National Assembly for Wales
Constitutional Affairs Committee

Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years

February 2011

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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

Committee Member	*Party*	*Constituency or Region*
Janet Ryder (Chair)	Plaid Cymru	North Wales
Alun Davies	Labour	Mid and West Wales
William Graham	Welsh Conservatives	South Wales East
Rhodri Morgan	Labour	Cardiff West
Kirsty Williams	Welsh Liberal Democrats	Brecon and Radnorshire

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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
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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

The Committee's Role & Background to the Inquiry

Committee's Role

1. The Constitutional Affairs 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".[1]

Background

2. The Government of Wales Act 2006[2] devolved for the first time the power to make new primary legislation for Wales, known as Measures of the National Assembly for Wales. Since May 2007 the National Assembly has passed thirteen Measures proposed by the Welsh Government. A further four Welsh Government Measures have been published and are currently being considered by the National Assembly.[3]

3. As the end of the third Assembly approached, the Committee decided that it would be useful to undertake a short Inquiry looking into the drafting of Welsh Government Measures to see what issues of general significance may have arisen. In particular, whether there any lessons from experience so far that might be applied to how Measures are drafted in future. We have not looked at Member or Committee proposed Measures which are usually more ad hoc in nature and for which different drafting arrangements apply.

Evidence Received

4. The Committee issued a call for written evidence in August last year. Submissions were received from a number of organisations and individuals, which have been published on our pages on the National Assembly's website. A list of those who provided written evidence is set out at the end of this report.

5. We also took oral evidence from the Law Society; Mr Daniel Greenberg; Stonewall Cymru; the Wales Governance Centre, Cardiff

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[1] Standing Orders of the Third Assembly (Standing Order 15.6(v)) - National Assembly for Wales
[2] Government of Wales Act 2006 (2006 Chapter 32)
[3] At 15 January 2011 – For latest position see http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/bus-legislation-measures-notinprogress.htm and http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures.htm

Law School; and John Griffiths AM the Counsel General and Leader of the Legislative Programme for the Welsh Government.

6. In taking oral evidence, we sought, in what was a relatively short and focused inquiry, to balance evidence from those with legal drafting experience, legal practitioners in Wales, constitutional experts and groups affected by laws made in the Assembly. Further details are also set out at the end of this report.

Issues Arising from the Inquiry

The Policy Behind Legislation

7. A number of those who provided evidence expressed concern that the policy behind legislation was still being decided as the legislation was being considered or that legislation was being drafted so that policy issues could be decided later.

8. The issue is perhaps most starkly illustrated in the case of the NHS Redress (Wales) Measure 2008.[4] While we were considering this report, the first regulations arising from the Measure were about to be considered by the Assembly. The Regulations[5] run to over 60 pages, are accompanied by a nearly 50 page Explanatory Memorandum and will only come fully into force over 3 years after the Measure was originally passed.

9. Although later Measures have not shown the tendency quite so starkly, concerns relating to a lack of policy clarity have been expressed in relation to aspects of the Local Government Measure 2009,[6] the Education Measure 2009,[7] Social Care Charges Measure 2010,[8] Red Meat Industry Measure 2010,[9] Carers Strategies Wales Measure 2010,[10] Waste Measure 2010[11] and the Welsh Language Measure 2010.[12]

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[4] NHS Redress (Wales) Measure 2008 (2008 nawm 1)

[5] The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011

[6] Proposed Local Government (Wales) Measure - Stage 1 Committee Report – National Assembly for Wales January 2009 - Paragraph 5

[7] Subordinate Legislation Committee - The appropriateness of the subordinate legislation provisions in the Proposed Education (Wales) Measure, 24 June 2009, Recommendation 1; Page 5

[8] Subordinate Legislation Committee, The appropriateness of the subordinate legislation provisions in the Proposed Social Care Charges (Wales) Measure, 14 October 2009, Recommendation 3

[9] Subordinate Legislation Committee, The appropriateness of the subordinate legislation provisions in the Proposed Red Meat Industry (Wales) Measure, November 2009, Recommendation 2; Page 7

[10] Legislation Committee No.5, Stage 1 Committee Report on the proposed Carers Strategies (Wales) Measure, May 2010, Recommendation 12; Page 7.

[11] Legislation Committee No.4, Stage 1 Committee Report on the proposed Waste (Wales) Measure, June 2010, Paragraphs 73 and 77. Also, Finance Committee, Report on the Financial Implication of the proposed Waste (Wales) Measure, July 2010, Paragraph 44

[12] Legislation Committee No.2, Stage 1 Committee Report on the proposed Welsh Language (Wales) Measure, July 2010, Paragraph 112, 114, 124, 458 and 509. Also,

10. The Law Society in their written evidence said:

> "…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."[13]

The Wales Governance Centre said:

> "It is as if the law was drafted first before any policy was defined."[14]

And, Daniel Greenberg, a former Parliamentary Counsel told us:

> "What the drafters need is clear policy … With some of the examples that we have discussed today about the lack of balance between primary and secondary legislation, and the lack of clear purpose clauses, I am 100 per cent sure that they are not the result of a lack of drafting technique, but a lack of a clear policy emanating to the drafter."[15]

11. Given the subject matter of this inquiry it would perhaps have been wishful thinking to expect many contributions from individual members of the public. In fact we received only one written response of this sort but even this concentrated on the need to establish a clear policy or vision before legislating:

> "Is there a possibility that a stage is missing – we need more White Papers that clearly state what will be different/better – a concise document?
>
> Is there a possibility that there is a lack of clarity on when and how we're able to give input, because the language and the focus is on the legislative process, and not on the objective?"[16]

Finance Committee, Report on the Financial Implications of the proposed Welsh Language (Wales) Measure, August 2010, Paragraph 27-30

[13] CA(3)-22-10(p10); The Law Society; paragraph B1

[14] CA(3)-22-10(p10); The Wales Governance Centre; paragraph 3

[15] Record of Proceedings – Constitutional Affairs Committee (RoP) - 3 November 2010; para. 96

[16] CA(3)-22-10(p10); Daniel Greenberg (Berwin Laighton Paisner LLP);

12. However, the Counsel General argued that there is a robust process in place to ensure that policy issues are fully thought through before legislative proposals are brought forward.[17] He also rejected criticism that the content of some Measures seemed to indicate that the law was drafted first and the policy defined later.

