Legislation Committee No.3

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Proposed Mental Health (Wales) Measure

Written Evidence submitted by Professor Phil Fennell

I am a Professor of Law at Cardiff University Law School. I have been a mental health lawyer for 35 years. I have written many books and articles on the subject. I served as specialist legal adviser to the Joint Parliamentary Scrutiny Committee on the Mental Health Bill 2004, to the Joint Committee on Human Rights on the Mental Health Bill 2006, and to the Welsh Affairs Committee on the Legislative Competence Order which forms the legal base for this measure.

Summary

The gist of my submission to the Committee is that this measure, although well-intentioned, is cumbersome, unduly complex, and will lead to a delay in providing services which ought to have been available already to service users and their families in Wales under the National Service Framework for Adult Mental Health and the Care Programme Approach. Wales' first National Service Framework for mental health was published in 2002 and was refocused in 2005, with the key actions including access to services and written treatment plans to be achieved by 2009. Similarly advocacy services for non detained patients were to have been available by now. By introducing legislation with a deferred implementation date which will then give local mental health partners a further time frame within which to develop local schemes for assessment and provision of services defers the provision of these services further into the future.

I would also contend that the moneys spent in introducing and explaining this measure to service providers would be better spent in funding the direct provision of services rather than the proliferation of legislative provisions, regulations and new job titles. Since the first National Service Framework in 2002 there has been a steady stream of policy documents outlining service user and carer entitlements to access to mental health services, visa the new national Service Framework issued in 2005 Raising the Standard, through the Care Programme Approach Guidance, and through the Stronger in Partnership policy documents. It was claimed by the sponsors that the intention was to entitle people who may not already have a firm diagnosis of mental disorder, but who appear to be suffering from mental disorder, to obtain early assessment of their condition and need for services. It is claimed by the Member in Charge that this is legislation which would 'give rise to rights.' Jonathan Morgan said this :

Effectively, it is rights-based legislation without specifically saying that 'This is a right to X, Y and X.'. It would place a duty on the relevant bodies to ensure that the services were provided. We would have to look at the scope of the Measure to see exactly how it could be drafted and outlined.

While this may have been the intention and the basis on which legislative competence was secured from the Westminster Parliament, I think it is a misnomer to describe this measure as 'rights-based', for reasons which will become apparent.

The measure is complex, with 52 clauses and two schedules. There are no fewer than 17 powers to make regulations only two of which are by affirmative resolution. Mental health service users and their families will find it hard to divine what new entitlements, if any, this legislation gives them. It is claimed that this will 'embed' outcome focused mental health services in Wales in a way that the National Service Frameworks were unable to achieve. This sounds attractive but it is not clear how this measure will do that. The National Leadership and Innovation Agency for Healthcare Review of the Care Programme Approach in Wales (2009), stated that the key obstacle to effective provision of the Care Programme Approach was the level of bureaucracy attached to implementation. This measure is likely in my view to increase rather than diminish that bureaucracy. The need to provide local schemes and to ascertain entitlement according to what the Scheme says will in all probability lead to continued local variations in provision

What does the measure do?

It places a duty on local mental health partners (LHBs and LAs, cl. 1) to take all reasonable steps to agree a scheme which (a) identifies the treatment which is to be made available for that area and (b) for securing the provision for that area of the services, including local primary mental health treatment. The scheme must be recorded in writing and must identify the extent to which each of the partners is to provide local primary mental health support services. This was all supposed to have been done already under the NSF and Stronger in Partnership. By passing legislation imposing duties on partners to act in partnership and to take reasonable steps to produce a scheme does not provide clear entitlements for service users.

Patients

In order to qualify for an assessment a person must be a 'patient'. The measure adopts a different definition of patient than that which applies to the rest of the Mental Health Act 1983. The 1983 Act definition is a person suffering or appearing to be suffering suffer from mental disorder. So the person does not have to have a firm diagnosis but there must be some indication that the person at least appears to be suffering from mental disorder. Mental Disorder means any disorder or disability of the mind. The Measure adopts a new definition (presumably only for the purposes of the provisions in the measure) that a patient is a person who is or may be suffering from mental disorder. This could be everyone. Anyone 'may be suffering from mental disorder.'

In my view it would be better to keep the same definition of patient as appears in the 1983 Act, since assessments should be confined to

people where there is some basis on which it appears that the person is suffering from mental disorder. 'May be suffering from mental disorder' seems fare too vague and having two definitions of patient under the same Act for different

purposes seems to me to be a recipe for confusion.

Assessments

A primary mental health assessment must be provided if requested by the patient's doctor if the patient is registered, and if the patient is not registered assessment must be provided if the scheme provides for patients in that category to be assessed. This is not a right to an assessment but a duty to provide an assessment if requested by the patient's primary care physician.

