

EXPLANATORY MEMORANDUM TO

The Welsh Language Standards (No. 5) Regulations 2016

This Explanatory Memorandum has been prepared by the Welsh Language Division and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

First Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Welsh Language Standards (No. 5) Regulations 2016. I am satisfied that the benefits justify the likely costs.

The Right Honourable Carwyn Jones AM
First Minister of Wales

23 February 2016

Description

The Welsh Language Standards (No. 5) Regulations ('the Regulations') specify service delivery standards; policy making standards; operational standards; and record keeping standards.

The Regulations also make the standards specifically applicable to the following 16 organisations, enabling the Welsh Language Commissioner ('the Commissioner') to issue Compliance Notices to those organisations in relation to the standards specified:

- Chief Constable of South Wales Police
- Chief Constable of Dyfed Powys Police
- Chief Constable of North Wales Police
- Chief Constable of Gwent Police
- Police and Crime Commissioner for South Wales
- Police and Crime Commissioner for Dyfed Powys
- Police and Crime Commissioner for North Wales
- Police and Crime Commissioner for Gwent
- British Transport Police Authority
- Chief Constable of the British Transport Police
- Independent Police Complaints Commission
- Civil Nuclear Police Authority
- Chief Constable of the Civil Nuclear Constabulary
- Mid and West Wales Fire and Rescue Authority
- South Wales Fire and Rescue Authority
- North Wales Fire and Rescue Authority

These Regulations also make an amendment to The Welsh Language Standards (No. 1) Regulations 2015 which made standards specifically applicable to Welsh Ministers, local authorities and national park authorities.

Matters of special interest to the Constitutional and Legislative Affairs Committee

Numbers in the Regulations

The Regulations use the Welsh alphabet i.e. (a), (b), (c), (ch) etc. This affects only one group of Standards – Standards 25A-D. It also affects;

- (1) regulation 2(5).
- (2) a small number of sub paragraphs within individual Standards (see Standards 91, 112, 125, 134, 135A, 151, 167).
- (3) paragraphs 28, 35, 36, 47 and 49 of Schedule 1, paragraph 2 of Schedule 2, paragraphs 11 and 13 of Schedule 3

This style is different to the usual numbering style adopted in subordinate legislation made by the Welsh Ministers. Usually, the Welsh and English version adopt the English alphabet. In this case, because of the nature and

the subject matter of the Regulations, the Welsh alphabet had been used. The Welsh style numbering has been used in the English and Welsh versions to ensure consistency and to remove any possibility of confusion when cross-referring. The same style was adopted within The Welsh Language Standards (No. 1) Regulations 2015 (SI 2015/996) and The Welsh Language Standards (No. 2) Regulations 2016.

Name of the Regulations

The title of the Regulations laid is The Welsh Language Standards (No. 5) Regulations 2016. If passed by the Assembly, these will be the fifth Welsh Language Standards Regulations to be made. It has been decided that the title of these Regulations will refer to (No. 5) as they follow on from the Welsh Language Standards (No. 2) Regulations 2016 made on 9 February 2016 and The Welsh Language Standards (No. 3) and (No. 4) Regulations 2016 which have also been laid today. It is intended that all the Regulations made under section 26 of the Welsh Language (Wales) Measure 2011 ('the Measure') will be made in one continuous series, in the same way as commencement orders. It is felt that this approach will make the Regulations easier to deal with and to refer to, particularly when Compliance Notices refer to Regulations.

Bodies in Regulation 3 of and Schedule 6 to the Regulations

Schedule 6 to the Regulations lists the bodies that the Commissioner is authorised to give a compliance notice to in respect of the Standards specified. Section 43 of the Measure provides that regulations may not make standards specifically applicable to a person unless the standard is potentially applicable to them. The majority of the bodies listed are either specified in column 1 of the table in Schedule 6 of the Measure or are within a category of persons specified in that column, and column 2 of their entry sets out which standards are potentially applicable to them (section 36 of the Measure).

Legislative background

The Regulations are made in exercise of the powers conferred on the Welsh Ministers under sections 26, 27, 39 and 150(5) of the Measure. Section 26 of the Measure enables the Welsh Ministers to specify standards by regulations. Section 27 enables the Welsh Ministers to specify different standards in relation to different conduct. It also enables them, in relation to a particular conduct, to specify one standard or a number of standards.