> "We do not accept that criticism. As I have said, there are mechanisms to go through and a Cabinet committee deals with bids for legislation to ensure that the policy is properly thought out and that legislation is required. If there has been no hard thinking about the policy that the legislation is required to give effect to, the proposals would not be allowed to proceed. So, it is a matter of policy officials working with Legal Services and the drafters to make sure that there is a team approach and that policy has been worked up sufficiently for the drafters to understand what is required of them and what they are required to achieve through the legislation. So, there are processes to ensure that it is not a matter of introducing legislation and then thinking of the policy afterwards. That would be putting the cart before the horse."[18]

13. We accept that the NHS Redress Measure[19] was the very first Measure the Assembly considered using its new powers and that there were other specific factors that do not apply to other Measures. We believe that, despite issues with other Measures, the position has improved over time. We also believe that the Legislative Competence Order process may have deflected attention away from more detailed consideration of policy issues in some cases.

14. Despite this, and the Counsel General's defence of the Government's internal process, we believe that there needs to be more rigour in the policy development process, particularly in terms of wider external challenge to policies before they become legislative propositions.

15. We believe that future Welsh laws, whether made under the current process or under the powers that the Assembly will acquire if there is a positive vote in the referendum, should follow the

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[17] RoP; 1 December 2010, para 13, 29, 30
[18] RoP; 1 December 2010, para 45
[19] See Subordinate Legislation Committee, Report on the Proposed NHS Redress (Wales) Measure 2007, November 2007, Paragraph 13

publication of detailed policy proposals using the Green and White Paper models.

16. Not only would this ensure that the Government has to think through in more detail its policy objectives but it would allow a period of wider engagement and political and public challenge. It would also allow the Assembly to test legislation against a relatively detailed statement of policy so that there can be greater confidence that new laws will be used for their stated aim.

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 implement.

The Need for Legislation

17. We also heard criticism, notably from Daniel Greenberg of the law firm Berwin Leighton Paisner LLP that some Welsh Laws were either wholly or partly unnecessary and that as much could be achieved by administrative or other action.

18. Using the Carers Strategies (Wales) Measure 2010 as an illustration he told us:

> "I cannot see any legislative proposition in the Proposed Carers Strategies (Wales) Measure 2010 from start to finish. …
>
> … The institutions and bodies listed in section 2 of the proposed Measure are all, to a very great extent, under the control of devolved Government. I would have thought that your starting point would be to put effective administrative arrangements in place to ensure that they approach carers properly. Then, if you are not satisfied by the effectiveness of the administrative arrangements, that is the time to come along and say that there will now be a legally enforceable duty to co-operate. It is unlikely that you would ever get to that point, but in case you did, you would sit down and ask, 'What are the sanctions? What is the method of enforcement? How will we put

a rigorous mechanism in place to ensure that this is not just verbiage, but that it actually makes a change?"[20]

19. The Counsel General, however, argued that:

> "I think that the Government is entitled to take the view that a particular subject matter is one that requires legislation. It is then a matter for normal legislative processes to deal with that. If the legislature passes a Measure, as it has in this case, the process shows that the legislature was of the view that the Government was right to put forward the proposals, and that the legislation—as suggested and enacted—was required. So, it is difficult to see that criticism as valid, given that we have gone through the appropriate process and have seen the results."[21]

20. This seems to us a rather circular argument. However, we specifically asked the Counsel General for his view of what the legislative proposition in the Measure concerned was. Although, he was unable to point to any specific legislative proposition at the time, he later wrote to the Committee Chair[22] drawing attention to the duties the Measure placed on the NHS, local Authorities and others to prepare, publish and implement Carers strategies. While these are important duties, the Committee would have been more convinced, if the Counsel-General's rebuttal had been less dependent on an essentially circular argument.

21. As Daniel Greenberg set out in written evidence:

> "It is important that legislation should be used only to achieve change that cannot be achieved in any other way; and once it is decided that legislation is necessary, it must be centred around propositions that impose clear rights and duties and have appropriate mechanisms for enforcement."[23]

22. We are not unmindful of the role that legislation can have in raising awareness, and in setting the scene for changing and influencing public attitudes for the better. However, we also believe it

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[20] RoP; 3 November 2010; para 34 & 36
[21] RoP; 1 December 2010; para 18
[22] CA(3)-01-11(p9); additional written evidence from the Counsel General and Leader of the Legislative Programme
[23] CA(3)-22-10(p10); Daniel Greenberg (Berwin Laighton Paisner LLP); para 6

is very important to ensure that, before legislation is contemplated, all other ways of achieving a policy aim, such as administrative action, funding mechanisms, guidance etc have been explored fully first.

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.

