

National Assembly for Wales
Constitutional Affairs Committee

Proposed Carers Strategies (Wales) Measure

May 2010



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Constitutional Affairs Committee

The Constitutional Affairs Committee must consider and report on any of the matters set out in Standing Order 15.2 and may consider and report on any of the matters set out in Standing Orders 15.3, and 15.6.

Powers

The Constitutional Affairs Committee was established in June 2007 (as the Subordinate Legislation Committee). Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 15. These are available at www.assemblywales.org

Committee membership

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
Janet Ryder (Chair)	Plaid Cymru	North Wales
Alun Davies	Labour	Mid and West Wales
Mike German	Welsh Liberal Democrats	South Wales East
William Graham	Welsh Conservatives	South Wales East
Rhodri Morgan	Labour	Cardiff West

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The Committee's Recommendations

The Committee's recommendations are listed below, in the order that they appear in this Report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

Recommendation 1. Recommendation 1. We recommend that the first regulations made using the powers in the proposed Measure should be made using the affirmative resolution procedure. **(Page 11)**

Recommendation 2. Recommendation 2. We recommend that the proposed Measure is amended to provide Ministers with a power to amend, by affirmative resolution, the list of relevant authorities set out in Section 2(3). **(Page 11)**

Recommendation 3. Recommendation 3. We recommend that the Minister considers how regulations under Section 4 might be drafted to include a more specific duty in relation to consultation arrangements with carers. **(Page 12)**

Recommendation 4. Recommendation 4. We recommend that the Assembly should agree to the general principles of the proposed Measure. **(Page 12)**

Report on the Subordinate Legislation Provisions in the Proposed Carers Strategies (Wales) Measure

Standing Orders

1. The Constitutional Affairs Committee may consider and report on the following matters under the National Assembly's Standing Orders:

- Standing Order 15.6 (ii) states that the Constitutional Affairs Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measuresthat grant powers to make subordinate legislation to the Welsh Ministers'.
- While it is not part of the Committee's remit to comment on the merits of the policy which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on 'any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers'.

2. The purpose of this report is to inform the Assembly's Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

Background

3. The Proposed Carers Strategies (Wales) Measure¹ was introduced on 25 January 2010 by Gwenda Thomas AM, Deputy Minister for Social Services. An Explanatory Memorandum has been prepared by the Welsh Government's Department for Health and Social Services of the and was laid before the National Assembly on 25 January 2010. A legislative statement was made in the National Assembly by the Deputy Minister, on 26 January 2010².

4. The proposed Measure was referred to Legislation Committee No. 5 for consideration. The Committee issued a call for evidence³ on the proposed Carers Strategies (Wales) Measure which closed on 18 March 2010. The Stage 1 process (consideration and agreement of the general principles of the proposed Measure) commenced on 3 February. The Committee must report by 21 May 2010.

¹ <http://www.assemblywales.org/ms-ld7876-e.pdf> (Measure as Introduced on 25 January 2010)

² Record of Proceedings (RoP) – 26 January 2010 – pages 59-77

³ http://www.assemblywales.org/lc5-carers_strategies_wales_measure-e.pdf

5. The policy background to the proposed Measure is summarised in the Explanatory Memorandum⁴ as follows –

“1.1 The purpose of this Measure is to enable the National Assembly for Wales to legislate to introduce a new requirement on the NHS and Local Authorities in Wales (“the relevant authorities”) to work in partnership to prepare, publish and implement a joint strategy in relation to carers.

1.2 The strategy will provide for the provision of information and advice to carers and for the effective involvement of the relevant authorities with carers when making decisions about the provision of services to or for carers or the person cared for.”

Committee Consideration

6. The Constitutional Affairs Committee considered the Proposed Carers Strategies (Wales) Measure on 11 March 2010 and received written and oral evidence⁵ from the Deputy Minister for Social Services Gwenda Thomas AM. A list of the papers considered is set out in the table at paragraph 33 of this report.

Subordinate Legislation Making Powers and Procedures

7. The proposed Measure contains enabling powers for Welsh Ministers to implement and set out the detail of the preparation and publication of strategies for carers in regulations and orders.

8. The subordinate legislation procedures will all be subject to the negative procedure. The Explanatory Memorandum states that In each of the cases detailed below, the rationale for the application of subordinate legislation rests upon:

- the need to avoid inappropriate detail on the face of the Measure and to provide flexibility to revise the types of information to be made available to carers, and the detail to be included in the strategy, as necessary; and
- the proposed subordinate legislation is concerned primarily with the administrative arrangements governing the preparation and publication of the strategy.