Service Provision

Clause 10 provides that 'Where a primary mental health assessment identifies services which might improve, or prevent a deterioration in, an adult's mental health, the local mental health partner which carried out the assessment must—

(a) if the partner considers that it would be the responsible authority for providing any of the services, decide whether or not the provision of any of those services is called for; and

(b) if the partner considers that it would not be the responsible authority for providing any of the services, make a referral to the person whom the partner considers would be the responsible authority for providing those services.

We may ask what this does that is not already done by the National health Service and Community Care Act 1990 s 47.There is a general entitlement to assessment by social services under the National Health Service and Community Care Act 1990 of need for community care services on the part of any person who appears to the local authority to be in need of such services. The duty is on local authorities, but health bodies may be requested to assist by the social services authority.

Section 47(1) of the National Health Service and Community Care Act 1990 provides that where it appears to a local authority that any person for whom they may provide or arrange to provide community care services may be in need of any such services, the authority:

(a) must carry out an assessment of his needs for those services; and

(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.

This duty applies regardless of whether the person has requested an assessment. The individual's circumstances must have come to the attention of the local authority, the person must be someone for whom they may provide services, and it must appear that the person may be in need of such services. This would include not only those known to be suffering from mental disorder, but also those who, in the words of the Wales Office Memorandum, appear to be exhibiting symptoms or manifestations of such disorder. In R v Bristol City Council ex parte Penfold, the court held that this was 'a very low threshold test.' The Welsh Assembly Government Guidance on the Unified System of Assessment reflects this: 'With reference to section 47 of the NHS and Community Care Act 1990, local authorities should set a low threshold (so that people are not excluded at the first point of contact) when deciding whether or not it appears to them that any person for whom they may provide or arrange community care services, may be in need of such services.' It would be very surprising therefore if it did not appear to a local authority that a person exhibiting the symptoms of mental disorder and requesting support was not someone who may be in need of community care services.

The Wales Office Memorandum seeking Legislative Competence asserted that 'The duties for assessment by local authorities are applicable only in respect of those who are mentally disordered, and not those who appear to be exhibiting symptoms or manifestations of such disorder. This can result in individuals having to reach a certain level of ill health before becoming eligible for assessment.' This is inaccurate in relation to assessments under the Mental Health Act, since 'patient' for the purposes of the 1983 Act means 'a person suffering or appearing to suffer from mental disorder' It is also inaccurate in relation to assessments under s 47 the National Health Service and Community Care Act 1990, since authorities are to adopt a low threshold in deciding whether a person appears to be in need of services.

The Wales Office Memorandum stated that one of the reasons for seeking legislative competence is to 'strengthen multidisciplinary working', to allow for 'a more seamless approach to service provision for the individual recipient, and for those services to be focussed on the needs of the individual in line with effective care planning.' The 1990 Act already provides that if at any time during an assessment it appears to the local authority that there may be a need for services under the National Health Service (Wales) Act 2006 the local authority is under a duty to notify the relevant health body and invite them to assist, to such extent as is reasonable in the circumstances, in the making of the assessment.

As Luke Clements and Pauline Thompson have noted, during the Parliamentary debates on the Health Act 1999

An attempt was made to insert an amendment which would have required a positive response from health authorities to any request for assistance by a local authority (similar to that under the Children Act 1989, s 27) On the amendment being withdrawn the Government gave an assurance that guidance would be issued requiring health and local authorities to publish details of how they will work together to ensure that all the assessment needs of individuals are met.

Consequently, in 2002 the Welsh Assembly Government issued Policy Guidance on the Unified System of Assessment, with the aim of ensuring that health and social services authorities should jointly participate in assessment of need and care and emphasising duties

under the Health Act 1999 on health and local authorities to co-operate in promoting health and well being. Chief officers in each health and social care organisation were charged with responsibility for ensuring implementation of the Unified Assessment and Care Management System. The Guidance exhorts agencies to 'recognise that individuals are the experts on their own situation and encourage a partnership approach to assessment. They should help them find the best ways to state their views in order to prepare for and contribute to the assessment process.'

Section 47(4) of the 1990 Act empowers the Secretary of State and Welsh Ministers to give directions as to the form community care assessments should take. In England the Community Care Assessment Directions 2004 require social services authorities to

consult the person, consider whether the person has any carers and, where they think it appropriate, consult those carers.

take all reasonable steps to reach agreement with the person and, where they think it appropriate, any carers of that person, on the community care services which they are considering providing to him to meet his needs.

provide information to the person and, where they think it appropriate, any carers of that person, about the amount of the payment (if any) which the person will be liable to make in respect of the community care services which they are considering providing to him.

As Clements and Thompson note, 'It appears that no equivalent direction has been issued in Wales.' Directions have the force of law. In the absence of directions local authorities are to carry out assessments in such manner as they consider appropriate. Clements and Thompson argue that this entails the following minimum legal requirements:

The aim of the process … must be to determine … which of the applicant's needs call for the provision of services. This therefore requires the local authority to gather sufficient data about the applicant to make an informed decision about what his or her needs are and have some general standard or formula by which it can make consistent decisions as to when needs do and do not call for services.

