

**National Assembly for Wales**  
Constitutional Affairs Committee

Report on the Proposed Welsh Language  
(Wales) Measure

July 2010



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

An electronic copy of this report can be found on the National Assembly's website:  
**[www.assemblywales.org](http://www.assemblywales.org)**

Copies of this report can also be obtained in accessible formats including Braille, large print; audio or hard copy from:  
Legislation Office  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

Tel: 029 2089 8154  
Fax: 029 2089 8021  
Email: [Legislationoffice@wales.gsi.gov.uk](mailto:Legislationoffice@wales.gsi.gov.uk)

© National Assembly for Wales Commission Copyright 2010  
The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

**National Assembly for Wales**  
Constitutional Affairs Committee

**Report on the Proposed Welsh Language  
(Wales) Measure**

July 2010



## **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](http://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

# Contents

---

<b>The Committee's Recommendations .....</b>	<b>5</b>
<b>The Committee's Role .....</b>	<b>6</b>
Standing Orders.....	6
<b>The Proposed Measure .....</b>	<b>6</b>
Scope and Intent .....	6
Subordinate Legislation Making Powers and Procedures.....	6
The Welsh Language Commissioner - Appointment Regulations for the Commissioner, the Members of the Advisory Panel and the Tribunal ..	7
<i>Appointment Regulations for the Commissioner.....</i>	<i>7</i>
<i>Delegation of First Minister's functions .....</i>	<i>7</i>
<i>Appointment regulations in relation to the members of the Advisory Panel .....</i>	<i>7</i>
<i>Appointment regulations in relation to the members of the Tribunal ..</i>	<i>8</i>
The conduct by the Commissioner of his or her functions.....	8
<i>Legal assistance: costs .....</i>	<i>8</i>
<i>Annual report to Welsh Ministers in relation to freedom to use the Welsh language .....</i>	<i>8</i>
<i>Integrity of the Commissioner and Deputy Commissioner .....</i>	<i>9</i>
<i>Restrictions on the Commissioner .....</i>	<i>9</i>
Joint and collaborative working between the Commissioner and prescribed ombudsmen or other authorities .....	9
<i>Joint working between the Commissioner and the Public Services Ombudsman for Wales.....</i>	<i>9</i>
<i>Collaborative working between the Commissioner and other Ombudsmen .....</i>	<i>10</i>
<i>Power to disclose information .....</i>	<i>10</i>
The imposition of standards on persons specified in the Measure.....	10
<i>Specification of standards.....</i>	<i>10</i>
<i>Amendment of persons and categories specified in Schedule 6 and 8</i>	<i>11</i>

<i>Amendment to the amount of public money a person must receive to be included within the description of a person in entry (5) of schedule 5</i>	11
<i>Making standards specifically applicable to a person</i>	11
<i>Duty to make certain service delivery standards specifically applicable</i>	11
<i>Supply of information to the Commissioner</i>	11
The imposition of civil penalties	12
The Tribunal's rules of practice and procedure	12
Transitional and consequential provision	12
Commencement Provision	12
The abolition of the Welsh Language Board and the transfer of its functions	12
<b>Issues arising from evidence and recommendations of the Committee</b>	13
General	13
Appointment arrangements for the Welsh Language Commissioner	13
The imposition of standards on persons specified in the Measure	14
Transitional and Consequential Provisions	16
<b>Witnesses</b>	17
<b>List of written evidence</b>	18

## **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.** We recommend that regulations under paragraph 7 of Schedule 1, making provision about the appointment of the Commissioner, should be made by the affirmative resolution procedure. **(page 14)**

**Recommendation 2.** We recommend that relatively detailed illustrative Standards are published as a contribution to the public debate on this aspect of the Measure. **(page 15)**

**Recommendation 3.** We recommend that the Measure be amended to include a list of activities in relation to standards other than service delivery standards, similar to that contained in Schedule 9. **(page 16)**

**Recommendation 4.** We recommend that the Measure be amended to provide that an order under section 143, that amends primary legislation, be made subject to the affirmative procedure. **(page 16)**

## **The Committee's Role**

---

### **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 Measures .....that grant powers to make subordinate legislation to the Welsh Ministers'.
  - Whilst it is not part of the Committee's remit to comment in the merits of the proposal 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.

## **The Proposed Measure**

---

3. The Minister for Heritage, Alun Ffred Jones AM, introduced the proposed Measure on 4 March 2010. This was followed by a legislative statement by the Minister in the National Assembly on 10 March 2010. The proposed Measure was referred to Legislation Committee No. 2 for stage 1 (general principles) consideration. The stage 1 reporting deadline is 23 July 2010.

### **Scope and Intent**

4. The stated intent of the proposed Welsh Language (Wales) Measure 2010 is to modernise the existing legal framework largely governed by the Welsh Language Act 1993 ("the 1993 Act") regarding the use of the Welsh language in the delivery of public services.