⁴ <http://www.assemblywales.org/ms-ld7876-em-e.pdf>

⁵ RoP – Constitutional Affairs Committee (CA) – 11 March 2010 paragraphs 153-281

9. Subordinate legislation making powers are contained in the following sections:-

Section 2 - Duty to produce strategy

10. Section 2 (1) gives the Welsh Ministers a power to make regulations to require relevant authorities to prepare and publish a strategy setting out how they will work together to provide appropriate information and advice to carers and ensure that carers are consulted about service provision. Sub-section (3) lists the “relevant authorities”. There is no provision in the Measure to allow the Welsh Ministers to amend the list of “relevant authorities”. Without subordinate legislation making powers to amend the list of “relevant authorities”, a further Measure would be required to amend the list in future.

Section 3 - Appropriate information and advice

11. Section 3 (2) provides the Welsh Ministers with a power to make regulations setting out further provision about what constitutes appropriate information or advice.

Section 4 – Consultation

12. This section gives the Welsh Ministers a power to make provision, by way of regulations, specifying the steps which relevant authorities may or must take for the purposes of consulting with carers under section 2 (1) (b) and (c) (Duty to produce a strategy).

Section 5 - Further provision about strategies

13. Section 5 (1) provides the Welsh Ministers with a power to make regulations which set out further provision in relation to the preparation and publication of a strategy under section 2. Section 5 (2) lists the types of provision which might be made. Section 5 (3) gives the Welsh Ministers power to designate an NHS organisation as the lead authority for the co-ordination, oversight, preparation, publication and any subsequent review of the strategy.

Section 6 - Submission of draft strategy to Welsh Ministers

14. Section 6 (4) enables the Welsh Ministers, by regulations, to make provision as to how and when the responsible authorities must submit their strategies to the Welsh Ministers and publish them.

Section 8 - Orders and regulations

15. Section 8 provides that any power to make orders or regulations is exercisable by statutory instrument and also provides the power to make different provision for different cases and to make such incidental, supplementary, consequential, transitory, transitional or saving provisions as the Welsh Ministers think fit.

16. Sub-section (3) of section 8 provides that any statutory instruments made under the Measure will be subject to the negative procedure i.e. they are subject to annulment in pursuance of a resolution of the National Assembly. Paragraph 5.3 of the Explanatory Memorandum states that:

“given the nature of the proposed subordinate legislation, being concerned primarily with the administrative arrangements governing the preparation and publication of the strategy, the legislation will be subject to the negative procedure.”

17. The provisions of the Measure come into force on such day or days as the Welsh Ministers may, by order, appoint. These orders are not subject to any specific procedure for making subordinate legislation.

Issues arising from evidence and recommendations of the Committee

Use of Affirmative or Negative Procedure for Making Subordinate Legislation

18. As noted above, by virtue of Section 8(3) of the proposed Measure, **any subordinate legislation** made under its provisions **will be made by the negative procedure**. This procedure allows Ministers to make subordinate legislation without the approval of the Assembly, although the Assembly can subsequently vote to annul the legislation concerned.

19. The alternative to the negative procedure is the 'affirmative resolution' procedure. This means that subordinate legislation cannot come into force until it has been debated in the Assembly and the Assembly has voted to approve it.

20. In previous reports⁶ we have recommended the adoption of the principle that when Welsh Ministers seek powers to implement significant changes in policy through regulation, the affirmative procedure should be used.

21. The nature of this Measure is enabling. It contains 10 Sections and is barely 5 pages long. The crux of the Measure is the very broad powers it contains allowing Ministers to direct relevant authorities to prepare strategies to help carers.

22. The first set of regulations made under the Measure will, specify:

- the authorities to be placed under a duty to produce a strategy - s2(1);
- what constitutes appropriate information and advice to carers - s3(2);
- the steps that authorities must take to consult carers - s4; and
- the more detailed provisions (if any) that strategies should take into account - s5(1)

23. We are generally content for the negative resolution procedure to be used for the subordinate legislation set out in the proposed Measure.

24. However, although it can be argued that the Measure itself sets out a very broad policy direction, the details of how the Measure will be implemented in practice are extremely vague. The Minister made clear to us in her oral evidence⁷ that the process of drawing up regulations has not yet started and that they are unlikely to be laid before the National Assembly until the autumn of 2011 at the earliest.

