



Cymdeithas y Cyfreithwyr  
The Law Society

**Consultation on  
Drafting Welsh Government Measures:  
Lessons from the first three years**

September 2010

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supporting  
solicitors

The Law Society is the representative body for over 100,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

In Wales the Law Society has a permanent office which is resourced to enable solicitors across England and Wales to respond to both law and policy consultations and to respond to current legal issues both stemming from the devolution of law-making and consequent upon a developing and distinct legal community.

This paper is submitted in response to the Constitutional Affairs Committee's short inquiry into the drafting of Welsh Government Measures and any lessons that can be learned from the experience of the first three years of the Third Assembly.

## **A. Overview**

Given the nature of this consultation we draw on observations made by us during the scrutiny of the first Assembly Measure, the NHS Redress (Wales) Measure 2008, and one of the most recent, the proposed Welsh Language Measure only (enclosed).

In addition, we offer observations relating to the wider body of law which is developing and how the government might approach its task of drafting legislation particularly in the context of a referendum vote which would mean an immediate expansion in proposed legislation.

## **B. The Committee's areas of interest**

### **B.1 The balance of what is included on the face of Measures and what is provided for in regulations**

Our general concerns about the NHS Redress (Wales) Measure 2008 during its passage through the National Assembly focussed on the breadth of the subordinate lawmaking powers, the lack of scrutiny of those powers and the lack of detail stipulated for the making of regulations.

At the time the proposed NHS Redress (Wales) Measure was drafted the policy work was incomplete. The Committee's own report states that the:

"the Committee accepts that there are valid reasons why a 'Framework' Measure is justified in this case, but considers that the approach taken by this particular Proposed Measure should not set a precedent" (Recommendation (1) para 13 Report from the Subordinate Legislation Committee 14 November 2007)

Moving forward to 2010 the Committee is still observing a lack of clarity on the part of the Welsh Government who fail to finalise their policies and to agree implementation before proposing legislation and so the Welsh Government is undertaking the task of drafting legislation for broad possibilities as opposed to firm proposals. The Proposed Welsh Language (Wales) Measure lacks detail and the Committee found it necessary to recommend "that relatively detailed illustrative Standards are published as a contribution to the public debate on this aspect of the Measure" (Recommendation 2 Report on the Proposed Welsh Language (Wales) Measure July 2010)

## **B.2 The extent to which Measures are drafted in clear language and provide legal clarity**

Our comments upon the proposed Welsh Language Measure illustrate recent criticism of the drafting style: “In places the legislation is detailed and prescriptive and in others there is not even a framework. For example in relation to investigations by the Commissioner reference is made to a “relevant person” and the provision runs to 52 words<sup>1</sup> at the same time the central feature of the legislation, “standards”, are not described and the government states “the exact nature of standards will become apparent only at the end of the process established by the proposed Measure”<sup>2</sup>.”

## **B.3 The extent to which Explanatory Memorandums provide a useful guide to the proposed Measure**

The quality and usefulness of Explanatory Memoranda varies.

The Explanatory Memorandum accompanying the Proposed Welsh Language Measure states “the system that the proposed Measure will establish will enable standards to take into account regional variations as well as provide for varied timescales for compliance across a sector”<sup>3</sup>, but the proposed measure is silent as to how will this be accommodated in the standards.

The Explanatory Memoranda follow the sections of the legislation but do not always seek to explain the provisions and sometimes are little more than a re-write of the section.

## **B.4 The extent to which Regulatory Impact Assessments provide a robust assessment of the likely impact of proposed Measures**

The Law Society has only raised specific concerns relating to the lack of any adequate costs analysis in Regulatory Impact Assessments (“RIAs”) in the past. However, it is to be noted that RIAs are of limited use in many cases for proposed Measures as the true impact of a provision is not known at the time of passing primary legislation due to the ‘framework’ nature of the provision and the need to move down to the subordinate legislation stage of law-making. The Proposed Welsh Language Measure is a good example where the regulatory impact of complying with new language standards, which is of most concern particularly in the private sector, is unfulfilled. The Explanatory Memorandum states:

“The process [for imposing standards] will require the Welsh Ministers to produce a Regulatory Impact Assessment on the effects of the proposed regulations to be tabled alongside the subordinate legislation” (paragraph 8.22 Explanatory Memorandum).

