it is very broad. As you said, your witness last week, who is a constitutional expert, was of the opinion that the Measure, as it stands, has the same effect as an Act of Parliament—it is primary legislation—and that it is important that it does not simply pass on power to the Executive. The legislation should be robust and should have been properly considered. That is where defects in the explanatory memorandum and in the policy will have an impact on the legislation that is made.

[40] **David Lloyd:** Diolch yn fawr. A **David Lloyd:** Thank you. Are there oes unrhyw gwestiynau eraill? any other questions?

[41] **Karen Sinclair:** You talked about the lack of clarity in the costings. Are you seriously saying that you think that this Measure could end up costing the taxpayer more money than the present system does?

[42] **Ms Powell:** As I said, I have not studied the costings and I am not aware of specific costs currently in relation to legal cases that are brought. The concern is that that figure is not closer in time or in size. If a broad Measure is made, it then gives the Government power to move beyond what might be considered to be the first case. We are all talking about the type of cases that are currently under the speedy resolution procedure, which are at the £15,000 to £20,000 level. However, that is not covered in the Measure, and because we do not have the regulations, they cannot be tied to that currently either. So, after Christmas, when the policy is made, they could come back with very different figures, and, at that point, it will be difficult to deal with the issues afresh.

[43] **Sandy Mewies:** I think that one of the problems that we have—and it happened in the evidence that we had before us last week—is that you are putting forward a view about costings, and then you are telling us that you have no idea whether or not what you are saying is based on fact.

[44] **Ms Powell:** No; I was saying that I had not studied the costs. I am simply taking that cost as an example of where the explanatory memorandum is unclear. So, it could just as easily be the other examples that I have raised in relation to the services and so on. I hoped not to concentrate too much on the specific costs. I was referring to the fact that the level of costs put forward in relation to this Measure was so broad—it varies from a loss of £750,000 to a cost of £3 million. It was simply an example of where the explanatory memorandum and the supporting policy and evidence are not robust.

[45] **Sandy Mewies:** It still seems to me that implications are being put forward. There is a definite implication in what you have said, and it is being left on the table. You were asked—and I think that it is a fair question—what you thought ought to be done. Are you saying that, even if the concerns that you have raised today are addressed, you will still feel that this ought to be stopped and explored further?

[46] **Ms Powell:** The reason for coming to this committee today is simply to look at the law-making power of the National Assembly and the Measures.

[47] **Sandy Mewies:** With the greatest respect, do you think that it ought to be stopped?

[48] **Ms Powell:** I do not think that I said that it should be stopped.

[49] **Sandy Mewies:** That is the conclusion that I drew from what you said.

[50] **Ms Powell:** I do not mean stopped in terms of it being withdrawn; I mean that the Measure is rushing ahead without support. In my view, the regulations should have been brought forward at the same time as the Measure. The Law Society supports NHS redress as a policy and has supported it in Westminster; I am here today to discuss how we get to those redress arrangements.

[51] **Sandy Mewies:** I would have thought that our job, in many ways, is to facilitate this Measure in any way that we can. If concerns are addressed, we are facilitating the Measure rather than stopping it. Would you agree?

[52] **Ms Powell:** Yes.

[53] **David Lloyd:** A oes unrhyw gwestiwn arall? Nac oes. Diolch, Kay, am drafodaeth hynod ddiddorol, am gyflwyniad graenus ac am ateb y cwestiynau yn dda iawn. **David Lloyd:** Are there any further questions? No. Thank you, Kay, for a very interesting discussion, an excellent presentation and for answering the questions excellently.

ANNEX F

Extract from the transcript of the Subordinate Legislation Committee meeting 16 October 2007 - Discussion with Minister for Health and Social Services Edwina Hart AM MBE

Y Mesur Arfaethedig ynghylch Gwneud lawn am Gamweddau'r GIG (Cymru) 2007: Trafodaeth gydag Edwina Hart AC MBE, y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol

The NHS Redress (Wales) Measure 2007: Discussion with Edwina Hart AM MBE, Minister for Health and Social Services

[1] **David Lloyd:** Dyma brif eitem y cyfarfod a chroesawaf Edwina Hart, y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol, i'r cyfarfod i roi tystiolaeth. Byddwch yn ymwybodol o'r cefndir, ond af drwyddo eto ar gyfer y cofnodion. Yr ydym, fel Aelodau, yn parhau i drafod priodoldeb y pwerau a roddir gan y Mesur arfaethedig ynghylch Gwneud lawn am Gamweddau'r Gwasanaeth Iechyd Gwladol (Cymru) 2007 i wneud Gorchmynion a rheoliadau.