25. This will fall after the next Assembly general election when it is entirely possible that an incoming Minister or government could decide to use the powers in this Measure in a quite different way to those envisaged, albeit imprecisely, by the current administration. As the Measure is currently drafted, this could result in important changes of policy direction being implemented without any real opportunity for the Assembly to consider and debate them in any depth.

⁶ See: [bus-committees-third-sleg-Current Inquiries](http://www.assemblywales.org/cr-ld7812-e.pdf) and, most recently, <http://www.assemblywales.org/cr-ld7812-e.pdf>)

⁷ RoP – CA – 11 March 2010 paragraphs 188-194

26. Given the lack of certainty about how the powers in the Measure will be used, the very long lead time before we can expect this detail to be filled-in, and the fact that the powers will be used first by a Government elected after the next Assembly elections, we believe that there is a need for a full plenary debate on how the powers in this Measure are to be used. For that reason we believe that the first regulations made under the Measure should use the affirmative resolution procedure so that the Assembly as a whole is able to consider and approve them.

Recommendation 1. We recommend that the first regulations made using the powers in the proposed Measure should be made using the affirmative resolution procedure.

Other Issues

27. **Section 2(3)** – This section lists those organisations that are to be considered “relevant authorities” for the purposes of the Measure. As noted earlier there is no provision in the Measure to allow the Welsh Ministers to amend the list of “relevant authorities” and any future amendment of the list of relevant authorities would require further primary legislation.

28. We are concerned that the Government may be taking an overly restrictive approach on this occasion. The ability to make changes to the list of relevant authorities through subordinate legislation does not seem to be an unreasonable flexibility. It may even be considered to be a weakness in the Measure that it is overly restrictive in this respect and could hinder the development of desirable co-operation between the authorities listed and other authorities that might have legitimate roles in this area.

Recommendation 2. We recommend that the proposed Measure is amended to provide Ministers with a power to amend, by affirmative resolution, the list of relevant authorities set out in Section 2(3).

29. **Section 4 - Duty to consider views of carers** – There is no explicit provision either on the face of the Measure or to be provided in Regulations to require authorities to take into account or to have regard to any representations received from carers following a

consultation exercise. However, in oral evidence⁸ the Minister argued that there was no need for such a provision as it was implicit in any duty to consult that such consultations must be proper and meaningful.

30. We are content to accept the Minister's assurance which was confirmed by the Minister's and our own legal advisers. However, we note the Minister's undertaking in oral evidence to consider whether, in the drafting of regulations under Section 4 of the Measure, some more explicit duty in relation to consultation arrangements might be included.⁹

Recommendation 3. We recommend that the Minister considers how regulations under Section 4 might be drafted to include a more specific duty in relation to consultation arrangements with carers.

General Principles of Measure

31. Subject to our views above we are otherwise content that the Assembly should agree to the general principles of the proposed Measure and that it should move forward for more detailed Stage 2 consideration in Committee.

Recommendation 4. We recommend that the Assembly should agree to the general principles of the proposed Measure.

⁸ RoP – CA – 11 March 2010 para 245

⁹ Ibid para 252-253

Witnesses

32. The following witnesses provided oral evidence to the Committee on 11 March 2010. A transcript of the session can be viewed in full at www.assemblywales.org

11 March 2010

Gwenda Thomas AM Deputy Minister for Social Services, Welsh Government

John Carter Head of Vulnerable Adults and Carers Branch, Welsh Government

Huw Rowlands Legal Services Department, Welsh Government

List of written evidence

33. The Committee considered the following written evidence. All written evidence can be viewed in full at www.assemblywales.org

Document	Reference
Proposed Carers Strategies (Wales) Measure	CA(3)-08-10(p2)
Explanatory Memorandum	CA(3)-08-10(p3)
Legal Advisers' Report	CA(3)-08-10(p4)
Letter from the Chair to the Minister requesting the briefing	CA(3)-08-10(p5)
CA(3)-08-10(p7) - The Minister's response and Annexes 1 and 2	CA(3)-08-10(p7) CA(3)-08-10(p7) - Annex 1 CA(3)-08-10(p7) - Annex 2
Invitation from the Chair to the Minister to give evidence	CA(3)-08-10(p8)
Additional information provided by the Deputy Minister for Social Services on Proposed Carers Strategies (Wales) Measure	CA(3)-12-10(p5)