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

23. A clear policy rationale, or the absence of one, for introducing a new law tends to have a considerable impact on the structure of Measures. Where a policy, its objectives and implementation, is not fully thought through beforehand it very often has the unfortunate side-effect of Measures drafted as "skeletons" with the detail to be filled in later through subordinate legislation. This has not just occurred with some of the earlier Measures that the Assembly has considered. For instance, in our report on the proposed Welsh Language Measure we drew attention to the relative lack of detail surrounding how aspects of the Measure would work in practice.[24]

24. It is fair to say that this point of view was more prevalent among legal practitioners than others who submitted evidence. Both NFU Cymru[25] and Stonewall Cymru[26] for instance felt that the balance in the Measures they had been involved with was about right. However, both struck notes of caution. NFU Cymru said:

> "Whilst it might be appropriate to grant fairly broad powers for Ministers to regulate through statutory instrument … in relation to the red meat industry, granting such wide powers might not be as appropriate or may even be inappropriate in relation to something such as mental health for example."[27]

25. While Stonewall Cymru seemed to point to the need for greater clarity on the face of the Measure:

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[24] CR-LD8163 - Constitutional Affairs Committee - Report on the Proposed Welsh Language (Wales) Measure; paragraph 63
[25] CA(3)-22-10(p10); NFU Cymru
[26] CA(3)-22-10(p10); Stonewall Cymru; para 1.0
[27] CA(3)-22-10(p10); NFU Cymru; para 5

> "However we are concerned that it is often unclear how Measures will be implemented, yet this is the stage at which sexual orientation mainstreaming and inclusion, or exclusion occurs. We are also concerned that, as there is usually no opportunity to provide input into secondary legislation important aspects, including best practice design to ensure sexual orientation inclusion, are often overlooked."[28]

26. Apart from the practical issues that Stonewall and the NFU identified, there is also the objection in principle of providing legal powers to Ministers for which there is no clear rationale and that can be used to achieve widely differing policy ends.

27. Daniel Greenberg offered the following principle for judging whether a piece of legislation has got the balance right:

> "Again, there is no single set of rules that can be applied. There are some danger signals that can be used, and there is an underlying principle involved. I set out the underlying principle in the 2008 edition of Craies in the following terms. I will read the sentence to you.
>
> '*In essence, the aim in striking a balance is to avoid leaving too much of significance to be determined by the executive or the courts, while at the same time, preventing the principal purpose of the primary legislation from being obscured by an excess of complicated detail.*'"[29]

28. He went on to warn of the dangers of accepting that a power is reasonable simply because it "is consistent with normal drafting convention" and suggested in each case "…ask[ing] the Minister what they are planning to do with this and then decide whether it sounds like the sort of thing that you would rather do on the floor of the Chamber."[30]

29. The Wales Governance Centre and the Law Society[31] also expressed concerns that the balance in a number of Measures between the detail on the face of the Measure and that to be set out in subordinate legislation is in many cases wrong:

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[28] CA(3)-22-10(p10); Stonewall Cymru; para 1.1
[29] RoP; 3 November 2010; para 63 & 64
[30] RoP; 3 November 2010; Para 66-68
[31] CA(3)-22-10(p10); The Law Society; para b1

> "With many of the Welsh Measures, it is almost as though the order of 'substance and effect' is being reversed in the Welsh Measures."[32]

30. We agree with this view, although we have noted a move toward a more appropriate balance in more recent Measures such as the Housing Measure and the Safety on Learner Transport Measure.

Principles that should be applied

31. We accept, in line with Daniel Greenberg's advice, that each case needs to be considered on its merits. It is for Assembly Members, using the Assembly's scrutiny procedures, to reach a judgement on each occasion whether a particular subordinate legislation provision is reasonable or not.

32. However, we have considered whether there are any general guiding principles or information that might assist the Assembly in carrying out its scrutiny role and deciding whether provisions would be better set out on the face of a Measure or in subordinate legislation. We are grateful, therefore, to the Wales Governance Centre for drawing up, at our request, supplementary evidence[33] which sets out a range of principles which might be established to assist in the Assembly's consideration of proposed Measures. The principles they have suggested are attached as an annexe to this report and we commend them to the Assembly.

33. In relation to the balance between provisions on the face of the Measure and in delegated legislation, they suggest that in each case the reasons for choosing delegated powers should be explained in specific terms for each delegated legislative power. We agree that these are entirely reasonable requirements and we recommend that they are used in all cases in future.

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;**

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[32] CA(3)-22-10(p10); The Wales Governance Centre;

[33] CA(3)-01-11(p10); Additional written evidence from the Wales Governance Centre of the Cardiff Law School

- **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.**

34. It is of course for the Assembly to decide whether and how to grant powers in Measures. The Wales Governance Centre suggests that in considering these issues the Assembly and its Committees should consider a number of other principles. These are that the Assembly and its Committees should have particular regard to:

- the assumption that scrutiny of proposed powers can be most effective if the legislation is on the face of the Measure, unless delegated legislation is used to:
- prescribe technical matters,
- implement administrative provisions where the substantive structure is in the Measure itself or
- make emergency provisions.
- the need for giving exceptional reasons for using delegated legislation to make consequential amendments to other legislation rather than identifying such amendments before the Measure is introduced and included in a Schedule to the Measure;
- the avoidance of creating new criminal offences by delegated powers rather than on the face of the Measure; and
- reasons why delegated legislation should be used to make future unspecified amendments to existing statutory provisions rather than including them in an appropriate amending Measure.

35. Again, we commend these principles to the Assembly and its Committees.

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.

36. We also believe that these principles should be drawn to the attention of and form the basis of guidance for Welsh Government staff who are involved in supporting Ministers in bringing new legislation before the Assembly.

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.

Procedure for making Subordinate Legislation

37. In our consideration of individual Measures, the procedure by which subordinate legislation is approved in each case has been one of the most consistent areas of concern for us.