[2] Byddwch yn ymwybodol y bu inni gytuno'n drawsbleidiol mewn Cyfarfod Llawn cyn toriad yr haf fod hwn yn syniad da. Trafod manylion sut i ddod â'r pwerau hynny i rym yr ydym yn awr. Byddwch yn cofio inni drafod â Kay Powell o Gymdeithas y Cyfreithwyr yr wythnos diwethaf. Mae hefyd yn bwysig inni nodi y bu inni benderfynu yn y cyfarfod ar 25 Medi, yn unol â'n cylch gwaith o dan Reol Sefydlog Rhif 15.6, y byddem yn craffu ar briodoldeb y pwerau, gan ei bod yn ymddangos nad oedd yn bosibl ar y pryd pasio'r Mesur heb archwilio yn ddyfnach.

[3] Yn y nodiadau a ddsbarthwyd i chi eisoes, ceir crynodeb byr o'r prif bwyntiau a wnaed mewn dau gyfarfod blaenorol, er gwybodaeth. Byddwch hefyd wedi cael rhagor o fewnbwn gan Gymru Yfory, yn ogystal â rhai

David Lloyd: This is the main item for this meeting, and I welcome Edwina Hart, Minister for Health and Social Services, to the meeting to give evidence. You will be aware of the background, but I will go over it once again for the minutes. We, as Members, are still discussing the propriety of the powers conferred under the proposed National Health Service Redress (Wales) Measure 2007 to make Orders and regulations.

You will be aware that there was cross-party agreement in Plenary before the summer recess that this is a good idea. We are now discussing the detail of how to introduce these powers. You will recall that we had a discussion with Kay Powell from the Law Society last week. It is also important to note that we decided in our meeting on 25 September, in accordance with our terms of reference under Standing Order No. 15.6, that we would scrutinise the propriety of those powers, given that it appeared at the time that it was not possible to pass this Measure without undertaking further investigation.

In the notes that have already been distributed to you, there is a short summary of the main points that were made in two previous meetings, for your information. You will also have received more input from Tomorrow's

cwestiynau pellach y mae'n awgrymu y gallem eu gofyn.

Wales, as well as some further questions that it suggests we could ask.

8.20 a.m.

[4] Dylech nodi ateb y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol, wedi imi ysgrifennu ati. Yr ydym wedi dosbarthu'r ymateb ysgrifenedig yn sail i'r hyn y bydd hi'n ei ddweud heddiw o ran sut y mae hi'n meddwl ynglŷn â symud y Mesur hwn yn ei flaen. Heb fwy o drafod, estynnaf gyfarchion eto at ein gwestai, Edwina Hart, y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol. A ydych chi, Weinidog, am ddweud rhywbeth, yn fyr, ac wedyn symudwn ymlaen at gwestiynau Aelodau?

You should note the response of the Minister for Health and Social Services, after I had written to her. We have distributed that written response so as to form the basis to what she will say today about how she intends to take this Measure forward. Without further ado, I extend a warm welcome again to our guest, Edwina Hart, the Minister for Health and Social Services. Minister, do you wish to say something briefly, and then we will move on to questions from Members?

[5] **The Minister for Health and Social Services (Edwina Hart):** Thank you very much, Chair. I hope that my letter goes some way towards clarifying the position for the committee. It was never my intention to ride roughshod over everything; it was always my intention, as I indicated in Plenary, to consult on various Measures. I think that the work that we are doing currently with the working groups indicates how we are taking the sector's views into account as we deliver further Measures in this area.

[6] **David Lloyd:** Diolch yn fawr, Weinidog. Gyda chymaint â hynny o ragymadrodd, yr ydym yn gofyn am gwestiynau.

David Lloyd: Thank you, Minister. With that amount of preamble, we are now seeking some questions.

[7] **Sandy Mewies:** Minister, thank you for the letter, which addressed many of the points that had been raised. One issue was that some people wanted to see the draft regulations alongside the Measure. You have said, in your letter, how you intend to deal with that at this stage. Do you have any thoughts on what will happen in the future?

