

NHS REDRESS (WALES) MEASURE 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1 - Power of Welsh Ministers to make regulations in respect of NHS Redress

2. *Subsection (1)* sets out the general principle that Welsh Ministers may make regulations to provide for NHS Redress arrangements which will enable matters to be settled without having to go to court where a qualifying liability in tort arises. *Subsection (2)* provides that the arrangements will apply to cases where there is liability in tort arising out of health services provided as part of the National Health Service in Wales, or elsewhere provided that it is commissioned as part of the health service for a person resident in Wales. As set out in *subsection (3)*, the arrangements will apply to liability in tort arising on the part of:
 - NHS Trusts in Wales;
 - Local Health Boards;
 - Special Health Authorities;
 - Welsh Ministers;
 - Any body or person providing or arranging for the provision of services in Wales as a result of an arrangement with any of the above bodies. This means that general practitioners; dentists, pharmacists and ophthalmologists providing NHS care or independent hospitals commissioned to provide care as part of the NHS may incur liability.
3. *Subsection (4)* provides that liabilities in tort must be in respect of personal injury or loss arising out of a breach of duty of care, in connection with the diagnosis of illness or of care and treatment provided. Therefore redress will normally apply in relation to patients receiving NHS care. *Subsection (4)* specifically provides that this liability will be owed as a result of an act or omission by a healthcare professional, but the Welsh Ministers have the power to specify any other body or person who might also incur liability.
4. Arrangements would not be restricted to claims by patients. So long as claims otherwise fall within the definition in *subsection (4)*, it may cover claims that could be brought following the death of a patient by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 (which provides that where a person has a cause of action and that person dies, the action may be pursued for the benefit of his estate). It may also cover claims brought by the dependents of a deceased patient under the Fatal Accidents Act 1976. This provides that where a person's death is caused by any wrongful act, neglect or default which is such that, had death not occurred, it would have entitled the person injured to maintain an action and recover damages in respect of the injury, liability to an action for damages continues for the benefit of dependents of the person who died, such as a wife, child or civil partner.

5. *Subsection (6)* provides that people working under a contract of employment will not be personally held liable for negligence, rather it would be their employer who would be liable for their actions.

Section 2 - Redress under the regulations

6. This section sets out in more detail the type of provision that Welsh Ministers may make in respect of redress arrangements. *Subsection (1)* provides that Welsh Ministers may make whatever arrangements in regulations they think appropriate about redress, subject to the provisions of *subsections (2), (3) and (6)(b)*. Those subsections state that the regulations must provide:
 - For redress to comprise of the making of an offer of financial compensation; giving explanations, written apologies and a report on action and learning and that these can be provided in any combination (*subsection (2)*);
 - That the arrangements must not apply to a case which is already or which has been the subject of legal proceedings (*subsection (3)*) and
 - That any regulations which provide for financial compensation must specify an upper limit on the amount to be offered in respect of pain and suffering (general damages), if no overall upper limit is set (*subsection (6)(b)*). It is currently envisaged that any arrangements would seek to set an overall limit encompassing general and special damages to ensure that more complex and high value claims are dealt with by claims specialists and not through the local arrangements.
7. *Subsection (4)* provides that the regulations may allow for compensation to be offered in the form of remedial treatment and/or financial compensation, set out in a contract with the patient. This would provide real guarantees to the patient that they will receive the remedial care they need, within a specified time. If financial compensation is to be offered, then *subsection (5)* provides that the regulations may specify the matters in respect of which financial compensation may be offered and how the assessment of compensation is to be carried out. *Subsection (6)(a)* provides that an upper limit may be placed on the amount of financial compensation.

Section 3 - Accessing redress

8. This section makes provision for Welsh Ministers to make whatever arrangements they see as appropriate about accessing the redress arrangements. *Subsection (2)* provides that the regulations may specify who may access the arrangements. This might be the patient or someone on their behalf, or the organisation concerned might initiate the arrangements on the patient's behalf and with their consent. The regulations may also make provision for time limits in relation to accessing redress.

Section 4 - Duty to consider potential access to redress arrangements

9. This section provides that Welsh Ministers may specify in regulations that any body or person who is reviewing a specific case relating to a patient should actively consider whether redress may be available in relation to that case.

