



Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales

Subordinate Legislation Committee

## **The appropriateness of the subordinate legislation provisions in the Proposed Social Care Charges (Wales) Measure**

### **1. Standing Orders**

1.1 The Committee has the following powers under Standing Orders:

- Standing Order 15.6 (ii) states that the Subordinate Legislation 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 in 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’.

1.2 The purpose of this report is to inform the Assembly’s Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

### **2. Consideration**

2.1 On 30 September 2009 the Committee considered the Proposed Social Care Charges (Wales) Measure and received evidence from the Deputy Minister for Social Services, Gwenda Thomas AM.

### **3. Background**

3.1 The Welsh Government introduced the Proposed Social Care Charges (Wales) Measure to the Assembly on 29 June 2009. A Stage 1 Committee has been established to consider the general principles of the proposed Measure.

3.2 The Proposed Social Care Charges (Wales) Measure provides for the introduction of a new regime which will ensure that local authorities across Wales adopt a more consistent approach to charging service users for non – residential social care

services. The Measure is primarily an enabling Measure which will leave the detailed provisions to be set out in subordinate legislation and statutory guidance to be made under the Measure.

#### **4. Subordinate Legislation Making Powers and Procedures**

4.1 The proposed Measure contains a number of provisions which confer on the Welsh Ministers, a power to make regulations and orders in relation to certain functions under the proposed Measure. The power in each case is to be exercised by the Welsh Ministers by statutory instrument. The legislation with one exception will be subject to the **negative procedure**. The Explanatory Memorandum explains that this is due to the nature of the proposed subordinate legislation, being concerned primarily with the financial and administrative arrangements. The exception is that under Section 10 (3) and (4) (a) if the subordinate legislation seeks to amend an Act of Parliament or Assembly Measure it will be subject to the **affirmative procedure**.

4.2 The following provisions contain powers to make regulations:-

**Section 2 (2):** power to make regulations controlling and limiting the determination by local authorities of reasonable charge. Subsection (3) gives examples of the type of provision that may be included in regulations made under this section. This includes provision for setting out the maximum that a local authority may charge for a particular service or for any combination of services and provision for establishing a maximum hourly or weekly charge.

**Section 3 (1):** power to make regulations excluding certain categories of persons or services from charging.

**Section 4 (3) & (4):** power to make regulations governing the assessment of a person's means by the local authority.

**Section 4 (5) & (6):** power to make regulations concerning the determination of what is reasonably practicable for a service user, to pay in light of their means assessment.

**Section 5 (4) (e):** power to make regulations adding to the list of information to be provided to those on whom the local authorities decide to impose a charge.

**Section 6 (1):** power to make regulations for and in connection with the review of charging decisions taken by local authorities.

**Section 10 (3):** power by order to make provision that is necessary or expedient for the purposes of the Measure, or in consequence of, or to

give effect to, any provision of the Measure. Section 10 (4) provides that such an order may amend, repeal or revoke any provision of an Act of Parliament, an Assembly Measure or subordinate legislation. Where such an order amends an Act of Parliament or an Assembly Measure it will be subject to the affirmative procedure.

**Section 11 (3):** power for the Welsh Ministers to make an order to commence provisions of the Measure. As is normal practice for commencement orders, no procedure will apply.

## **5. Issues raised in evidence and recommendations of the Committee**

5.1 The Committee queried why the proposed Measure gives powers to Welsh Ministers to make Regulations and Orders, and whether this restricts scrutiny and debate on many areas. The Committee believes that more detail should be contained on the face of the Measure and makes recommendations to address this.

### Section 2: Maximum Charging

5.2 Whilst the Committee accepted the rationale for setting the level of a maximum charge by regulation since this would need regular updating, the Committee queried whether a formula for calculating the maximum charge should be included on the face of the Measure.

5.3 In response to this the Minister stated:

‘There is no formula as such. We are setting out a maximum charge of £50 for all services—that is the proposal..... However, if we were to use a formula and include it on the face of the proposed Measure, it would require another Measure to change it, which would complicate matters. It is far clearer and easier to rely on regulations to amend the maximum charge as and when necessary.’<sup>1</sup>

5.4 The Committee saw evidence submitted by the Wales Neurological Alliance to Legislation Committee 5, who are considering the Measure. This evidence stated that the Alliance:

‘expected the proposed Measure to either set a maximum charge or develop a formula that would be used to set charges. This would have given ... Assembly Members the ability to contribute to the debate as to

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<sup>1</sup> ROP, Paragraph 49 and 53, 30.09.09

what level of charges are reasonable for people wanting access to social care.’<sup>2</sup>

5.5 The Committee also noted that section 2(3)(e) on maximum charges sets out ‘in relation to a charge specified under (c), setting out a formula for determining the amount which must be considered the maximum reasonable charge’, as such the Committee feels that a formula for the maximum charge should be contained on the face of the Measure.

### **Recommendation 1**

**The Committee recommends that a formula for calculating the maximum charge appears on the face of the Measure. The Committee does not consider that this would restrict the Welsh Ministers ability to cap maximum charges at £50 per week, as suitable provision could be inserted into the Measure to use a formula in the alternative to a maximum charge. Given the framework nature of the section together with the financial impact it could have on those in receipt of social care services, the Committee further recommends that any regulations made under Section 2 of the Measure be subject to the affirmative procedure.**

### Section 3: Person and services excluded from Charging

5.6 The Committee questioned the Minister as to why details of the persons and service users exempt from charging does not appear on the face of the Measure. The Committee also queried whether this provision should be subject to the affirmative procedure to allow for debate by Members of the National Assembly.

5.7 In response to this the Minister stated:

‘...the ability to specify persons in respect of whom charging cannot be made has been left to the regulations. That is to allow for maximum flexibility in considering who those persons or groups should be..... We want maximum flexibility so that we can embrace as many groups and persons as possible, and to allow flexibility for this and future Governments.’<sup>3</sup>

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<sup>2</sup> Wales Neurological Alliance, written evidence to LC5, SCC21

<sup>3</sup> ROP, Paragraph 60, 30.09.09

5.8 The Committee also notes the evidence from the Wales Neurological Alliance to Legislation Committee 5, which states that:

‘the proposed Measure as drafted would allow the current Welsh Minister or future Welsh Minister to exclude groups of people who the government believe to be special cases without this decision being fully consulted by the National Assembly for Wales.’<sup>4</sup>

5.9 The Committee accepts the concerns of the Wales Neurological Alliance but notes the Ministers requirements for flexibility, and therefore thinks the affirmative procedure should be used in this instance.

### **Recommendation 2**

**The Committee accepts the Ministers reasons for not including details on the face of the Measure but given its framework, recommends that the provision under section 3 allowing Welsh Ministers to make regulations to exempt from charges certain persons and certain services should be subject to the affirmative procedure.**

### Section 10: Order and Regulations

5.6 The Committee is increasingly concerned by the framework nature of the Measures being proposed by the Welsh Assembly Government. The Committee questioned whether due to the framework nature of this Measure whether the first set of regulations made under the Measure should be subject to the affirmative procedure.

5.7 In response to this the Minister stated that she did not agree with this and that the one regulation subject to the affirmative procedure was satisfactory for this Measure.

### **Recommendation 3**

**Given the framework nature of the Measure, together with the potential impact it may have on those in receipt of social care services, the Committee recommends that the first set of regulations made under the Measure are subject to the affirmative procedure.**

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<sup>4</sup> Wales Neurological Alliance, written evidence to LC5, SCC21