38. There are 3 main procedures for approving subordinate legislation. These are:

- **No procedure** (approval by Ministers only). This is most often used for commencement provisions. When made by statutory instrument, legislation has to be laid before the Assembly for information but no other approval is required. In some cases, (particularly if the power is not to be made by Statutory Instrument) there is no requirement to lay items before the Assembly;
- **Negative procedure**. Subordinate Legislation is laid before the Assembly and the Constitutional Affairs Committee has up to 20 days to report to the Assembly on whether it raises any issues of concern. Individual Assembly Members can table a motion seeking to have such legislation annulled. If a motion is debated and approved within 40 days of the subordinate legislation being laid, then it is annulled and no longer has effect;
- **Affirmative procedure**. Subordinate Legislation is normally laid before the Assembly in draft. The legislation cannot

come into effect until the Assembly as a whole has voted to approve it, usually following a debate. The Constitutional Affairs Committee has up to 20 days to report to the Assembly on whether the legislation raises any issues of concern. The Assembly cannot vote to approve the legislation until the Committee has reported or 20 days have passed.

39. Occasionally, powers may be exercised by the affirmative procedure on first use but by the negative procedure on subsequent occasions. We have also recommended the use of a **super affirmative** procedure on occasions. This is the affirmative procedure but with additional requirements for a period of consultation before draft subordinate legislation is put to the Assembly for approval. These procedures might be used because there were concerns about how the power would be used in practice, particularly where Government policy appeared to be less than fully developed, or where the power was so significant that an additional level of scrutiny was considered necessary.

40. However, items of subordinate legislation must be approved or rejected in their entirety and cannot be amended. Although the affirmative procedure offers a higher level of scrutiny (and the super affirmative procedure a higher level still) it still suffers from the inability to consider amendments. Even where Assembly Members have considerable concerns about particular aspects of a piece of legislation, they are for this reason usually reluctant to reject it in its entirety.

41. As we indicated in paragraph 34, in terms of effective scrutiny, neither the affirmative procedure nor the super-affirmative is a satisfactory replacement for being able to scrutinise provisions on the face of a Measure.

42. The evidence we have received indicates that, as well as concerns that provisions that should have been included on the face of a Measure are being dealt with in subordinate legislation, there were also concerns at a lack of consistency in the procedures used to introduce subordinate legislation. The Law Society told us:

> "… in the Proposed Local Government (Wales) Measure that is currently before the Assembly, there is a fairly coherent scheme of what is dealt with on the face of the proposed Measure, what

> is left to regulations, and then the arguments as to which procedure is adopted. That seems to reflect a particular approach to what should be in regulations on the part of the officials dealing with local government. On the other hand, in the Proposed Waste (Wales) Measure, a huge area is left to regulations and that is very much in the style of environmental legislation, where there are broad frameworks and then regulations that, in terms of their drafting complexity, are tantamount to being primary legislation in their own right. So, there is this variation."[34]

43. The Wales Governance Centre made similar points in their written evidence[35] while Stonewall Cymru argued for greater use of the super-affirmative procedure as well as more comprehensive reporting of the responses to Assembly Legislation Committee consultations on Measures.

> "We feel that regular and consistent use of a super-affirmative procedure would considerably improve the consultation process and the ability to input into secondary legislation in particular. However, we still feel that recommendations from the consultation process should be able to be recorded for consideration at later stages, due to issues of capacity to respond, combined with the complexity of procedures."[36]

44. Daniel Greenberg argued in his written evidence that:

> "…it is neither possible nor desirable to attempt to set out rules; the balance of flexibility, convenience and accountability must be struck anew in each case. What matters, therefore, is to have an effective mechanism for scrutinising the Executive's proposed use of delegated powers on each occasion before the power is taken."[37]

45. He went on to commend[38] the work of the House of Lords Select Committee on Delegated Powers and Regulatory Reform and added in his oral evidence:

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[34] RoP; 20 October 2010; para 26
[35] CA(3)-22-10(p10); Wales Governance Centre; p3, para 4-5
[36] RoP; 17 November 2010; para 70
[37] CA(3)-22-10(p10); Daniel Greenberg (Berwin Laighton Paisner LLP); para 11
[38] Ibid; para 12

> "One of the most important documents in the preparation of a Westminster Bill is now the memorandum provided by the Government to the Delegated Powers and Regulatory Reform Committee of the House of Lords, either in advance of the Bill or as it is introduced. It lists and justifies each power individually, and it sets out the justification for the kind of scrutiny used. It is a process that has been useful just in focusing the Government's minds on every single power before a Bill is introduced. It requires the Government to ask whether it really needs the power, whether it can really be justified, and whether it has the appropriate level of scrutiny. In itself, that has been a salutary process and has changed Government behaviour."[39]

46. The Wales Governance Centre in their supplementary evidence has also commended the work of the Delegated Powers and Regulatory Reform Committee. The Centre has suggested that the Government, in setting out the reasons why a particular procedure should be used to scrutinise a subordinate legislation power, should consider the following principles in each case:

> "· powers to amend or repeal legislation should be subject to the Assembly's affirmative procedure,
>
> · powers to create new unprecedented legislative regimes should be subject to affirmative procedure,
>
> · powers to impose obligations should be by affirmative procedure,
>
> · powers which are similar to powers in other legislation should be subject to the same Assembly procedure as the other powers,
>
> · powers implementing administrative arrangements or prescribing technical matters based on principles set out on the face of the measure can be by negative procedure and

[39] RoP; 3 November 2010; para 73

- it would be rare for provision only to be made for laying the legislation before the Assembly with no provision for any Assembly scrutiny."[40]

47. As to the super-affirmative procedure, they call for it to be used sparingly:

> "It is only in exceptional circumstances that wide delegated legislative powers should be sought to amend or repeal existing legislation and to create new legislation in its place.
>
> …
>
> Where such exceptional circumstances can demonstrate that delegated powers should be used instead of using fast track amending legislation, the delegated powers should be made subject to the Assembly's super affirmative procedure."[41]

48. We believe these principles are an excellent rule of thumb that Assembly Committees may wish to apply when scrutinising Measures. We also believe that the Welsh Government should consider these principles each time they propose a particular method of scrutiny for a piece of subordinate legislation.

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.