That the process must be conducted fairly - i.e. ensuring that the individual understands what is occurring and has a full opportunity to contribute and respond to third party evidence; that the process be non discriminatory and carried out within a reasonable period of time

That all relevant matters are taken into account - i.e. central and local government guidance and directions, the views of important persons (the service user, relevant professionals, carers and friends who have relevant information.

The Welsh Ministers have extensive powers to issue directions and policy and practice guidelines, in addition to their powers under s 47(4) of the 1990 Act. Under s 12(3) of the National Health Service (Wales) Act 2006 the Welsh Ministers may give directions to a Local Health Board about its exercise of any functions, and under s 19(1) they may issue directions to NHS Trusts. Welsh Ministers also have the power to issue directions under s7A of the Local Authority Social Services Act 1970. Directions must be complied with. Welsh ministers may issue 'policy guidance' under s7(1) of the Local Authority Social Services Act 1970. Finally they may issue practice guidance, which although it 'lacks the status accorded by s 7(1)' guidance is advice to 'which regard must be had' by councils in carrying out their statutory functions, and if they adopt a different course to that advised in the guidance, they should have a good reason for so doing.

Under the National Health Service and Community Care Act 1990, if someone presents him or herself in a crisis they may need support and services before there is time to carry out a full assessment. Section 47(5) of the 1990 Act allows for the provision of urgent services before an assessment is made. It provides as follows:

Nothing in this section shall prevent a local authority from temporarily providing or arranging for the provision of community care services for any person without carrying out a prior assessment of his needs in accordance with the preceding provisions of this section if, in the opinion of the authority, the condition of that person is such that he requires those services as a matter of urgency.

Statutory power to carry out assessments and make service provision decisions already exists in s 47 National Health Service and Community Care Act. The duty under s 47 of the 1990 Act and co-operation between health and social services could be substantially strengthened by the Welsh Ministers issuing directions or guidance on the assessment process to make clear that persons exhibiting symptoms or manifestations of mental disorder are people who appear to the authority to be in need of community care services, and to emphasise and reinforce the duty of health bodies to co-operate in mental health assessments

Scotland has attempted to link assessment of the need for compulsory powers under the Mental Health (Care and Treatment) (Scotland) Act 2003 with community care assessments under s 12A of the Social Work (Scotland) Act 1968 (the Scottish equivalent of s 47 of the 1990 Act).

Section 227 of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides that if a mental health officer notifies a local authority that a person may be in need of community care services that person shall be deemed to be a person who may be in need of community care services, and therefore requiring assessment. Section 228 of the Scottish Act provides that if a local authority or a Health Board receives a request for assessment of the needs of a person for services which appears to be from a person suffering from mental disorder, their primary carer, or their named person (the Scots equivalent of the nearest relative), the relevant body must give notice within 14 days of whether they intend to carry out the assessment, and if they decide not to assess they must give reasons. This is a somewhat weak duty, with a 14 day period of grace for the authority, a long time to wait for a person who is in sufficient need and distress to have approached the service for help. The Scottish legislati

on does give a process whereby a service user or carer may apply for a community care assessment and, if the reasons for refusal are inadequate, may challenge the refusal by judicial review. Weak though the process is, it is less complex than that envisaged by the

measure, and the object of the measure in relation to assessment could be achieved by two clauses along the lines of those in the Scottish Act, with a shorter time limit for action, and a provision to the effect that where a person suffering or appearing to suffer from mental disorder has been found to be in need of services, the local mental health partners are under a joint duty to provide, where they are satisfied that having regard to the results of the assessment services from them are called for.

Advocacy

As for the provision of mental health advocates for service users not subject to compulsion, this is an important development, but again one which should already have been achieved under the National Service Framework. Choosing the legislative route will further defer introduction of this service. The problem is the shortage of suitably qualified advocates and resources to employ them, not the absence of a legal duty to provide them.

Conclusion

Although the intention behind this measure is noble, it must be doubted whether introduction of a measure and accompanying regulations in this form will achieve those intentions. The production of this volume of legal rules will be costly, both in terms of time spent by the Assembly's legislative drafters, and the time spent training local authorities and LHBs in the implementation of the measure. The measure does not contain enforceable rights to assessment and services. It is unlikely to embed new practices any more firmly than the existing cornucopia of policy documents. It is noteworthy that England, which currently has the same legislative framework as Wales, has mental health services which are generally recognised to be far superior to those available in Wales. What is needed is the political will to develop these services in Wales, to fund and to staff them adequately, and to use existing policy levers and legislation to the full, not to introduce more legislation which is distinctive mainly for its complexity and volume. Far from enabling Wales to lead the way, this Measure may simply allow the time frame for the introduction of better services to slip further behind.

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