[8] **Edwina Hart:** Yes. I think that it is important to recognise that whatever we do on this Measure will not set a precedent, because how we in Government deliver Measures will be different across the piece. We must also recognise that some of the Measures that have been introduced will have been subject to prior consultation and some will not, as you are already aware, as members of the Subordinate Legislation Committee.

[9] It is important for us to recognise that this is the first set of regulations to establish the arrangements, and they are therefore likely to be comprehensive and draw on the provisions and particularly the details in the

Measure. As you know, I propose an amendment to the Measure at Stage 2 to subject any regulations dealing with qualifying services under section 1(5) of the Measure while assessing redress under section 13 to the affirmative procedure, which goes a long way towards dealing with some of the issues. The remaining powers are largely administrative in nature, and we have to recognise that. A proportionate level of scrutiny of these issues can be obtained by the use of the negative resolution procedure, given that it still comes before the committee. Therefore, I think that we can deal with those issues in that way.

[10] It is important that we recognise that I have advised the committee of my intention to consult fully on the regulations when they are ready—I have made that commitment. A broad range of stakeholders are already involved in the development of the policy agenda, and one of the key issues will be the information that we make available to the public as a part of this. That will be developed and consulted upon. I am taking the Measure through by consulting with everyone and trying to take their views into account. This is quite a difficult Measure in some respects, but, on the other hand, we also need to recognise that it is a Measure that the public expects us to deal with. Sometimes, there are other interested parties that do not necessarily want government to take forward such Measures, as it might impinge on their livelihoods.

[11] **Eleanor Burnham:** I note that in the last paragraph on page 2 of the 'Project Progress Report', you say that the group of stakeholders will be making its interim recommendations in January 2008. My question is to you and to the Chair. How does that help us if we are following a slightly different timetable? I presume that we will be finishing our discussion before Christmas and so, if we have to wait until January for the recommendations, what use can we make of them? As far as I can see, it would probably be too late to take the group's views into consideration. It is not a criticism; it is a genuine question, because we are in Stage 1 of our first Measure—or 'swimming in custard', as I call it.

[12] **Edwina Hart:** I assumed that the committee would look at the consultation responses when the Measure reached Stage 2. I assume that that is allowed. I look to you, Chair, for advice and guidance. I very much hope that the committee can take into account everything that comes through from the various groups when it looks at the further issues arising.

[13] **David Lloyd:** There is also a Measure committee looking just at the Proposed NHS Redress (Wales) Measure 'simultaneously at the same time', as we say in Swansea. I meet the Chair of that Proposed NHS Redress (Wales) Measure Committee, Jonathan Morgan, regularly to co-ordinate responses. We are all copied in to the correspondence from the Finance Committee as well because some disquiet has been expressed in that committee.

[14] **Eleanor Burnham:** Are you happy, Minister—through the Chair, of course—that we will be able to address some of the comments made by the

legal fraternity?

[15] **Edwina Hart:** Yes, I very much hope that we can address the comments that have been made—and not only comments about the law. I am well aware of the concerns expressed by the British Medical Association, which I have spoken directly to it about. I understand the issues about primary care, and when we look into the Measure, first in relation to secondary care, and see what lessons and experience have been learned, we will then look at it in terms of primary care, and we will certainly consult with the likes of the BMA on how we take further work forward.

[16] **Janet Ryder:** I am sure that you are aware that much of the evidence, especially from Cymru Yfory, was to do with striking a balance between the power held by you, as Minister, and the power held by the rest of the National Assembly. Given what you have said in committee, would you be happy if, after due consideration, this committee were to consider making recommendations to you? Would you be mindful of those recommendations if, perhaps, they included a suggestion that the bulk of that power remain with the National Assembly, where possible, rather than in your hands?

[17] **Edwina Hart:** We have to look at the affirmative and the negative procedure. In the case of matters of principle, you would expect those to follow the affirmative procedure. However, if a set of regulations was required only to change amounts, for example—and I will not use the amounts in the Measure—so that a sum of, say, £5,000 needed to be increased in line with inflation, that would be an entirely appropriate step for a Minister to take, using the negative procedure. In my response to the letter from the Chair of this committee, I have indicated that I am very open to any suggestions, whether made by the Subordinate Legislation Committee or other Assembly committees, about changes that will make the legislation function better. My role and function as Minister is to take on board Members' views and ensure that I maintain cross-party support for the principles behind this legislation. The devil, of course, will be in the detail.