49. We also agree with Daniel Greenberg that the case for a particular scrutiny procedure should be considered on its own merits on each occasion and that good scrutiny is what will ensure that appropriate procedures are used in each case. We believe that scrutiny would be improved if in future the Constitutional Affairs Committee were to be provided with a separate memorandum on the subordinate legislation powers in a Measure, in line with the model provided to the House of Lords Delegated Powers and Regulatory Reform Committee, when a Measure is introduced.

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[40] CA(3)-01-11(p10); Additional written evidence from the Wales Governance Centre of the Cardiff Law School p 19/20

[41] CA(3)-01-11(p10); Additional written evidence from the Wales Governance Centre of the Cardiff Law School; p 20

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.

Drafting and Clarity of Measures

50. We asked those giving evidence for their views on whether Measures are drafted in clear language and provide legal clarity. We commend at the outset the Welsh Government's general policy of drafting Measures:

> "…in modern standard Welsh and English reflecting ordinary general usage for formal written communication." Plain language drafting in English is well established…"
>
> and
>
> "Where practicable, the principles of Cymraeg Clir (plain Welsh) are applied."[42]

51. However, we also note that a number of those who gave evidence agreed with the general point made in the Welsh Government's written evidence that "…simplicity and clarity – while related – are not the same thing. Clarity requires both simplicity and precision."[43]

52. There was general agreement that the clarity of language and standard of drafting of Measures was good. Daniel Greenberg, for instance, commented:

> "You are absolutely right that I am more than generally supportive. It is a bit of an impertinence to comment on other people's work, because one does not know the circumstances in which they are working, but it seems to me that you have a first-rate team of drafters doing an extremely impressive job."[44]

53. Stonewall Cymru made the point that:

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[42] CA(3)-22-10(p10); Counsel General and Leader of the Legislative Programme; para 17 & 18
[43] Ibid; para 14
[44] RoP; 3 November 2010; para 95

> "…Measures are drafted in fairly complicated language, which is inaccessible to lay people. However we recognise that this is a result of the requirement for Measures to provide legal clarity.
>
> Therefore we feel that the Measures are written in appropriate language for their purpose and that accessibility and language issues that arise from the use of legal language need to be overcome through the Explanatory Memorandums."[45]

54. Both the Law Society[46] and the Wales Governance Centre were of the view that no particular Welsh "style" of drafting was developing. The Wales Governance Centre in particular were concerned:

> "…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."[47]

55. While noting developing good practice, the Wales Governance Centre also noted what they considered to be a number of problem areas. These included inconsistencies in the layout of Measures, placement of definitions, translations of institutions or bodies, inconsistencies with the wording of existing UK legislation and clarity of Schedules.[48] While not arguing for slavish adherence to a set format for Measures, they did argue that "the creation of principles in the drafting of Welsh Measures would be useful."[49]

56. Daniel Greenberg on the other hand took a somewhat different view:

> "I am strongly opposed to consistency for the sake of consistency, in the same way that I am strongly opposed to precedent for the sake of precedent. Each proposed Measure needs to be drafted in a way that is appropriate to the information to be conveyed in that proposed Measure. Creating

[45] CA(3)-22-10(p10); Stonewall Cymru; para 2 2.1
[46] RoP; 20 October 2010; para 17
[47] CA(3)-22-10(p10); Wales Governance Centre; para 4
[48] Ibid; p4 &5
[49] Ibid; p 8

manuals or rules simply prevents the drafter from exercising his or her skill in the most effective way on each occasion."[50]

57. We asked the Counsel General whether there was anything to be gained from a more consistent drafting style. He told us:

> "… there is a balance to be struck in seeking to achieve good practice in Wales, which, as was mentioned earlier, we want to achieve. I would like to think that we could establish good practice on using plain English and making it comprehensible to the lay person because that is important in order to engage the people of Wales in the legislative and policy-making process. However, I am mindful of the need for flexibility, and I know that some of the evidence that you have received in previous committee meetings did stress that need for flexibility."[51]

58. This was reiterated by Nia Evans, one of the Welsh Government's legislative draftspersons:

> "The important thing for us is that, although we can have overarching principles, such as clarity, what we want to do is ensure that the end user can use that legislation effectively. What we do not want is a rigid set of rules that tell us how we must go about doing that. So, for instance, it would not be of any use for me to have a rule saying that all the definitions have to go at the beginning, or that I am not allowed to use a table in the middle; we have to look at the subject matter and, sometimes, it might be appropriate to put a definition at the beginning, and sometimes it might be appropriate to put it at the end. You have to look at the subject matter and work out how you best convey that concept to the end user, and the key there is to have the flexibility to do that properly."[52]

59. We commend the work that has been done by the Welsh Government's legislative drafting team. Given the lack of experience in Wales of drafting new primary laws we believe the standard of drafting that has been achieved in such a short time has been generally exemplary.

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[50] RoP; 3 November 2010; para 99
[51] RoP; 1 December 2010; para 68
[52] Ibid; para 69

60. Despite the best efforts of drafters to make Measures accessible and understandable through the use of plain English and clear Welsh, it is inevitable that much of the content of legislation will be technical in nature and somewhat inaccessible to the lay reader. We believe that it would be wrong to try to impose a rigid straitjacket on drafters, who in each case will be drafting a unique piece of law, but that clarity and accessibility should be overriding principle in all cases.

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.

61. We also believe that there is much to be gained from an open dialogue and understanding between those drafting Welsh laws, legal practitioners in Wales and the wider public. We note from the Government's own written evidence to this inquiry a number of developing principles and practice underpinning their drafting of Welsh laws. We believe it would be helpful if the Welsh Government could make these available more widely to encourage greater debate about developing practice in the drafting of Welsh laws.

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.