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<sup>1</sup> Section 60(4) of the proposed Welsh Language Measure

<sup>2</sup> Paragraph 9.2 of the Explanatory Memorandum to the proposed Welsh Language Measure

<sup>3</sup> Paragraph 3.21 of the Explanatory Memorandum to the proposed Welsh Language Measure

## **C. Further Points**

### **C.1 A legislative concordat?**

The Welsh Government continues to propose Measures with very broad subordinate law-making powers. The Committee's reports on proposed Measures contain many recommendations for the tightening up of procedures for ministerial law-making including the use of 'super-affirmative' procedure for the making of regulations: should this issue be settled?

Due to the limited nature of the current law-making powers there has not as yet been any large scale legislation and the proposed Welsh Language Measure is the closest there has been to a comprehensive single piece of legislation. However, following a move to Part 4 of the Government of Wales Act 2006 far more legislation will need to be made in a shorter timescale. In order to facilitate this, the Welsh Government and the National Assembly might consider a "concordat" of good legislative practice to avoid the same concerns being raised in relation to each new piece of legislation. In this way a more consistent approach to drafting legislation could be adopted.

### **C.2 Future Resourcing**

The UK Government has access to a corps of legislative drafters whose collective experience has been developed over generations. With an increase in the amount of law-making by the National Assembly we are concerned at the resources available for this most important task. We recognise that capacity will be freed up if Part 4 is implemented as the demands of the Legislative Competence Order process will disappear. Nevertheless the Government should consider carefully the future resources it needs to deliver legislation of quality.

If Part 4 is implemented then the Welsh Ministers will become responsible for large bodies of legislation applying only in Wales. The codification of existing legislation as it applies to Wales should be a priority if Part 4 is implemented and is, in our view, an important issue even if the present settlement remains in place.

The Law Society would like to be reassured as to the skills that already exist within the office of the Welsh Legislative Counsel to undertake larger scale legislation than hitherto and, if it is the view that those resources need supplementing, to know what consideration has been given to:

- Instructing freelance legislative counsel, as happens in some other Commonwealth jurisdictions;
- The availability of assistance from the Law Commission in the developing of codified Welsh legislation in the main devolved subjects such as education and planning.

### **C.3 The Consolidation Problem Again**

The divergence of the statute book as it applies in England and in Wales and the problems it brings within a single jurisdiction, is a subject that the Law Society and other commentators have repeatedly remarked upon. The development of Acts of Parliament having to make different provision for England and Wales and then being amended separately and by different legislatures, is an unsustainable system for developing accessible and comprehensible laws.

For example, the task of practitioners in establishing the basic law relating to the NHS in Wales was greatly simplified by the passage of the NHS (Wales) Act 2006 and the statute law relating to education, planning and local government in Wales would all benefit from codification into separate Welsh legislation.

We have already seen the difficulties caused by the absence of a basic Act dealing with Wales in relation to the Local Government (Wales) Measure 2009. The Measure itself is a clear short code for legislating into effect the Government's local government efficiency and improvement programme and for community strategies. Were there already a basic Welsh local government Act in place, then it would normally be expected that a reform such as this would have been carried out by amending legislation and the result would be that anyone wishing to find the law on local government could see how the efficiency duties and community planning duties fitted into the overall legislative scheme.

As matters stand at present the accretion of separate short pieces of legislation within the same subject area makes the law in Wales even harder to find and consolidation will ultimately be forced on the legislature as the statute book becomes increasingly unmanageable.