Before the Commissioner can give a person a compliance notice requiring them to comply with a standard, that standard has to be specifically applicable to the person (section 25). Section 39 provides that a standard is specifically applicable to a person once the Welsh Ministers have authorised the Commissioner to give that person a Compliance Notice in respect of that standard. Section 105(5) provides that any power of the Welsh Ministers to make regulations includes a power to make such transitional, transitory,

consequential, saving incidental and other provision as the Welsh Ministers think necessary or appropriate.

The Regulations, pursuant to section 150(2) of the Measure must be laid before and approved by resolution of the National Assembly for Wales (i.e. the affirmative procedure).

Purpose and intended effect of the legislation

The Measure confirmed the official status of the Welsh language in Wales and created a new legislative framework for the language.

A key step in giving effect to the Measure is specifying standards and authorising the Commissioner to require persons to comply with those Standards.

Section 25 of the Measure provides that a person is required to comply with a standard specified by the Welsh Ministers where certain conditions are met. Those conditions include:

- i. That a standard is specifically applicable to the person (i.e. the Welsh Ministers have authorised the Commissioner to give that person a Compliance Notice in respect of that standard),
- ii. That the Commissioner has given a Compliance Notice to the person,
- iii. The Compliance Notice requires the person to comply with the standard, and
- iv. The Compliance Notice is in force.

The duty to comply with standards will take the place of the Welsh Language Schemes that were developed under the Welsh Language Act 1993 and monitored by the Welsh Language Board until its abolition on 31 March 2012, and the Welsh Language Commissioner since 1 April 2012.

The first purpose of the Regulation is to specify standards.

Standards falling into the following categories of standards are specified in the Regulations:

- Service-delivery standards will be imposed in relation to the delivery of services in order to promote or facilitate the use of the Welsh language, or to ensure that it is treated no less favourably than English.
- Policy-making standards will require organisations to consider what effect their policy decisions will have on the ability of persons to use the language and on the principle of treating Welsh no less favourably than English.
- Operational standards deal with the internal use of Welsh by organisations.
- Record-keeping standards will make it necessary to keep records about some of the other standards, and about any complaints received

by an organisation. These records will assist the Commissioner in regulating the organisation's compliance with standards.

The standards have been drafted with the aim of:

- Improving the services Welsh-speakers can expect to receive from organisations in Welsh
- Increasing the use people make of Welsh-language services
- Making it clear to organisations what they need to do in terms of the Welsh language
- Ensuring that there is an appropriate degree of consistency in terms of the duties placed on organisations in the same sectors.

Some standards are dependent on each other. The Regulations therefore contain tables (in Part 2 of Schedules 1 and 3) to accompany the service-delivery standards and operational standards, detailing which other standards will also need to be imposed when a particular standard is included in a Compliance Notice.

The second purpose of the Regulations is to authorise the Commissioner to give Compliance Notices to the organisations listed above requiring them to comply with the standards specified.

The Regulations, when they come into force, will not have a direct effect on organisations and they will not, by themselves, create rights for Welsh language users. That will only happen when all the conditions in section 25 have been met. However, the Regulations are a crucial step in the Measure's framework, and enable the Commissioner to require organisations to comply with the standards.

It will be for the Commissioner to choose which standards to impose on each organisation by way of a Compliance Notice. The Regulations set the range of standards which could be imposed on an organisation. There is no requirement on the Commissioner to require every organisation to comply with every standard. The organisation may have to comply with the standard only in some circumstances and not in others – depending on what is stated in their Compliance Notice. The Compliance Notice will also set the date by which the organisation is required to comply with a standard.

Means of appeal

Any organisation will be able to challenge the requirements to comply with a particular standard on the grounds of whether it is reasonable and proportionate to require them to do so.

In the first place, an organisation will be able to present a challenge to the Commissioner. If they wish to challenge the Commissioner's decision, there is a route of appeal available to the Welsh Language Tribunal, and thereafter to the High Court.

Sanctions

The Commissioner will be responsible for enforcing compliance with standards. In cases where the Commissioner determines that an organisation has failed to comply with a standard, the Commissioner may take enforcement action. Enforcement action under the Measure can vary from the making of recommendations or giving advice to an organisation, to the imposition of a civil penalty not exceeding £5,000.