[18] **Janet Ryder:** To take that a little further, the day may come, Minister, when you are not holding the health portfolio, and this responsibility will fall on other Ministers. They will therefore have the ability to bring forward regulations. If those regulations are allowed to go through without any consultation or further scrutiny, some Ministers may be able to make considerably radical changes. I think that we all accept that inflationary rises represent a non-substantive change, and may need to happen regularly. However, do you accept that some limitations may be needed on making substantive changes at some point in the future? Perhaps it is at this point that we need to consider what kind of mechanism needs to be in place so that the Assembly has a voice in that and can influence the regulations as they come forward?

[19] **Edwina Hart:** To be absolutely truthful, I think that Cymru Yfory has overreacted to these regulations. We have to recognise the balance between the Executive and the parliamentary side, in how matters are dealt with. We

need to recognise that many things are done using the negative procedure in Parliament. This is taking it a stage further, in that we are using the affirmative procedure. I am suggesting that we look at the affirmative procedure for Stage 2, but maintain the negative procedure for the purely administrative side. We do have scrutiny on that side, too. This morning, you will have scrutinised this Measure as part of your deliberations, as such matters will always come before you, and there is always a specific Assembly committee to consider and raise points about a Measure, even if it follows the negative procedure. It is also up to Members, is it not, to see what Government proposals are going through? I am trying to strike the right balance in this area, and I will take on board matters that come from this committee.

8.30 a.m.

[20] **Alun Davies:** Thank you for that answer, Minister, as it addresses some of the issues that I was going to raise. The evidence that we have received, not only from Tomorrow's Wales, but also from the Law Society last week, has been quite striking, given the concerns about the principle of framework powers that you are taking as a Minister. In terms of legislating, it is correct, and I do not think that anyone has an issue with a Minister or the Executive taking powers to implement law—that is clearly required. However, there is a difference between taking those powers and taking a power to determine how that law will look, because that is the role of a legislature rather than of the Executive. That is the area that caused most concern. I accept what you said about consultation on the regulations and the opportunities that will arise for this committee and the Measure committee to consider further proposals that you will make at Stage 2. However, that does not answer the fundamental question about the nature of legislation that we will pass in the Assembly, because the taking of considerable powers as an Executive in itself sets a precedent for further Measures in the future. How do you respond to those criticisms?

[21] **Edwina Hart:** I do not think that my Measure sets a precedent—every Measure must be looked at on the basis of what it is. On the specific issue of the conversion of framework power to an Assembly law-making power, which is one of the issues that was raised, there was no assumption that these powers would be handed back to the Welsh Assembly Government and there is no evidence to suggest such a motive. Indeed, if we look at the record, during the passage of the NHS Redress Bill, Department of Health Ministers gave assurances that the future exercise of framework powers would be subject to rigorous scrutiny of the Assembly. The fact that the Measure is enabling in style is dictated by the nature of the subject, and it does not exempt it from scrutiny in any way whatsoever. I understand the Law Society's concerns, but I also understand the concerns of the general public, who want a simple system in place on NHS redress. No disrespect to the lawyers present, but lawyers sometimes apply their case on certain issues when perhaps they do not want legislation of this nature to come through.

[22] **Andrew R.T. Davies:** It struck me that the two witnesses that we have had before us have shown a total and united concern about the Measure. I

hear what you say about the vested interests of the Law Society but when we look for advice, we ultimately turn to solicitors for it. Why was more consultation not done before the Measure was put forward so that there was more meat on the bone, as it were, so that we could understand more about what was going on? From what I can see, there was very little consultation before the Measure came forward. I appreciate that the scrutiny continues as the Measure goes through the Assembly, but if people felt more included in the Measure, surely there would have been a better feeling for the Measure among the professional bodies and the witnesses who have provided evidence? Everyone is supportive of the Measure and what it seeks to do, but it seems that there was not much input from the people who should have been consulted in the first place.

[23] **Edwina Hart:** With regard to consultation, we must look at the timing of the introduction of this Measure. That did preclude consultation on the detailed policy, and there was always going to be a potential risk of criticism, which subsequently emerged, from the Law Society. We are developing the detail with our 'Putting Things Right' project. I acknowledge that is on a slower track, and you have seen the paperwork in relation to what I have written to Dr Dai Lloyd. In that, I am developing the issues that will frame the Measure in the future.

