

WELSH ASSEMBLY GOVERNMENT WRITTEN RESPONSE TO THE CONSTITUTIONAL AFFAIRS COMMITTEE REPORT (FEBRUARY 2011):

INQUIRY INTO THE DRAFTING OF WELSH GOVERNMENT MEASURES: LESSONS FROM THE FIRST THREE YEARS

Executive Summary

The Assembly Government welcomes this timely report of the Constitutional Affairs Committee. Following the “yes” vote in the referendum on 3 March the fourth Assembly will be able to pass primary legislation called Assembly Acts in relation to a much broader range of subjects. It is, therefore, an appropriate juncture to consider the lessons to be learned from our experiences so far and to take action, where appropriate, to improve performance.

The Committee’s inquiry was conducted at the same time as I had instigated my own review of the Assembly Government’s legislative processes as I mentioned in my evidence to the Committee. On 15th March I made an oral statement in the Assembly about the outcomes of that review. There is a considerable degree of overlap between a number of the Committee’s recommendations and the outcomes of my review. Where there is overlap that has been reflected in the Assembly Government’s responses (below) to the Committee’s individual recommendations.

Although the Committee’s inquiry related to Assembly Measures and its recommendations are framed in terms of Measures this response looks forward to commencement of the Assembly Act provisions.

This response, on behalf of the Assembly Government, affects all of my ministerial colleagues as the issues cut across Assembly Government portfolios.

Financial Implications

There are unlikely to be significant additional financial implications as a consequence of the Assembly Government’s response to these recommendations. The proposals to establish and publish guidance/guidelines are already planned within existing budgets. The circumstances when Green and White Papers will be published in relation to proposals for Assembly Acts are to be developed but should not result in significant additional financial implications given the Assembly Government is already committed to increasing consultation and stakeholder engagement.

Recommendation 1. We recommend that in advance of proposing new Welsh laws, the Welsh Government should publish —White Papers setting out the policy proposals that the new laws are intended to

Response: Accept in principle

As I said in my oral statement the Assembly Government will ensure earlier and more innovative stakeholder engagement in respect Assembly Bills, including, where possible, the publication of draft Bills for consultation.

This Administration accepts the recommendation in principle. Where appropriate and practicable we will publish Green and White Papers in respect of proposals to develop Assembly Acts

Recommendation 2. We recommend that before any new laws are proposed in future, the Government sets out very clearly in a White Paper why the new law is needed and why the policy it seeks to achieve cannot be achieved through other action. **page 15**

Response: Accept in principle

As above.

Recommendation 3. We recommend that the Welsh Government should explain in each case the reasons for choosing delegated legislation rather than having substantive powers in the Measure and that each delegated power:

- should be identified;
- should have a brief description of its purpose;
- should have reasons given as to why the power will be used after the coming into force of the Measure rather than having the provision on the face of the Measure; and
- should have particular reasons given for any wide delegated powers to amend and repeal existing legislation and replace with new legislation. **page 17**

Response: Accept

It is already the case that a member who introduces a proposed Measure must also lay an explanatory memorandum containing certain information in relation to powers in the proposed Measure to make subordinate legislation. Standing Order 23.18(vii) already provides that an explanatory memorandum must:

- (vii) where the proposed Measure contains any provision conferring power to make subordinate legislation, set out, in relation to each such provision:
- (a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;
 - (b) why it is considered appropriate to delegate the power; and
 - (c) the Assembly procedure (if any) to which the subordinate legislation made or to be made in the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (and not to make it subject to any other procedure); and

It appears to the Assembly Government that the Committee's recommendation does not go further than the current Standing Order but does assist in breaking down what explanation it would be helpful to provide to the Assembly in respect of Standing Order 23.18(vii)(b).

Recommendation 4. We recommend that Assembly Committees should have regard to the principles set out in paragraph 34 of this report when considering proposed subordinate legislation provisions in new Welsh laws. **page 18**

Response: Noted

Although this recommendation is directed at Committees the Assembly Government wishes to record some concerns about the proposals of the Wales Governance Centre as summarised in paragraph 34 of the Committee's Report.

The Assembly Government does not accept the premise underlying the fifth bullet point in paragraph 34 of the Report if it is being suggested that a power to make amendments to other legislation consequent upon an Assembly Act can only be taken in "exceptional" circumstances. There are good reasons for taking such a power – e.g. to avoid the primary legislation becoming too long or to pick up necessary amendments that were not contemplated at the time the primary legislation was passed.

The Assembly Government does, however, accept that the presumption should be that key amendments to primary legislation consequent on an Assembly Act should, if possible, appear on the face of that Act.

The Assembly Government also has concerns about the sixth bullet point in paragraph 34 of the Report if it is being suggested that Assembly Acts should not confer power to make provision that has effect so that a breach of them is a criminal offence. Again there are good reasons why in some cases it is appropriate to do so – e.g. so that where circumstances are likely to change the legislative regulatory regime can keep pace.

In all such cases the key objective is to strike the correct balance between provision on the face of primary legislation and that which can, appropriately, be left to delegated powers. Factors relevant to that balance will include how constrained the delegated power is, the need to keep pace with changing circumstances, the nature of the Assembly procedure to be applied to the exercise of any power to make subordinate legislation and the seriousness of the offence and the penalty for breach of it.

Recommendation 5. We recommend that the Welsh Government issues guidance to staff who are involved in supporting Ministers to bring legislation before the Assembly. The guidance should emphasise the importance that Ministers attach to helping the Assembly consider whether the principles set out in paragraph 34 of this report have been met in each case. **page 19**

Response: Accept

The Assembly Government agrees with this recommendation subject to the concerns referred to above about paragraph 34 of the Report and work is in hand.

