



**Cynulliad Cenedlaethol Cymru
The National Assembly for Wales**

**Y Pwyllgor ar y Mesur Arfaethedig ynghylch
Gwneud Iawn am Gamweddau'r GIG
The Proposed NHS Redress (Wales) Measure
Committee**

**Cyfnod 2
Stage 2**

**Dydd Llun, 11 Mawrth 2008
Monday, 11 March 2008**

Cynnwys
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2007—Cyfnod 2: Ystyried Gwelliannau
Proposed NHS Redress (Wales) Measure 2007—Stage 2: Consideration of
Amendments

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal,
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee.
In addition, an English translation of Welsh speeches is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Edwina Hart	Llafur (Y Gweinidog dros Iechyd a Gwasanaethau Cymdeithasol) Labour (The Minister for Health and Social Services)
Helen Mary Jones	Plaid Cymru The Party of Wales
Val Lloyd	Llafur Labour
Jonathan Morgan	Ceidwadwyr Cymreig (Cadeirydd y Pwyllgor) Welsh Conservatives (Committee Chair)
Jenny Randerson	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Pat Vernon	Pennaeth, Cangen Cynnwys Cleifion a'r Cyhoedd y GIG, Llywodraeth Cynulliad Cymru Head, NHS Public and Patient Involvement Branch, Welsh Assembly Government
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Swyddogion Gwasanaeth Seneddol y Cynulliad yn bresennol
Assembly Parliamentary Service officials in attendance

Joanest Jackson	Cynghorydd Cyfreithiol Legal Adviser
Lewis McNaughton	Dirprwy Glerc Deputy Clerk
Siân Wilkins	Clerc Clerk

Dechreuodd y cyfarfod am 9.31 a.m.
The meeting began at 9.31 a.m.

Cyflwyniad, Ymddiheuriadau a Dirprwyon
Introduction, Apologies and Substitutions

[1] **Jonathan Morgan:** Good morning. I call the committee to order. Before we proceed with the main item of business this morning, I have a few housekeeping items to cover. I remind those in the public gallery that the committee operates bilingually and that headsets are available in order to hear the translation, or the proceedings more clearly. Channel 0 provides a verbatim broadcast while channel 1 provides the translation. I ask committee members and members of the public to switch off mobile phones, pagers and BlackBerrys. If there is any sort of emergency, please follow the advice of the ushers, who will escort everyone from the room.

[2] I also welcome the students from Cardiff Law School who are joining us this morning. We will probably have a fairly brief meeting, because we are in the middle of Stage 2 proceedings with regard to the NHS Redress (Wales) Measure 2007, and we only have one amendment to consider this morning. It is a great pleasure to welcome all visitors, but

particularly those from the law school.

[3] I have received no apologies, so there are no substitutions.

9.32 a.m.

**Y Mesur Arfaethedig ynghylch Gwneud Iawn am Gamweddau'r GIG (Cymru)
2007—Cyfnod 2: Ystyried Gwelliannau
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[4] **Jonathan Morgan:** You have been provided with the marshalled list of amendments. I call and propose amendment 17 in my name, which is in a group of its own.

[5] I wish to make a few remarks as to why this amendment has been tabled. It relates to section 7, line 36 of the Measure. The Measure, as it stands, states that:

[6] 'Subject to subsections (2) and (4), the regulations may make such provision as the Welsh Ministers think fit',

[7] with regard to legal advice. The amendment would leave out the words 'may make such provision as the Welsh Ministers think fit' and insert the words 'must provide'. There are a number of reasons why this amendment has been tabled. If we consider the evidence that we took during the Stage 1 proceedings, we were told by a number of people about the necessity for legal advice throughout the process. The recommendation of the working group that the Minister set up reflects what is in the Measure, namely that legal advice must be provided at certain stages: when an offer is made or refused, or an offer is accepted but liability is not accepted. So, the working group has accepted many points.

[8] However, from the evidence given to us, which we did accept, it is clear that a number of organisations thought that advice should be provided all the way through. In fact, the Wales Council for Voluntary Action strongly expressed the view that legal advice and support for patients under redress should be provided at all stages. It was concerned that the provision of free legal advice and other expert advice and advocacy support would be available only as a Minister sees fit. Furthermore, the Welsh board of the community health councils focused on the value of providing advice and assistance at the start of the redress process, and considered that there is a danger that patients could get lost in the process, so it would be more helpful if patients received guidance and had an opportunity to talk through the process right at the beginning.