Explanatory Memorandums and Regulatory Impact Assessments

Explanatory Memorandums

62. Explanatory Memorandums (EMs) are the main way in which the provisions of a Measure are explained and are particularly important to aid the understanding of those who are not qualified legal practitioners or do not have a detailed knowledge of the policy background.

63. With the best of intentions it is highly unlikely that Measures can be drafted in a way that is always entirely clear and transparent to the lay reader. However, it is absolutely essential that what a law is trying to achieve, who it will affect and their rights and duties under that law

are well known and understood. It is also essential that Assembly Members as legislators have a clear understanding of a legislative proposal if scrutiny is to be meaningful and effective and the Assembly is not to make bad law. Explanatory Memorandums should assist this process not hinder it.

64. There have been a number of criticisms made by Assembly Committees about EMs for Assembly Measures. Committees have on a number of occasions complained that EMs contained insufficient information to allow a balanced judgement to be made of the policy a Measure was trying to implement or of whether the Measure achieves its policy aim.

65. During our inquiry we again heard a number of criticisms of EMs including that they can sometimes obfuscate[53] rather than explain, that they can be overly long[54] and that they often simply paraphrase the relevant section of a Measure[55].

66. Stonewall Cymru told us:

> "However, explanatory memoranda could be improved to be more accessible to people to ensure that LGB people, groups and individuals understand the explanatory memoranda and can input into the consultation process."

They went on to say:

> "The issue is specifically about the accessibility of explanatory memoranda, rather than of Measures. We feel that, in the interests of open government, they need to be accessible to all. With respect, lawyers are one part of the process. They are an important part, but accessibility is vital to Welsh legislation being understood by the citizens of Wales."[56]

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.

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[53] RoP; 3 November 2010; para 85
[54] CA(3)-22-10(p10); Wales Governance Centre; p 5
[55] CA(3)-22-10(p10); The Law Society
[56] RoP; 17 November 2010; para 72 & 74

67. The Welsh Government's written evidence to the inquiry acknowledges the concerns of Assembly Committees and that more can be done to improve Explanatory Memorandums and Regulatory Impact Assessments. The Counsel General has instructed officials to produce a definitive model of best practice which he intends to share with the Committee once it is ready[57]. We welcome this and it is also fair to note that some EMs, notably the one for the proposed Local Government Measure, have been widely praised[58] as a model that could be used for other memorandums.

68. In their additional written evidence[59] the Wales Governance Centre have suggested a number of principles and an outline structure for future Memorandums. We are not entirely committed to every specific point of this structure but believe that it is worthy of consideration by the Counsel General in considering how to improve EMs in future.

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

Regulatory Impact Assessments

69. We received relatively little evidence about Regulatory Impact Assessments (RIA) although we are aware that they have also been subject to criticisms from Assembly Committees. In our own experience in looking at RIAs for statutory instruments they can often appear impenetrable and formulaic. The assumptions on which they are based can sometimes appear to have been chosen in order to justify a predetermined outcome.

70. The Law Society view was:

> "…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'

[57] CA(3)-01-11(p9); Additional written evidence from the Counsel General and Leader of the Legislative Programme; para 35-37
[58] CA(3)-22-10(p10; The Law Society; para 38; Wales Governance Centre; para 111; Stonewall Cymru; para 80
[59] CA(3)-01-11(p10); Additional written evidence from the Wales Governance Centre

nature of the provision and the need to move down to the subordinate legislation stage of law-making."[60]

71. The Wales Governance Centre made similar points.[61]

72. Stonewall Cymru argued that the options assessed in RIAs are sometimes too limited and that other options do not appear to have been considered. They believed that there should be scope for expanding the options available.[62]

73. Daniel Greenberg thought that RIAs were potentially key documents in understanding whether or not laws were justified by the intentions behind them.[63] We agree with this but are far from convinced that RIAs are as helpful as they could be particularly where policy has not been fully developed at the time legislation is being considered.

74. We note that the Counsel General is looking at improving the standard of Regulatory Impact Assessments as part of his more general review of legislative process. We welcome this and recommend in particular that he looks at the relationship between policy development and RIAs.

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

Other Issues

Consolidation of Welsh legislation

75. The Law Society expressed concern that the statute book is becoming "increasingly unmanageable"[64]. They told us in written evidence that:

> "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.

[60] CA(3)-22-10(p10); The Law Society; para b4
[61] RoP; 24 November 2010; para 201 & 203
[62] CA(3)-22-10(p10); Stonewall Cymru; para 3
[63] RoP; 3 November 2010; para 91
[64] CA(3)-22-10(p10); The Law Society; c.3 (last para)

> …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."[65]

76. In oral evidence they said:

> "If, in future, the Assembly is going to make extensive legislative provision in a major field, such as education, you need a good base legislative text to start working from. … periodically you have to gather up the legislative efforts of the previous years and decades and create a fresh text."[66]

77. They argued that the problem would become more acute if Part 4 of the Government of Wales Act 2006 takes effect after the referendum although they also pointed out the resource implications of consolidation:

> "… the Law Commission charges a fee to the individual departments for carrying out things such as consolidation exercises. The Law Commission does a certain amount of fundamental research of its own on areas of law reform, but it is asked by Government departments from time to time to undertake specific projects. As I understand it, the arrangements are that the Government department is then charged for those services. The absence of financial resources is therefore impacting on the projects that the Law Commission is taking on."[67]

78. The Counsel General in his oral evidence accepted the need to consider consolidation but also pointed out the resource implications:

> "Thought has been given to that in those sorts of subject areas, … because people's ability to understand and easily find out what the relevant law is in any particular area is crucially important. For example, we have discussed, as an Executive, consolidation in general terms with the Law Commission, and we intend to give further consideration to that, including the resourcing issues as and when proposals for consolidation

[65] Ibid
[66] RoP; 20 October 2010; para 57
[67] Ibid; para 62

come forward, either from Ministers or from outside bodies. So, it is something that has been considered."[68]

79. Whatever the result of the referendum, the likelihood is that the statute book for Wales will continue to diverge from England and at some point, particularly in areas identified by the Law Society such as Education and Local Government, consolidation Measures or Acts will be needed. We agree, therefore, that consolidation is an issue that the Welsh Government needs to consider actively.