Recommendation 6. We recommend that the Welsh Government considers the principles referred to in paragraphs 46 and 47 of this report when considering the scrutiny method proposed for subordinate legislation powers in Measures. **page 23**

Response: Consider

In my oral statement I said that I would publish the guidance on the criteria to be used by the Assembly Government to determine the appropriate subordinate legislation procedure where powers to make subordinate legislation are conferred in Assembly Acts.

The Assembly Government will give further consideration to the suggestions of the Wales Governance Centre as summarised in paragraphs 46 and 47 of the Committee's report in formulating the guidance.

Recommendation 7. We recommend that when a new Measure is introduced, the Welsh Government should provide the Constitutional Affairs Committee with a memorandum on the subordinate legislation provisions, in line with the memorandum provided by UK Government Departments to the House of Lords Delegated Powers and Regulatory Reform Committee. **page 24**

Response: Accept

See the response to recommendation 3. However, this would require a change to Standing Order 23.18.

Recommendation 8. We recommend that Welsh laws should as far as possible continue to be drafted in plain English and clear Welsh and structured to aid the understanding of the reader, taking into account of the need for legal precision. **page 27**

Response: Accept

The Assembly Government agrees with this recommendation.

Recommendation 9. We recommend that the Welsh Government publishes information on any general drafting principles and practices used by their drafting team in drawing up new Welsh laws. **page 27**

Response: Accept

The Assembly Government is committed to publishing general principles and practice in drafting Assembly Acts.

Recommendation 10. We recommend that Explanatory Memorandums should be written in plain English and clear Welsh and should seek to add value by explaining in clear terms the intended effect of a Measure and its parts. They should avoid simply paraphrasing the wording in the Measure itself. **page 28**

Response: Accept

The Assembly Government agrees that Explanatory Memoranda should be clear for the reader.

The explanation of the effect of an Assembly Act is the purpose of the Explanatory Note, which is an annex to an Explanatory Memorandum. The Assembly Government agrees that simply paraphrasing the words of the Assembly Act itself is to be avoided.

As I said in my oral statement the Assembly Government is committed to improving the standard of Explanatory Memoranda relating to Assembly Acts.

Recommendation 11. We recommend that the Counsel General considers the Wales Governance Centre's suggestions for improving the quality and consistency of Explanatory Memorandums. **page 29**

Response: Accept

The Assembly Government will consider the Wales Governance Centre's suggestions in this regard.

Recommendation 12. We recommend that the Counsel General considers how Regulatory Impact Assessments can be improved, particularly in relation to the development of policy. **page 30**

Response: Accept

As I said in my oral statement the Assembly Government will be updating and strengthening internal guidance to ensure the financial data and information contained in the Explanatory Memoranda and Regulatory Impact Assessments relating to Assembly Acts are more rigorous, and based on robust financial monitoring. The Assembly Government will also ensure consistency of approach by introducing a best practice template to ensure the best information is presented in the best way.

Furthermore, as stated above in respect of recommendation 1, the view of this Administration is that any consideration of Green and White Papers could involve consideration of how such Papers could contribute to the development of more robust Regulatory Impact Assessments.

Recommendation 13. We recommend that the Welsh Government brings forward proposals for arrangements for consolidating Welsh laws, particularly in the event of Part 4 powers coming into force after the referendum. **page 32**

Response: Accept

The Assembly Government is considering what the Assembly procedures in respect of consolidating legislation should be.

The Assembly Government continues to give consideration to whether a particular area of the law within devolved competence could benefit from consolidation. There are, however, resource implications for the Assembly Government in developing and taking forward substantive proposals for consolidated legislation.

Recommendation 14. We recommend that the Welsh Government consults organisations active on equality issues in Wales for their views on how Measures can be drafted in non-gender-specific and antidiscriminatory language. **page 33**

Response: Accept

The Assembly Government is fully committed to working with bodies promoting equality in Wales and to non gender specific and anti discriminatory language in drafting Acts.

The Assembly Government intends to publish information about the drafting of Assembly Acts. As a published document members of the public and stakeholders will be free to comment.

The Assembly Government is fully aware of its duties under equality legislation and section 77 of the Government of Wales Act 2006.

It appears that the Stonewall Cymru evidence referred to at paragraph 81 of the Committee's report is essentially about policy and not drafting. Such matters are considered through compliance by the Assembly Government with, for example, the equality duties under existing equality legislation and the Assembly Government's Single Equality Scheme and Inclusive Policy Making guidance. The Welsh Ministers recently laid before the Assembly the draft Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 which is a further demonstration of the Assembly Government's commitment to equality of opportunity.

As explained elsewhere in this response and in my oral statement the Assembly Government will ensure earlier and more innovative stakeholder engagement in respect Assembly Bills, including, where possible, the publication of draft Bills for consultation. I have also referred to proposals for Green Papers and White Papers where appropriate and practicable. The Assembly Government will consider how, through these mechanisms, the public and stakeholders can be consulted on the issue of gender neutrality and anti-discriminatory language in proposals for Assembly Bills.

Recommendation 15. We recommend that the Assembly Commission considers the recommendations of this report and how they might be applied in support of legislative proposals made by Assembly Committees and Members and to any legislative proposals that it brings forward in future. **page 33**

Response: Noted

Recommendation 16. We recommend that the Welsh Government reports to the Assembly on progress in addressing recommendations in this report within 12 months of their initial response. **page 34**

Response: Accept

The Assembly Government accepts this recommendation.

John Griffiths AM
Counsel General & Leader of the Legislative Programme