[9] I had a huge degree of sympathy with the view that was being expressed, because if you state that advice must be provided at certain stages, in my view, it must be provided at the outset. It is going to be very confusing for people who do not understand how redress works. Some people will be confused as to what they might be entitled to. They may not understand how the process operates, and they might not have the full knowledge and understanding as to whether or not they could have a claim with a qualifying liability in tort.

[10] On the basis of the evidence that we were given, I felt it necessary that this amendment be inserted so that that advice would be provided as a right at the outset. If people are to have confidence in the purpose of redress and the redress arrangements, that level of support should be forthcoming right at the beginning. For those reasons, I have tabled this amendment. Are there any further comments from Members before I ask the Minister to respond?

[11] **Jenny Randerson:** As the Member supporting this amendment, if I dare to say it, I venture that the Minister will say in response that she is minded to do this via regulations. I hope that she will say that she agrees with the amendment entirely, but it is likely that she will say that she will achieve this through regulations—and I have no reason to doubt that. However, as per our discussion last week, it is not the current Minister I am worried about; it is her successors in five, 10 or 20 years' time. This is an issue of principle, which should be enshrined in the Measure. Some of the regulations will be subject to the affirmative procedure only the first time around, and therefore issues of detail, which are what regulations should deal with, will not come back to the Assembly as a whole when the regulations are changed. Look at our legal system in the UK; we enshrine the right to legal advice in primary legislation. That should be the principle here with regard to the provision of legal advice.

[12] There is a very practical reason for enshrining this in the legislation, which is that the danger is that, in times of cost pressures, the Government will be under pressure to cut back at the edges. It will not necessarily be this Government, because the Minister has gone into this with a very open mind concerning what it will cost, and I regard the financial details we have now been provided with as realistic. I know that the Minister takes a realistic approach to this, but, in future, there may be a Minister who is not quite so devoted to the principle of this, who is under pressure to cut back within the health budget, who would see this as one of the edges where things could be trimmed back. That is why the principle should be enshrined in the Measure.

[13] **Helen Mary Jones:** I can see the intention of the amendment, and the principle that people will need advice at the beginning of the process is one that I would support. I will be interested to hear what the Minister says, but my worry is that part of the point of the Measure is to take the lawyers out of the system, to a certain extent, to make it less complex, less legalistic and less expensive. If there must be legal advice all the way through, my worry—and I am not sure what the effect of the amendment would be—is that we would have created a new system that was just as complex and legalistic as the one that we were trying to replace.

[14] So, I am keeping an open mind at the moment, and I will listen to what the Minister says. I can see what we are trying to get at: people should not be disadvantaged in any way by taking this route as opposed to going straight into a more traditional legal process. I also take on board Jenny Randerson's point that regulations can be changed, although, arguably, if a Minister wanted to undermine this principle, he or she could also try to amend the Measure. So, including this in the Measure would not protect against the actions of a future Government that did not want this to work in principle, because it could simply table a motion to amend the Measure, if it wanted to be that difficult about it—although it would be easier for it to amend regulations. I have a slight sense that this is using a sledgehammer to crack a nut, but I will reserve judgment until I hear the Minister's response.

9.40 a.m.

[15] **Val Lloyd:** I listened with interest to the arguments made in favour of this amendment, and I feel the same as Helen Mary. For me, the crux seems to be that legal advice be available at crucial stages. I hear the arguments for that, which were made very cogently, but I feel that there are safeguards in place. So, I, too, will wait to hear what the Minister says.

[16] **The Minister for Health and Social Services (Edwina Hart):** Helen Mary has hit on the relevant point, which is that the intention of the Measure was to get away from the legalistic nature of the current arrangements while building in sufficient safeguards so that people know that they are being treated fairly. I can understand the principle of the amendment and why people want to put it in the Measure, but it has the unintentional effect of potentially introducing legal and expert advice at every step of the process, which is what we wanted to get away from. Under section 8, people will get more general independent help

and advice as part of the arrangements. Legal advice will be required for the making or acceptance of an offer and this is quite clearly set out in section 7(2).