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

Gender Specific Language

80. We asked Stonewall Cymru for their views on how overly complex drafting can be avoided while still avoiding assumptions about gender and sexuality. They told us:

> "We welcome the proactive approach that has been taken to drafting legislation in non-gender-specific language. That is fantastic and is great for same-sex couples, as is the fact that they are a part of Wales's statute book from the outset. That is really important. When referring to partners, 'spouse' and 'partner' are terms that could be used quite simply. The lawyers may argue with that, but we would be happy to hear their opinion on that. We do not feel that it needs to be complicated. An example from Westminster is the Civil Partnership Act 2004, which defined 'spouse' to include civil partners. We do not feel that there needs to be a clause for 'wife', 'husband' or 'civil partner'. We do not see that it needs to be complicated."[69]

81. We also asked whether they felt that any Measures so far conflicted with the Assembly's equality duties or affected the way in which that duty is carried out. They told us:

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[68] RoP; 1 December 2010; para 92
[69] RoP; 17 November 2010; para 106

> "'No' is the simple answer. However, going forward, we would encourage you to move from a non-discriminatory model to an anti-discriminatory model, which goes back to my previous point about designing services differently sometimes to cater for minority groups or protected characteristics. So, sometimes, for a group that experiences discrimination, culturally, practically every day, it is just not enough for you to say, 'We will treat everyone equally', because if that means that you ask everyone about 'partners', some LGB people might not feel comfortable with that, as they may not be out or they may not have a partner, and so that would enhance the discrimination. That is one small example, but we would encourage you to be more proactive on the equality duty."[70]

82. We believe these points are worthy of further consideration to help consolidate the already excellent practice in this area.

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 anti-discriminatory language.

Application to Acts and non-Government Measures

83. This inquiry has predominantly concerned itself with Welsh Government Measures. However, all of our recommendations are equally applicable, appropriately adapted, to Measures proposed by the Assembly Commission, Assembly Committees and individual Assembly Members. These bodies will not be in a position to produce "White Papers" setting out the policy behind their proposed Measures, why a new law is needed and why the policy cannot be achieved in any other way. However, they should still be able to satisfy the Assembly that they have given rigorous consideration to these matters before proposing new laws.

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.

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[70] RoP; 17 November 2010 para 112

84. We believe that all the recommendations in this report are equally applicable to Acts of the Assembly should there be a positive vote in the referendum on 3 March to bring into effect Part 4 of the Government of Wales Act 2006.

Review of Recommendations

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.

Conclusion

85. The Third Assembly was the first time for primary legislation to be made in Wales, on purely Welsh matters, for hundreds of years. It was the first time in our history that such laws had been made by a democratically elected body responsible to all the people of Wales.

86. Despite there being relatively little experience of drafting such legislation, we have heard no fundamental concerns that the drafting of the new Welsh laws is suspect, inferior or unclear. To the contrary, in terms of their drafting at least, there are good reasons to believe that they are the equal of laws made anywhere else in the UK.

87. That is not to say we have no concerns and that the Measures passed so far are above criticism. Far from it. Some Measures, particularly the early ones, were too skeletal in nature with far too much detail being left to subordinate legislation. However, that criticism is mainly one about a lack of policy clarity and should not be laid at the door of the draftspersons who we believe have done a commendable job in the circumstances.

88. It would also be easy, and valid, to criticise the Welsh Government for sometimes wanting to legislate before policy has been fully thought through. The Government has to some degree accepted this criticism, again, particularly in relation to some of the early Measures.

89. However, we are mindful that there would also have been criticism if the Assembly had not used the powers it had been given under the Government of Wales Act 2006 to try to make a positive difference for the people of Wales. The Legislative Competence Order process may also have used time and resources that could have been better used ensuring that underlying policy was fully developed. We hope that the LCO process does not continue to be the drain on policy making in future that we feel it may have been in this Assembly.

90. There are also very positive signs that things are improving. Later Measures have shown both a more developed policy context and a greater degree of consistency about what is on the face of the Measure, compared to what is in subordinate legislation. An underlying philosophy for the appropriate scrutiny procedure for subordinate legislation is also becoming more evident, as was seen in

the recent Explanatory Memorandum for the proposed Local Government Measure.

91. As well as ensuring that underlying policy is fully developed, the Welsh Government and its officials need to ensure that legislation is better explained. Explanatory Memorandums need to be improved, written in plain English and clear Welsh and be genuinely explanatory rather than just restating what is in the Measure itself.

92. In summary, we would hope that the Government will take steps to ensure that future Measures:

- are based on clear policy objectives that cannot be achieved except through legislation;
- have as much detail as possible on the face of Measures rather than in subordinate legislation;
- use procedures for subordinate legislation that ensure appropriate scrutiny in each case; and
- are fully explained in plain English and clear Welsh.

