



Canolfan Llywodraethiant Cymru Wales Governance Centre

Drafting Welsh Measures: Lessons from the first three years

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Our research group welcomes the growing body of Welsh Measures made since 2007. The eleven Measures made so far have gone through a novel democratic process set out in the Government of Wales Act 2006 and in the Assembly Standing Order. This process is truly democratic in that it is open and transparent and because the Assembly has extensively involved the people of Wales in their work either in the scrutiny of legislation or during their inquiries.

The group also welcomes this particular review of the drafting of Welsh Measures. It is always a good idea to reflect on the operation of a new untested system and to see which lessons could be learnt after eleven Measures were made and while another six are being considered before a new Assembly starts.

Overall the main issue which we consider to be of general significance in relation to the way in which the Measures are being drafted is the fact that there is a tendency in Wales to leave the substance of policies to be included in regulations rather than on the face of the Measures. It is as if the law was drafted first before any policy was defined. This will be detailed below.

Another general comment is that there does not seem to be any consistency in the format of the Measures. Each Measure is drafted in its own particular way. A single Welsh drafting style would certainly be of benefit to Wales.

Considering the particular questions raised in the Committee's letter, while having noted the emergence of good practices in all the areas set out in this consultation. Our observations are that:

- (1) The balance between what is to be included in primary and secondary legislation is often wrongly inclined towards the use of regulations.
- (2) The Measures do not always contain clear language or provide legal clarity.
- (3) While some Explanatory Memorandums are very complicated and lengthy, others are relatively much shorter and clearer, however providing little additional substance in the actual Measure itself. A considerable improvement in the clarity of explanatory memoranda has been observed in the three last Proposed Measures.

- (4) There is a lack of proper regulatory impact assessments. This has led the Finance Committee to conclude that it is not always in a position where it can scrutinise the cost implication of the Proposed Measures.
- (5) Finally, we think that an agreed set of published principles might be beneficial both in the drafting of future Measures and to assist in their scrutiny. For this purpose we particularly welcome the use of tables in the latest explanatory Memoranda which states where powers are given to the Welsh Ministers and very importantly WHY they have been delegated. Thus principles are emerging as to when secondary legislation powers should be used or not.

The balance of what is included on the face of Measures and what is provided for in regulations;

Historically, Wales has been subject to Acts of Parliament which for at least the last 30 years have often given wide legislative powers to the Executive without adequate Parliamentary control. The second Government of Wales Act has meant that to a certain extent Wales is now regulated through both primary and secondary legislation made in Wales by Welsh institutions. This gives the opportunity to the Assembly to achieve what is often not achieved by the UK Parliament, namely a proper balance between primary legislation which adequately expresses the main legal provisions and subordinate legislation which supplements those provisions.

While we also understand that there is generally in the UK and even in Europe a legislative inflation, which renders it difficult for any Parliament to consider all primary legislation, has led to a practice of delegating more legislative powers to ministers to compensate for such increase of primary legislation provisions, we believe that at present there is an imbalance between these two types of legislation in Wales.

With many of the Welsh Measures, it is almost as though the order of ‘substance and effect’ is being reversed in the Welsh Measures. The NHS Redress Measure is an example of this reversal where there is little or no substance in the Measure, leaving its full implementation to Regulations. The Welsh Language Measure is another such example.

Until the publication of the latest Explanatory Memoranda, there have been no explanations given by the Assembly Government as to when it is considered that subordinate provision should be put in the Measure itself and when subordinate legislation powers could be used.

Following on from this, where the substance of a provision is delegated to the decision of a Welsh Minister, there is no general convention that such decision when incorporated in Regulations will be subject to any automatic control by the Assembly. Much subordinate legislation is subject to negative resolution procedure and only some such legislation is subject to affirmative resolution procedure. However there has been no official statement as to the list of principles governing the use of the affirmative resolution procedure. While there is very limited use of super-affirmative procedure, there is no explanation as to when such procedure should be used. Unless

affirmative resolution procedure is used, there is no automatic consideration of the subordinate legislation by the Assembly.

Statements from WAG giving the reasons for the particular use of delegated legislation or for the use of a specific type of control can be found in some of the latest explanatory memoranda which accompany the Proposed Measures: for example in the Explanatory Memorandum to the *Education (Wales) Measure 2009*, the use of the negative procedure to make regulations is justified on the following grounds:

“Regulations made under the relevant sections relate to matters which are technical or procedural in nature or will set out detail. The nature and content of the provisions made by any such regulations would not be appropriate to be included on the face of the Measure. It is also desirable that the Welsh Ministers have the flexibility to amend provisions about matters such as those relating to the regulation of childminding and daycare quickly. The negative resolution procedure affords the Assembly a degree of scrutiny appropriate to the limited type of provision that can be made in these regulations.”¹ This is a statement of the proper use of the delegated legislation and it is to be commended.