Section 5 - Method of delivering redress

10. This section sets out in more detail the type of provision Welsh Ministers may make in regulations for how the arrangements will operate. *Subsection (1)* provides that Welsh Ministers may make whatever arrangements in regulations they think fit about how redress is to be delivered, subject to the provisions of *subsections (3), (5) and (6)*. Those subsections state that the regulations must provide:
 - For time limits in respect of the investigation and conclusion of cases being dealt with under the NHS Redress arrangements; for the findings of any investigation to

be recorded in a report and for a copy of that report to be available to the person seeking redress (*subsection (3)*);

- For any settlement under the arrangements to include a waiver of the right to bring civil proceedings in respect of the same issues (*subsection (5)*); and
- That if legal proceedings are started in respect of the same issues, then the redress arrangements can no longer apply. In such cases, any investigation already started would have to be discontinued (*subsection (6)*).

11. *Subsection (2)* states that the regulations may provide for details around investigations and settlements. *Subsection (4)* provides that the regulations may specify that a copy of an investigation report need not be provided in certain circumstances.

Section 6 - Suspension of limitation period

12. The Limitation Act 1980 provides that a person cannot normally bring court proceedings for personal injury more than three years from the date on which the harm arose or the patient had knowledge of that harm. This section ensures that the regulations must provide for the suspension of any limitation period applying to cases that are being considered under the arrangements. In doing so, it means that patients will not be prejudiced or prevented from taking matters to court (if they choose not to accept any offer) by having to wait for the outcome of an investigation under the redress arrangements.

Section 7 - Legal advice, etc.

13. This section sets out that Welsh Ministers may make any provisions they think fit in regulations for the provision of legal advice or other services, including expert medical opinion, to people using the redress arrangements (*subsection 1*). The regulations must at the very least ensure that people have access to legal advice about any offer, refusal to make an offer or any settlement agreement (*subsection 2*). *Subsection (3)* sets out that the regulations may specify that whoever provides legal advice should be included in a list. *Subsection (4)* provides that if the advice of a medical expert is to be commissioned, then effectively this would be done jointly by the NHS body and the individual seeking redress.

Section 8 - Assistance for individuals seeking redress

14. This section places a duty on Welsh Ministers to arrange reasonable assistance for people seeking or intending to seek redress under the arrangements. *Subsection (4)* provides that the assistance should be independent of the person or body who is the subject of the complaint. This assistance is different from the legal advice which is provided for under Section 7 and is more akin to general assistance or advice for people who feel they may want to talk through their situation before taking further action or advocacy and representation at meetings, etc.

Section 9 - Functions with regard to redress arrangements

15. This section allows Welsh Ministers to set out in regulations the functions that any person or body in the health service in Wales shall have regarding the operation of the redress arrangements. In particular, *subsection (2)* sets out that these may include functions around accessing redress, making payments, monitoring and collection of data, etc.
16. *Subsection (3)* makes provision for the keeping of records and for the conferring on any body or person responsibility for overseeing that the arrangements are being carried out properly and ensuring that lessons are learnt. This section also requires the regulations to make provision requiring such body or person as is specified to publish an annual report about the cases it deals with and the lessons learnt (*subsection (4)*) and to have regard

to advice and guidance issued by Welsh Ministers (*subsection (6)*). The section also allows for regulations to provide for functions to be exercised jointly (*subsection (5)*).

Section 10 - Complaints

17. This section amends section 113(2) of the Health and Social Care (Community Health and Standards) Act 2003 to include complaints about the provision of redress arrangements. This means that people will have the right to complain about the administration of the redress arrangement (i.e. whether a decision was properly taken). This is not the same as disagreeing with a decision that has been properly made and there is no right of appeal in such situations. If the claimant disagrees with a decision that has been properly made, then they retain the right to take legal action.

Section 11 - Orders and regulations

18. This section makes provision about Welsh Ministers' regulation making powers under the Measure. In particular, *subsection (6)* provides that the affirmative procedure will be used on each occasion that regulations are made under section 12 that modify an Act of Parliament or an Assembly Measure and on each occasion that regulations make provision under sections 1(4)(b); 1(5); 3 and 5. In addition, the affirmative procedure will be used for the first set of regulations to make provision under sections 2, 4, 6, 7 and 9. In any case, the first set of regulations made under the Measure, irrespective of which sections are covered, will be made under the affirmative procedure.

Section 12 - Power to make further supplementary and consequential provision, etc.

19. This section allows Welsh Ministers to make any other related provisions to give effect to the Measure. In particular, *subsection (2)* allows Welsh Ministers to amend or repeal any Act of Parliament and statutory instruments consequential on changes required as a result of the regulations. The scope of these powers is limited by the extent of the Measure making power to amendments which are related to NHS Redress.

Section 13 - Interpretation

20. **Section 13** provides definitions for certain expressions used in the Measure.

Section 14 - Short title and commencement

21. This states the name by which the Measure will be known. It also makes provision for Ministers to commence sections at different times from each other.