[24] I am fully involving stakeholders in policy development in a meaningful way, and there will also be full consultation on the regulations with all the parties. This is one of the first Measures that we have taken through. I will learn valuable lessons from this for any other Measures that I will take through in relation to the health service, and I value the evidence that you have taken and I will take it into account for anything in future. However, I think that I am taking the correct approach now in taking this forward in the way that I indicated in my letter to Dr Lloyd.

[25] **Andrew R.T. Davies:** Will there be full consultation on the regulations, because one of the criticisms was that, once you had the powers and the Measure, you could regulate as you saw fit?

[26] **Edwina Hart:** I have already indicated in Plenary, when I introduced the Measure, that there would be full consultation on the regulations. I would be a very foolish Minister if I did not consult on these regulations because, ultimately, we have to make the legislation work, and that is the important thing.

[27] **David Lloyd:** Alun wants to come back on that before Paul comes in.

[28] **Alun Davies:** Do you not agree, Minister, that there is a real difference between public consultation and parliamentary scrutiny?

[29] **Edwina Hart:** Yes, and we are undertaking parliamentary scrutiny today, and I will be appearing before the Health, Wellbeing and Local Government Committee for the same purpose in a few weeks' time.

[30] **Alun Davies:** The other issue that I wanted to come back on is that of a precedent being set. You have said twice now that this does not set a precedent in any way. I am not sure that that is a sustainable argument because, by passing the Measure in this way, you do set a precedent. I cannot see how it is possible to argue that this Measure does not set a precedent in terms of handing considerable power to the Executive.

[31] **Edwina Hart:** I do not think that it sets a precedent; Measures must be looked at on an individual basis, and I do not believe that this sets a precedent. We just have differing views on this.

[32] **Paul Davies:** Following on from Alun's point, witnesses from Tomorrow's Wales and the Law Society drew our attention to the fact that, if this proposed Measure were being considered by Parliament rather than the Assembly, it would raise concerns on the part of the Delegated Powers and Regulatory Reform Committee of the House of Lords due to its being a skeleton Bill. Do you accept that?

[33] **Edwina Hart:** No. We are dealing with it in the Assembly in the way in which we think is most appropriate. What happens in other places is not a concern for me.

[34] **David Lloyd:** I wish to flesh out part of your reply in the letter to me. How advanced is the work of drafting the regulations that are proposed under the Measure? Can you give us some detail about that? Is it possible for Members to see the latest drafts as work in progress, as it were, at each stage? What constitutes a less-serious case and what are your thought processes in moving away and putting some detail on the skeleton, as it were?

[35] **Edwina Hart:** I very much hope that we will be in a position, when we have the stuff that comes through from the various groups, to look at some of the regulations. At the earliest stage—I will ask my officials to look at the timetable for this—I will invite you to comment on the drafts as they arise. I very much hope that we will be in a position in 2008 to have all these matters resolved, with consultation and so on, but, as you will appreciate, this is a difficult and long process.

[36] **David Lloyd:** A oes unrhyw **David Lloyd:** Are there any further sylwadau eraill? comments?

[37] **Eleanor Burnham:** I am concerned about and interested in the timetable for the commencement of the Measure. I know that we are in the throws of dealing for the first time with an LCO and a Measure or whatever, as you mentioned, but do you have a timescale?

[38] **Edwina Hart:** I have not finalised my timetable fully yet. As soon as I do so, I will advise the committee.

[39] **David Lloyd:** Gwelaf nad oes **David Lloyd:** I see that there are no

cwestiynau eraill. Diolchaf i'r further questions. I thank the Minister
Gweinidog am ei chyflwyniad ac am for her presentation and for
ateb y cwestiynau mewn ffordd mor answering the questions so
raenus. eloquently.

ANNEX G

SUBORDINATE LEGISLATION COMMITTEE

PROPOSED NHS REDRESS MEASURE – POWERS FOR THE WELSH MINISTERS TO MAKE DELEGATED LEGISLATION

(1) Section conferring power	(2) Section setting out kind of provision to be made	(3) Description of provision to be made by the power	(4) Assembly Procedure (Proposed Measure as laid)	(5) Assembly Procedure (Minister's offer) -if different from column (4)	(6) Assembly Procedure-Recommended by Committee
1(1)	1(4)(b)	Specifying bodies or persons (in addition to health care professionals) for whose acts or omissions redress may be provided under the scheme.	Affirmative (first regulations) then negative		Affirmative (all regulations)
1(1)	1(5)	Specifying what services are “qualifying services”.	Affirmative (first regulations) then negative	Affirmative (all regulations)	Affirmative (all regulations)
1(1)	2	Redress under the regulations including the assessment of and limits on compensation and the provision of other remedies.	Affirmative (first regulations) then negative		Affirmative (first regulations) then negative
1(1)	3	Accessing redress, including who may claim, how to claim, time limits for claiming and circumstances in which no claims may not be	Affirmative (first regulations) then	Affirmative (all regulations)	Affirmative (all regulations)