The explanatory Memorandum to the Proposed Local Government (Wales) Measure lists the following reasons for the choice of scrutiny procedure:

- Where there is likely to be significant interest in the detail of subordinate legislation, the affirmative resolution is proposed to allow members of the Assembly to debate the issues and approve the exercise of the delegated power.
- If the provisions introduce new schemes or sanctions likely to have a significant impact, the affirmative resolution procedure is applied.
- However, the negative resolution procedure is considered appropriate when the technical and administrative details of the proposed regulations may require a number of updates in the future.

In this absence of established principles of this kind, our group would like to know if this approach is an example of a systematic approach or just an indication of the thinking behind this particular Measure.

Furthermore in the latest Proposed Measures it has been noted that the only executive powers contained in the Measures which are subject to no control by the Assembly are those which allow the Ministers to commence the provisions of the Measures.

While the Assembly has a robust system for scrutinising draft Measures, what we regard as the overuse of the delegation of the law making functions to the Welsh Ministers has made it extremely difficult to adequately scrutinise the Measures going through the Assembly both by Assembly Members and Committees but also the outsiders trying to provide evidence to the Committees.

The Finance Committee rightly highlighted this concern when stating: “The Finance Committee is concerned that use of secondary legislation, where there is so little

¹ <http://www.assemblywales.org/cr-ld7538-e.pdf>

detail supporting the enabling Measure, means that in practice there is very little actual scrutiny of the financial (and other regulatory) aspects of the legislation. The issue is particularly pertinent in relation to Measures such as the proposed Waste (Wales) Measure which can result in significant implications, for a wide ranging number of external organisations and authorities”.²

The extent to which Measures are drafted in clear language and provide legal clarity:

To involve bodies and people in Wales in the law making process and in its subsequent implementation, the Assembly’s objective is to render legislation more accessible to the public by the use of clearer language. However we have noted a number of problems in this respect:

1- There are inconsistencies in the layout of Measures. In certain Measures, a table is used in the middle of the Measure with no apparent reason, for example, the Learner Travel (Wales) Measure 2008.

2- There is the question of definitions. Within the eleven Measures, definitions are in different places. They may be found in the front, middle or at the end the end of the Measure. This is a particular difficulty where the Measure defines certain words but not others. In addition, definitions are not necessarily found together in the same section in each Measure.

For example in the Red Meat Industry (Wales) Measure definitions are contained in sections 1, 5 and 14; the Learner Travel (Wales) Measure 2008 where some definitions are under ‘Main Terms’ at the beginning of the Measure and others are under section 3(8) and the Healthy Eating in Schools (Wales) Measure 2009 definitions are contained in section 3(7),(9),(11).

Our group thinks that it is easier to have all the definitions at the front of the Measure as is the case for example in the Learner Travel (Wales) Measure 2008.

3- There are difficulties where measures define some words and not others when such words seem to require definition.

Building on from the previous point, some definitions are left to be defined subsequently by regulations. This goes against legal clarity as one needs to read two sets of legislation for it to make any sense.

Our group thinks that this should always be avoided, and that instead the definitions should always be contained in the Measures. While to avoid a Measure having to be amended Welsh Ministers might be given, for good reasons, a power to amend definitions by secondary legislation initial definitions should be set out in the Measures.

4- Any acronyms should always be defined.

² <http://www.assemblywales.org/cr-ld8110-e.pdf> paragraph 39, page 11:

5- Also there should be more consistency in the translations in Welsh of the name of institutions or bodies, for example the varying names for the same institution in the Healthy Eating in Schools (Wales) Measure (2009) section 11.

6- Sometimes the wording of a Measure can be inconsistent with the existing UK legislation. For example the Proposed Mental Health (Wales) Measure classifies children in Tiers, while adults are classified in two categories 'primary' or 'secondary'. In England the same categorisation applies to both adults and children. Witnesses in Wales indicated that the consistency might have provided greater clarity and given more legal certainty, while the inconsistency introduced by the Measure in terminology and the new additional categorisation might on the contrary affect the certainty and clarity.³

7- Finally as a matter of clarity schedules should not contain substance, nor give powers to the Welsh Ministers. They should only deal with procedural aspects of policies set out in the body of the Measure.