[17] Prior to introducing the legislation, there was a worry that some people could simply explore whether they had a case, using this almost as a free legal advice system, and then make their case through the usual channels. That was a concern that we explored, and so we looked at slightly different wording. We feel that section 7(4) deals with the instruction of medical experts and so the first set of regulations passed under section 7 will cover it, which will be subject to the affirmative procedure. So, on Jenny's point, I will indeed be dealing with these issues through regulation. I am reluctant to oppose the amendment as I understand the principle of it, but perhaps Helen is right, and it is using a sledgehammer to crack a nut. I think that there is an issue around this, but there is sufficient provision in the legislation as it stands for people to have access to the help and advice that they require.

[18] **Helen Mary Jones:** Minister, I understand what you are saying about people using this as perhaps an initial stage to suss out where they stand, but I also take the point about people needing to know the implications of what they are doing at the outset. If we do not carry this amendment today—and it could be tabled again when the Measure is brought to Plenary—would you consider looking again at whether it is appropriate for legal advice to be available at the outset? I see what you mean about not wanting this to be a free clinic for people, but I also see that people need to get proper advice as to whether they are going down the right route in the first place.

[19] **Edwina Hart:** Advice will be available at the start of the process, and people will be able to have the type of advice that is expected at the start of the process. It is only the key points that will be looked at when an offer is made, which is when they will get legal advice, for or against their case. I am happy to look further at issues, but the trouble with this amendment is that it has that unintentional effect of bogging down the system, by offering advice at every stage, which I do not think is necessarily appropriate. If a case is taken through in this legalistic manner at every stage, there will be no improvement on the old processes. That is my concern. What we wanted was a piece of legislation that was far more accessible for people seeking redress from the NHS and, to me, that is the key element. So, under section 8 we will be looking at how the arrangements will be formed, and I will also then look at issues through regulations. You have my assurances that it is not my intention for people not to have advice; it is just a question of how the amendment is framed.

[20] **Jonathan Morgan:** Thank you, Minister. It will come as no surprise to you to hear that I do not agree with you. If you are keen on people being able to access advice and assistance before an application for redress is made, there may be reasons why that advice should be legal advice and not the advice of someone who works for a charitable organisation on a voluntary basis, for example. There may be good reasons why legal advice should be available at the outset. Look at the detail of the Measure as it stands and compare that with the advice that we received from the working group, in paragraph 150 of our Stage 1 report:

[21] 'The Group highlighted the following key stages: at the conclusion of an investigation undertaken by an NHS trust; where a breach of duty is accepted, but causation and/or prognosis of the patient requires further expert opinion; where an NHS trust has made an ex gratia offer without making an admission of liability; or where an offer of settlement is made.'

[22] So, we are talking about stages at a developed point within the redress scheme; we are not talking about advice at the start. It is a process that could be quite lengthy. The working group advised that legal advice be provided at a much later point in the redress scheme. That concerns me, because there may be points before that at which legal advice could be required. You are talking about legal advice at the conclusion of an investigation,

which is virtually at the end of the whole process. That reflects what is in the Measure, because the Measure says:

- [23] ‘access to legal advice without charge in relation to—
- (a) any offer that is made,
 - (b) any refusal to make such an offer; and
 - (c) any settlement agreement.’

[24] So, that is, effectively, at the end of the process. There is no requirement to provide legal advice earlier in the process, and that should be addressed, which is why the amendment is tabled. So, I do not accept that merely providing assistance under section 8(2) covers that; we should define that more concisely by saying that legal advice could well be what is required for people to make informed decisions about the process on which they are about to embark. At the moment, the only requirement is later on in the process, which really concerns me.

[25] The question is that amendment 17 be agreed to. Are we all agreed? I see that we are not, and therefore I call for a vote.

Cynhaliwyd pleidlais drwy ddangos dwylo.
A vote was held by show of hands.

Gwrthodwyd gwelliant 17.
Amendment 17 defeated.

[26] As amendment 17 was the only amendment tabled for consideration today, that concludes the consideration of amendments at Stage 2. Sections 1, 2, 7, and 8 are therefore deemed agreed.

[27] Stage 3 begins tomorrow, and proceedings in Plenary are scheduled for Tuesday, 6 May. This means that the deadline for tabling amendments to all sections of the Measure will be 5.30 p.m. on 29 April. Although it is not envisaged that the committee will need to meet again, it will not cease to exist until the Measure has been passed or rejected by the Assembly. Therefore, the meeting is closed. Thank you for your attendance.

Daeth y cyfarfod i ben am 9.48 a.m.
The meeting ended at 9.48 a.m.