Witnesses

93. The following witnesses provided oral evidence to the Committee. A transcript of the session can be viewed in full at www.assemblywales.org

Date	*Organisation*	*Represented by:*
20 October 2010	The Law Society Adviser	E Kay Powell, Policy Adviser
		Huw Williams, Partner, Geldards LLP
3 November 2010	Berwin Leighton Paisner LLP	Daniel Greenberg
17 November 2010	Stonewall Cymru	Ele Hicks, Projects and Policy Officer
		Andrew White, Director
24 November 2010	Wales Governance Centre, Cardiff Law School	David Lambert, Research Fellow,
		Manon George, Research Assistant
1 December 2010	Welsh Government	John Griffiths AM, Counsel General and Leader of the Legislative Programme
		Jeff Godfrey, Director, Legal Services Department
		Nia Evans, Legislative Counsel
		Marion Stapleton, Head of Assembly Business and Legislation Management Division

List of written evidence

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

Document	*Reference*
Written Evidence to the Inquiry from: - The Law Society - Mr Daniel Greenberg (Berwin Leighton Paisner LLP) - Stonewall Cymru - Cardiff law School - the Counsel General and Leader of the Legislative Programme John Griffiths AM - National Farmers Union (NFU) Cymru - Association of Chief Police Officers (ACPO) - Member of public	**CA(3)-22-10(p10)**
Additional written evidence from the Counsel General and Leader of the Legislative Programme	**CA(3)-01-11(p9)**
Additional written evidence from the Wales Governance Centre of the Cardiff Law School	**CA(3)-01-11(p10)**

Annexe

Principles suggested by Cardiff Law School, which might be established to assist in the Assembly's consideration of proposed measures

Introduction

To assist the Assembly, its Constitutional Affairs Committee and other Committees in their consideration of proposed Measures, the Explanatory Memorandum which accompanies the laying of a draft Measure before the Assembly should always contain the information which is set out below.

Reasons must be given for not fulfilling the requirements set out below and the attention of the Assembly will be drawn to any failure to fulfill these requirements.

1. The Need for the Measure

The Principle

A concise explanation of why the proposed legislation is considered to be necessary should be given.

Application of the Principle

The explanation should be given in relation to:

- the Measure as a whole,
- each Part of the Measure and
- the inadequacies of existing legislation to achieve the desired purpose.

2. The Division of Powers Between Primary and Secondary Legislation

The Principle

The reasons for choosing delegated legislation rather than having substantive powers in the Measure should be explained.

Application of the Principle

Each delegated legislative 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.

General Comments

The Assembly and its Committees will have particular regard to:

- the assumption that scrutiny of proposed powers can be most effective if the legislation is on the face of the Measure, unless delegated legislation is used to:

- prescribe technical matters,

- implement administrative provisions where the substantive structure is in the Measure itself or

- make emergency provisions.

- the need for giving exceptional reasons for using delegated legislation to make consequential amendments to other legislation rather than identifying such amendments before the Measure is introduced and included in a Schedule to the Measure,

- the avoidance of creating new criminal offences by delegated powers rather than on the face of the Measure and

- reasons why delegated legislation should be used to make future unspecified amendments to existing statutory provisions rather than including them in an appropriate amending Measure.

3. The Use of Different Assembly Procedures for Scrutinising Delegated Legislation.

The Principle

Reasons should be given for the suggested Assembly scrutiny procedure (if any) to which each delegated legislative power in the proposed Measure would be subject.

Application of the Principle

- powers to amend or repeal legislation should be subject to the Assembly's affirmative procedure,

- powers to create new unprecedented legislative regimes should be subject to affirmative procedure,

- powers to impose obligations should be by affirmative procedure,

- powers which are similar to powers in other legislation should be subject to the same Assembly procedure as the other powers,

- powers implementing administrative arrangements or prescribing technical matters based on principles set out on the face of the measure can be by negative procedure and

- it would be rare for provision only to be made for laying the legislation before the Assembly with no provision for any Assembly scrutiny.

4. The Use of the Super Affirmative Procedure.

The Principle

It is only in exceptional circumstances that wide delegated legislative powers should be sought to amend or repeal existing legislation and to create new legislation in its place.

Application of the Principle

Where such exceptional circumstances can demonstrate that delegated powers should be used instead of using fast track amending legislation, the delegated powers should be made subject to the Assembly's super affirmative procedure.

5. The Basic Structure of Measures.

The Principle

Unless there are particular reasons:

- definitions in Measures should be placed in one definition section of the Measure,

- there should be only one definition used for the same word or phrase wherever it occurs in the Measure and

- substantive provisions should be placed in the body of the Measure rather than in a Schedule.

General Comments

It is helpful for the Assembly Members and users of the Measure to be able to rely on a generally accepted pattern of certain basic structures.

6. Measures which Amend Existing Legislation.

The Principle

Proposed Measures which make amendments to existing legislation should be accompanied by a non statutory document which sets out the text of the legislation as it would appear if the amendments become law.

General Comments

Such a non statutory document would be of help in understanding the context in which the amendments are made.

It would only be necessary to set out the specific sections or Schedules of the amended legislation, not the whole of the Act in which the amendments appear.

The document should accompany the draft Measure as it is first published or introduced before the Assembly.

7. Explaining the Anticipated Contents of Delegated Legislation.

The Principle

A brief explanation should be given of the anticipated provisions that will be made by exercising the delegated legislative powers.

Application of the Principle

- examples of the possible use of the power should be given,

- an explanation which only states that there are no current plans to use the powers in any anticipated circumstances is not acceptable, this is particularly the case where it is not possible to explain at the time of the preparation of the Memorandum how a wide power to amend other legislation will be used and

- Ministerial assurances as to how the powers will be used are no substitute for clearly expressed and comprehensive legislation appearing on the face of the Measure.

8. The Format of the Explanatory Memoranda

The Principle

All Explanatory Memoranda should follow the same structure.

Application of the Principle

The structure should be 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

Tables should only be used to explain explains by reference to each power in the Measure to make subordinate legislation:

- on whom the power is conferred;
- the form whether by order or by regulation;
- why it is appropriate for delegated legislation;
- procedure – negative, affirmative or other procedure;
- reason for procedure.

The remainder of the explanation should be in continuous prose.

General Comments

An agreed structure applicable to all Explanatory Memoranda is important for all those including Assembly Members who wish to understand each aspect of a proposed Measure. All Explanatory Memoranda in this form should also be published together with the Measure when it receives Royal Assent.