8- We commend the Red Meat Industry (Wales) Measure (2010) for being clearly drafted, using clear language.

The extent to which Explanatory Memorandums provide a useful guide to the proposed Measure;

We consider that a Memorandum is a useful guide if it provides the reader with a brief statement of the overall aims and objectives of the Measure, whilst also setting out a brief overview of the general provisions without reference to explaining specific sections. To this end, we have seen an Explanatory Note which runs for over a 100 pages. Such a document if associated with a UK Act of Parliament would be a separate 'Note on Clauses', not an overall explanation of the Act.

We have noted that the latest explanatory memoranda are to be welcome in that they follow a new template divided in two parts, which is as follows:

PART 1: Background and Purpose of the Proposed Measure

1. Description
2. Legislative Background
3. Purpose and intended effect of the legislation
4. Consultation
5. Power to make subordinate legislation

PART 2: Regulatory Impact Assessment

1. Options
2. Costs and benefits
3. Application
4. Competition Assessment
5. Implementation Plans
6. Post Implementation Review

³ <http://www.assemblywales.org/cr-ld8114-e.pdf> , page 31, paragraph 60.

The Explanatory Notes (which detail each section) are rightly separated in an Annex A as ‘Notes on Clauses’. For example in the Explanatory Memorandum of the Proposed Rights of Children and Young Persons (Wales) Measure the Annex contains the following information:

Annex A: Explanatory Notes

1. Introduction
2. Background
3. Section 1: Duty to have due regard to the Convention on the Rights of the Child
4. Section 2: The children’s scheme
5. Section 3: Preparation and publication of the scheme
6. Section 4: Reports
7. Section 5: Duty to promote knowledge of the Convention
8. Section 6: Power to amend legislation etc
9. Section 7: Application to young persons
10. Section 8: The Convention on the Right of the Child
11. Section 9: Other Interpretive Provisions
12. Section 10: Orders
13. Section 11: Commencement
14. Section 12: Short title

Two Proposed Measures also display a second Annex B which “seeks to explain in each case the purpose of the power, the reason why it is thought suitable for delegated legislation and the nature of, and explanation for, any Assembly procedures that apply”⁴. These Annexes contain Delegated Power Memoranda⁵.

We also value in particular the tables in Part 1 of the Memoranda showing all the executive powers to make subordinate legislation, the reason why such powers have been delegated to WAG (the latest column added to the tables), and the types of control attached to such legislation (affirmative or negative resolution procedure). The Proposed Rights of Children and Young Persons (Wales) Measure contains a table with an extra column “Reason for Procedure” which explains why a particular type of control as been attached to any power to make subordinate legislation. This is another example of good practice.

Our group believes that the Explanatory Memoranda of these latest Proposed Measures are examples of good practice in that they regroup all the documents necessary for robust scrutiny of the provisions of the Proposed Measures. We strongly suggest that such format should be followed systematically for every future Explanatory Memoranda.

We consider that a combination of the Explanatory Memoranda of the Proposed Mental Health (Wales) Measure or the Proposed Local Government (Wales) Measure and the Proposed Rights of Children and Young Persons (Wales) Measure would be ideal in that there would be the two Annexes (the Explanatory Notes and the Delegated Powers Memorandum) and the table with the extra-column in Part 1.

⁴ Explanatory Memorandum, Annex B, p.72

⁵ Proposed Mental Health (Wales) Measure and the Proposed Local Government (Wales) Measure.

It is important that Parts 1 and 2 of the Memoranda remain relatively short and succinct to give a summary and a brief overview of the Measure, with a separate Annex being more detailed and explaining each sections (avoiding if possible repeating simply what is already written in the Measure).

However a Memorandum which, prima facie, appears to be a clear useful guide to the Measure, may nevertheless give very little information about the possible way in which the Measure will operate because the substance has been made the subject of Regulations. In such cases, the Explanatory memorandum should at least provide several examples of what the regulations may contain in the future. The risk of having meaningless Explanatory Memoranda providing guides to empty Measures. The ultimate effect of this is that such Memorandum is not useful (see first question of the inquiry).

The extent to which Regulatory Impact Assessments provide a robust assessment of the likely impact of the Proposed Measures:

We are not well equipped to comment on this question. However we would like to draw attention to several reports of the Finance Committee and Legislation Committee which have declared that they were not always in a position to scrutinise the legislation could be assessed and scrutinised.