		made	negative		
1(1)	4	Imposing duties on those investigating or reviewing cases to consider if redress may be available and if so to take specified action	Affirmative (first regulations) then negative		Affirmative (first regulations) then negative
1(1)	5	Providing how redress is to be delivered, including how and by whom investigations are to be carried out, how settlement offers are to be made and considered, provision of reports of investigations and the exclusion of recourse to the courts when an offer is accepted.	Affirmative (first regulations) then negative		Affirmative (all regulations)
1(1)	6	Enabling the statutory time limits for bringing claims in the courts to be suspended whilst an application for redress under the scheme is being considered.	Affirmative (first regulations) then negative		Affirmative (first regulations) then negative
1(1)	7	Means by which free legal and expert advice is provided to those seeking redress	Affirmative (first regulations) then negative		Affirmative (first regulations) then negative.
1(1)	9	Enabling duties in relation to the operation of the redress scheme to be imposed on specified persons or bodies within the Health Service in Wales.	Affirmative (first regulations) then negative		Affirmative (first regulations) then negative
12(1)	12	Supplementary, incidental, consequential, transitional or saving provision, including modifications to Acts of Parliament and	Affirmative if regulations modify an Act of		Negative, unless contra- indicated by the content of

		Measures passed before (or in the same year as) this Measure	Parliament or an Assembly Measure, otherwise negative		the regulations
14(3)	14	Power to bring the Measure into force by Commencement Order.	None		None - Note: The Committee recommends that the Measure should not be commenced until the regulations are available for scrutiny

ANNEX H

Letter from the Minister for Health and Social Services Edwina Hart AM MBE to the Chair of the Subordinate Legislation Committee Dr Dai Lloyd AM

Edwina Hart AM MBE

Y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Our ref:

Your ref:

Dr Dai Lloyd AM
Chair,
Subordinate Legislation Committee
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25 October 2007

Dear Dai,

I would like to thank you and the Members of your Committee for inviting me to attend your meeting of 16th October to give evidence on the NHS Redress Measure and I hope you found my contribution to be of assistance. If I may, I would just like to follow up on one or two of the issues that were raised at the meeting.

I noted the concern of Members about consultation and in particular comments that, as there is no statutory requirement in the Measure to consult, there would be nothing to stop future Health Ministers making regulations and not consulting upon them. I agree that it will be important for consultation to be considered whenever regulations under this Measure are being made. However there are good reasons why a statutory requirement to consult is not necessary and might even be counterproductive.

There is a great deal of legislation in existence where the duty to consult is not spelled out, but where there would be a firm expectation that consultation would take place, in particular if

Ministers had already given an undertaking that there would be consultation. This is particularly true where the issue in question impacts either directly or indirectly on the rights of individuals. It is not necessary to spell that out on the face of the Measure and indeed to do so could create a misleading impression that in other cases where no such requirement is set out, there is no need to consult. In addition, Members will be aware of the long established practice of consultation that exists in Wales and that all parties in the Assembly are committed to consultation. This approach is so well established that if a future Minister failed to consult then it would be inevitable that they would be inviting objections from the Assembly, not to mention other bodies. I therefore would not propose to put such a provision on the face of this Measure, as I do not think it is needed.

The absence of draft regulations was also a matter raised by Members. Whilst I can understand Members' anxieties, it is important that the engagement with stakeholders that the Welsh Assembly Government is undertaking is allowed to continue and that we then take things in their proper sequence. As I indicated at the meeting, I fully intend to put the emerging work of the policy groups before the Assembly when it is available, which I expect to be in January, however the draft regulations will not be available within the timetable for the Measure. As I also said at the meeting, those regulations would in their turn come before your Committee before they are put to the Assembly for approval.

A handwritten signature in black ink, appearing to be 'L. Jones', written in a cursive style.