



Cymdeithas y Cyfreithwyr  
The Law Society

Ms S Wilkins  
Committee Clerk  
Legislation Office  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

19 September 2007

Dear Sir,

**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.

Yours sincerely,

**E Kay Powell**

Solicitor / Cyfreithiwr

Policy Adviser / Ymgynghorydd Polisi

**The Law Society / Cymdeithas y Cyfreithwyr**

Capital Tower / Twr y Brifddinas

Greyfriars Road / Heol Y Brodyr Llwydion

Cardiff / Caerdydd

CF10 3 AG