The Regulations also make an amendment (see regulation 4) to The Welsh Language Standards (No. 1) Regulations 2015 that made standards specifically applicable to the Welsh Ministers, local authorities and national park authorities.

Section 98 of the Marine and Coastal Access Act 2009 (“the 2009 Act”) provides that the Welsh Ministers may delegate their marine licensing or marine enforcement functions by Order. The Welsh Ministers delegated functions to Natural Resources Wales (NRW) pursuant to the Marine Licensing (Delegation of Functions) (Wales) Order 2013¹.

As both the Welsh Ministers and NRW would be liable to comply with standards in respect of an activity or service this could lead to confusion. To clarify the situation for the public and the organisations themselves the amendment to the No.1 Regulations means that the Welsh Ministers will not be required to comply with any of the standards in respect of an activity or a service that has been delegated to NRW under Section 98 of the 2009 Act.

Risks if Regulations are not made

If the proposed Regulations are not made, the following risks will be realised:

- Welsh Language Schemes introduced under the Welsh Language Act 1993 will remain in place for all the organisations listed above.
- If Welsh Language Schemes remain there will be no enforcement mechanism if an organisation breaches their Scheme.
- Currently, Welsh Language Schemes vary from organisation to organisation, and the commitments in some Schemes are not specific. This leads to a situation where the public are unsure about which services they can expect to receive in Welsh. This uncertainty will continue if the Regulations are not made. Although there may still be some variation between organisations, the standards are specific in their nature and will therefore reduce the public’s uncertainty.
- Uncertainty on the part of organisations concerning their Welsh language provisions, due to the fact that they have been under the impression that their Schemes will be replaced by standards. Many organisations have started to prepare for the onset of standards and the new monitoring and enforcement regime.
- No improvement as far as organisations’ internal use of Welsh is concerned. An organisation’s internal use of Welsh would continue to

¹ S.I. 2013/414 (W.50)

depend on the goodwill of that organisation, with no monitoring system in place.

- A key component of the Measure will not be implemented.
- There will be a lack of clarity for the organisations and the public if the No.1 Regulations are not amended.

More detailed information about the risks and benefits of implementing the standards can be found in the Regulatory Impact Assessment (RIA) below, with the risks of not introducing standards highlighted in the 'Option 1: do nothing' section of the benefits.

Consultation

The Commissioner conducted a standards investigation with the organisations who can be required to comply with the standards specified in the Regulations between November 2014 and February 2015. The Welsh Ministers fully considered the conclusions the Commissioner presented in the Standards reports. These reports can be found on the Commissioner's website.

The Welsh Ministers have decided not to hold a full public consultation on a draft version of these Regulations. However, the organisations in the Commissioner's second investigation have had opportunities to engage in the process of making Standards. All the organisations responded to the Commissioner's standards investigation; of these all already have a Welsh language scheme and experience of developing a Welsh language provision. Also, specific issues regarding the suitability of these Regulations have been discussed with officers from individual organisations.

PART 2 – REGULATORY IMPACT ASSESSMENT

Background

1. The organisations subject to the Welsh Language Commissioner's ('the Commissioner') second standards investigation were asked to take part in a Welsh Government Regulatory Impact Assessment (RIA). The RIA questionnaire was distributed with the Commissioner's Standards Investigation documentation. The Commissioner's investigation was conducted between 7 November 2014 and 9 February 2015, and organisations were asked to submit their RIA responses directly to the Welsh Government.
2. 73 of the 119 organisations in the Commissioner's second investigation responded to the RIA questionnaire, giving a response rate of 61%. The responding organisations included a good cross-section of the different sectors, and covered organisations with a varying range of Welsh language provisions. The majority of the respondents provided

detailed information about the costs and benefits of implementing the standards within their organisations.

3. In May and early June 2015, the Commissioner presented her official Standards Investigation response to the Welsh Government in the form of nine standards reports issued under section 64 of the Welsh Language (Wales) Measure 2011 ('the Measure'). The Welsh Ministers must have due regard (i) to the Commissioner's Standards Reports in deciding whether and how to exercise the powers in Part 4 of the Measure (which includes the power to specify standards), and (ii) to any advice issued by the Commissioner in writing.

Summary of Responses

4. 1 of the 16 organisations (6%) that will be subject to the No. 5 Regulations has provided information on the cost of its current Welsh Language Scheme and an estimate of the cost of complying with the Welsh Language Standards. This organisation was the Independent Police Complaints Commission.