For example Legislation Committee No. 4, in considering the Proposed Welsh Language Measure notes that ‘Whilst we note the Minister’s evidence that much of this policy will be determined in forthcoming consultation with stakeholders, we consider it would have been more appropriate for this work to have been undertaken in advance of the introduction of the proposed Measure, in order that a more complete legislative proposal could have been scrutinised.’ page 32. section 3, paragraph 77.

On several occasions the Finance Committee was not in a position to do its work properly because it lacks information and the assessments were not carried out properly by the government:

- **Report on NHS Redress (Wales) Measure, 2007**
Due to lack of estimated costs, a supplementary report was requested, which was subsequently approved.
- **Report on the financial implications of the Proposed Learning and Skills (Wales) Measure**
Little or no work had been perceived to have been done on ascertaining the true costs of implementing such a major new venture in education and a supplementary report was requested, which was approved.
- **Report on the Children and Families (Wales) Measure 2009**
“The Committee notes that some elements of the proposed Measure are largely indicative of approaches to development and are subject to further development and refinement. More accurate costing of these will only be possible when this work is complete and the Committee accepts that in these cases the Government is so far unable to provide other than very broad

costings. *In some senses this is disappointing and leaves the Finance Committee unable to judge the full impact of the proposed Measure and, in turn, the rate at which it might be implemented.*"⁶

- **Report on the Financial Implications of the Proposed Shipment of Waste for Recovery (Community Involvement in Arrangements) (Wales) Measure**

Only limited information was provided on the costs of the Proposed Measure, therefore it was recommended that Stage 1 debate on the general principles of the Measure that it is not brought forward until the Assembly have considered how it will operate.

- **Report on the Financial Implications of the Proposed Waste (Wales) Measure**

Lack of analysis, detail and adequate financial information led the Committee to find it impossible to comment on the overall financial impact of the Measure. The Committee stated: "The Finance Committee has found some difficulty in examining the financial impact of this proposed Measure because so many of its provisions are 'enabling' in nature and are supported by very little detail of their likely effect and, particularly their possible financial impact. In particular it noted the lack of a regulatory impact assessment on most of the specific proposals contained within the Measure".⁷

The two last reports reveal a very worrying situation indeed.

Any other matters that you consider to be relevant to the Inquiry:

We think that the creation of principles in the drafting of Welsh Measures would be useful. For example principles could dictate when a power is given or a duty is imposed on WAG. Equally principles could dictate when law making powers are to be delegated to WAG as we detailed in question 1.

Another useful addition to the documents given to plenary Members when debating a Proposed Measure would be a summary of all the reports of the different Committees which looked at the Measure.

Overtime it may be useful for the Assembly to review the effect of the operation of the Measures, particularly a review of the subordinate legislation made to implement the Measures by the Welsh Ministers.

Finally we regret that so few AM Proposed legislation has been made despite very generous Standing Orders.

⁶ <http://www.assemblywales.org/cr-ld7551-e.pdf>

⁷ paragraph 36, page 11.

Conclusion:

While the nature and extent of some recent Explanatory Memoranda are to be applauded, we consider that underlying problems remain:-

- Many Measure delegate important aspects of their substance to Welsh Ministers, including powers to define the extent of the operation of the Measure. In such cases, the Measure itself does not itself set out the law, merely a framework, and often a very flexible one, within which the Welsh Ministers operate.
- In some Measures there is some substantive law but the drafting is unclear.
- In cases where important aspects of the Measure are left for Regulations to set out there is no consistent practice in the Measures of requiring Welsh Ministers to place the Regulation before the Assembly for automatic debate before they come into operation. Without such requirement, such Regulations come into force without consideration by the Assembly unless an Assembly member has previously required that there be a debate.
- There is a lack of systematic principles agreed by the Assembly whereby a proper balance should be achieved between the substance of the law being in a Measure and ancillary provisions only being made by Welsh Ministers' regulations. Practices of the UK Parliament in their haste to approve considerable amounts of legislation by conferring wide and often unclear delegated legislative powers to the Executive should not be adopted by the Assembly. As an example, it undermines one of the fundamental purposes of a Parliament which is to make clear law with defined boundaries if provisions such as section 3(1) of the Red Meat Industry (Wales) Measure are to be considered to be a precedent. This provides that the Welsh Ministers may do anything that they consider appropriate to further the objectives of the Measures. Such a very undefined power by reference only to objectives should not be regarded as proper function of the Executive. This is for the Assembly as a Parliament.