Accuracy and Usefulness of Data Collected in the Second Standards Investigation

5. We have concerns around the limited data received from organisations and whether it is suitable to produce a robust and accurate RIA. The Commissioner based her second investigation on the draft Regulations prepared for bodies in set 1 that were subject to a Welsh Government consultation in November 2014. The RIA responses were therefore also based on these Regulations. Some organisations were reluctant to base their RIA responses on draft regulations due to their potential to change, and due to the fact that they had been prepared specifically for the Welsh Ministers, local authorities and national park authorities.
6. To enable an assessment to be made of the additional cost incurred in complying with the Welsh Language Standards, an organisation was asked to provide a figure for the cost of delivering their current Welsh Language Scheme and an estimate of what it would cost them to comply with Standards. However, in a number of cases organisations were unable to provide either figure or could only provide one of the figures.
7. Even where estimated or no costs have been provided, many organisations stressed the difficulties of providing accurate data when they did not know which of the draft standards they would be expected to comply with. Some organisations have seemingly provided estimated costs for complying with every single standard. However, it is unlikely that every standard will be imposed on any single organisation – this will be a decision for the Commissioner when she issues compliance notices under section 45 of the Welsh Language Measure.

8. Organisations have also interpreted the questions in different ways. There are examples of organisations indicating that their costs will increase in order to employ multiple additional members of staff to deal with implementing different categories of standards when their evidence suggests that they could meet the standard through using existing Welsh speaking staff or that only one person would potentially be needed to do that work. This has greatly increased the estimates provided by these organisations.
9. With these issues in mind, this RIA focuses on the economic, social and linguistic impacts on organisations as well as covering the financial impact as far as possible. If the Regulations are passed by the Assembly, further information will be collected from organisations when the Commissioner issues Compliance Notices and organisations are in a position to provide more accurate costs. A full financial impact assessment will then be possible.

Options

10. This Regulatory Impact Assessment considers two options:
 - Option 1: Do nothing – Organisations would continue to operate their existing Welsh Language Schemes under the Welsh Language Act 1993.
 - Option 2: Introduce Welsh Language Standards for the 16 organisations listed above.
11. The following analysis considers the costs and benefits associated with each of these options in turn.

Costs and benefits

12. As noted above, only one of the 16 organisations listed on the Regulations responded to the questionnaire with usable data on likely costs. A further round of data gathering was considered but it was decided that the outcome was likely be the similar and that it would not be possible to collect the data needed to produce a robust assessment of the cost implications until there is further information available on which standards will apply to each organisation.
13. The following is therefore a qualitative assessment of the likely costs and benefits associated with the Regulations.

Costs

Option 1: Do Nothing

14. There are no additional costs under this option. The organisations would not be required to comply with new Welsh Language Standards but they would be expected to continue to deliver the existing Welsh Language Schemes.

Option 2: Introduce Welsh Language Standards for the 16 organisations listed above.

15. While it has not yet been decided which of the standards will apply to each organisation, it is considered likely that there will be additional one-off and recurrent costs incurred by the organisations to comply with the standards.

16. The main recurring cost is expected to be staffing, in particular staff with expertise in the fields of translation, marketing and policy. Organisations are likely to need to expand translation facilities, either by recruiting more internal translators or more commonly by outsourcing translation work to external providers.

17. In addition, there are likely to be one-off and recurrent training costs incurred. The one-off training costs are expected to relate to internal administration and training regarding the implementation of standards, with the recurring training costs focusing to a greater degree on the possible need to provide more statutory staff training through the medium of Welsh and training for staff to improve their Welsh language skills.

18. In addition to the compliance costs incurred by the organisations, there are also likely to be costs incurred by the Welsh Language Commissioner and the Welsh Language Tribunal for monitoring and enforcing compliance with the standards. Finally, there will be an appeals process established whereby, if an organisation believes that the standards imposed on it are unreasonable and disproportionate, there will be means to appeal to the Commissioner in the first instance, and thereafter to the newly established Welsh Language Tribunal. The costs associated with these processes are not known at this stage.

Benefits

Option 1: Do Nothing

19. This is the baseline option and there are no additional benefits associated with this option.

20. Doing nothing would maintain the status quo of the Welsh Language Schemes which have been in place since 1993. The regulatory role of the Commissioner would continue along similar lines to that of the Welsh Language Board as would the resource-intensive procedures involved in

agreeing and amending schemes, and the current, limited, enforcement system.

Option 2: Introduce Welsh Language Standards for the 16 organisations listed above

21. The purpose of the standards is to improve the level of service which members of the public can expect to receive. At this stage (and until the Welsh Language Commissioner issues the compliance notices), it is only possible to outline the expected benefits in general terms.
22. The standards will make clear what organisations need to do in terms of the Welsh language, so that people will know what to expect with regard to Welsh language services. This clarity, both for the public and the organisations, will help ensure that the standards can be effectively enforced and lead to an increase in the use of Welsh language services.
23. All of the 16 organisations already operate Welsh Language Schemes and already do many of the things set out in the standards. The standards build on the Schemes and place more rigorous requirements on organisations. However, the Commissioner can only set standards that are reasonable and proportionate for each individual organisation.
24. On a practical level, the standards will replace sometimes vague commitments in Schemes with specific and enforceable duties.
25. Organisations will now be required to take a more proactive and strategic approach to mainstreaming the Welsh language. Key to this will be the 'proactive offer,' which places the onus on the organisation to offer services in Welsh, rather than on the individual to request them. This will provide a solid foundation to improve services for Welsh speakers.
26. An improved enforcement regime will provide a more effective means of dealing with alleged non-compliance and allow for early and informal resolution of complaints as appropriate.
27. As part of the RIA process, organisations were asked to comment on any linguistic, social or environmental advantages of introducing standards. Organisations said that the standards would help increase the use of Welsh in day to day life and would help Welsh speaking colleagues to increase their use of Welsh at work. They also said that the organisation would better reflect the community they serve and improve the public's perception of the organisation. A number of the police forces said that the standards would help them provide a better service to the public and commented that when people contacted the police they may be afraid, stressed, or need help - being able to use the language of their choice could allow the police to communicate more clearly with people in these situations, which could in turn increase public confidence in the police.

Conclusion

28. The current uncertainty surrounding which of the Standards each organisation will need to comply with means that it is not possible to produce a robust assessment of the costs and benefits associated with the Regulations at this stage.
29. The Welsh Language Commissioner will consult with the relevant organisations before issuing final compliance notices and factors such as reasonability and proportionality of individual standards are likely to be discussed at this stage, as well as which standards organisations will be expected to comply with and in which circumstances. As part of this process, organisations could present an assessment of the relative costs and benefits associated with the Standards. This could be considered by the Commissioner as part of the process of coming to a decision on whether the standards are reasonable and proportionate. This assessment will be completed before the final compliance notices are issued.

Competition assessment

30. A competition assessment has been undertaken – the Regulations are unlikely to have a significant detrimental effect on competition.

Equalities Impact Assessment

31. An Equalities Impact Assessment has been undertaken. We are content that specific provisions in draft Regulations do not breach The Equality Act 2010 duties on the Welsh Ministers.

Post-implementation review

32. The Measure provides many opportunities for the Commissioner to bring the suitability of the standards specified in the Regulations to the Welsh Ministers' attention. For example;
- The Commissioner may make recommendations or provide advice to the Welsh Ministers (section 4 of the Measure) which could directly recommend amending the Regulations if she sees fit to do so. Advice given by her could also lead to the Welsh Ministers determining that it would be appropriate to review the standards. The Welsh Ministers must have due regard to any written recommendations or advice that the Commissioner makes or gives when exercising the function to which the recommendation or advice relates.
 - Section 18 of the Measure requires the Commissioner to produce an annual report which must include a review of issues relevant to the

Welsh language (among other matters) and could also include any other matters the Commissioner think it is appropriate to include.

- The Commissioner also has the power to undertake Standards Investigations (sections 61 and 62 of the Measure) which can consider which standards should be, or should continue to be, specifically applicable to a person, whether or not the standards are already specified by the Welsh Ministers. After a Standards Investigation the Commissioner must produce a Standards Report, a copy of which must be provided to the Welsh Ministers. The Welsh Ministers must have due regard to such report in accordance with section 66 of the Measure.

33. Subject to their Compliance Notices, organisations will publish Annual Reports which deal with how they have complied with the standards imposed on them (see standards 155, 161 and 167). These Annual Reports could also raise issues regarding the suitability of the standards specified.