### **Subordinate Legislation Making Powers and Procedures**

5. The proposed Measure contains extensive powers for subordinate legislation to be made by Welsh Ministers. These are explained in Part 1 (5) of the Explanatory Memorandum laid with the Proposed Measure,



and in the Explanatory Notes that appear at the end of that Memorandum. Section 139 of the Measure specifies what orders or regulations will be subject to the affirmative or negative resolution procedures.

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

***The Welsh Language Commissioner - Appointment Regulations for the Commissioner, the Members of the Advisory Panel and the Tribunal***

***Appointment Regulations for the Commissioner***

7. **Section 2(2)** provides that the First Minister must appoint the Language Commissioner. **Schedule 1** then provides further detail in relation to appointment procedures. Schedule 1, paragraph 3 (1) (a) stipulates that the First Minister must comply with subsequent appointment regulations. Paragraph 7 of Schedule 1 requires regulations to make provision for the establishment of a panel of persons who are to interview candidates and make recommendations to the First Minister.

8. **Procedure:** These regulations will be subject to the **negative** procedure.

***Delegation of First Minister's functions***

9. **Schedule 1**, paragraph 8 (1) and (2) permits the First Minister to make an order delegating any of his or her functions in relation to the Commissioner to the Welsh Ministers.

10. **Procedure:** If these delegated functions require the Measure to be amended in any way then this will be subject to the **affirmative** procedure. Where the order does not contain provisions amending the proposed Measure, the order will be subject to the **negative** procedure.

***Appointment regulations in relation to the members of the Advisory Panel***

11. **Section 22** of the Measure provides that the Welsh Ministers must appoint members of the Advisory Panel and Schedule 4 makes further provisions in relation to regulation making powers in that respect.

12. **Procedure:** Any regulations dealing with the appointment of the advisory panel members will be subject to the **negative** procedure.

*Appointment regulations in relation to the members of the Tribunal*

13. **Section 109 (3)** provides that the Welsh Ministers must appoint members of the Tribunal and Schedule 11 makes further provisions in relation to regulation making powers in that respect.

14. **Procedure:** Any regulations dealing with the appointment tribunal members will be subject to the **negative** procedure.

*The conduct by the Commissioner of his or her functions*

*Legal assistance: costs*

15. **Section 9** deals with the recovery of the Commissioner's expenses incurred in providing legal assistance under section 8. Section 9(4) provides that regulation may be made that will set out how the Commissioner's expenses are to be calculated.

16. **Procedure:** These regulations will be subject to the **negative** procedure.

*Annual report to Welsh Ministers in relation to freedom to use the Welsh language*

17. **Section 108** gives regulation making powers to the Welsh Ministers to make provision about:

- the reports the Commissioner makes to Welsh Ministers about applications individuals make to the Commissioner requesting that alleged interferences with the freedom to use Welsh be investigated;
- the action taken by the Commissioner in response to such requests; and
- the Commissioner's view of the adequacy and effectiveness of the law in protecting the freedom of persons in Wales wishing to use Welsh with one another to do so.

18. **Procedure:** Regulations made under this section will be subject to the **negative** procedure.

### *Integrity of the Commissioner and Deputy Commissioner*

19. Part 8, Chapter 1 of the proposed Measure makes provisions in relation to the integrity of the Commissioner and the Deputy Commissioner.

20. **Section 129** gives regulation making powers to the Welsh Ministers to specify what interests must be registered for the purposes of recording conflicts of interest, and the creation, maintenance and publication of registers of interest.

21. **Procedure:** These regulations will be subject to the **negative** procedure.

### *Restrictions on the Commissioner*

22. **Section 133** states that the Commissioner is not authorised or required to exercise a particular function which, in light of an enactment, another person may also exercise. Section 133 (2) gives order making powers to the Welsh Ministers to identify and specify those particular functions and persons in question.

23. **Procedure:** Such Orders would be subject to the **negative** procedure.

### ***Joint and collaborative working between the Commissioner and prescribed ombudsmen or other authorities***

#### *Joint working between the Commissioner and the Public Services Ombudsman for Wales*

24. **Section 19** of the proposed Measure makes provision in relation to joint working between the Commissioner and the Public Service Ombudsman for Wales (PSOW). Section 19 (4) (a) gives order making powers to the Welsh Ministers to provide for section 19 to apply in relation to any other person as it applies to the PSOW.

25. **Procedure:** Such an order would be subject to the **affirmative** procedure if the order amended primary legislation. If it did not amend primary legislation the order would be subject to the **negative** procedure.

*Collaborative working between the Commissioner and other Ombudsmen*

26. **Section 20** of the proposed Measure makes provision in relation to collaborative working between the Commissioner and other ombudsmen.

27. Section 20 (7) gives the Welsh Ministers the power, by order, to amend the definition of ombudsman in subsection (6). An order under 20 (7) is subject to the **affirmative procedure**.

28. Subsection (8) gives the Welsh Ministers the power, by order, to make such other provision as to the Welsh Ministers think appropriate in connection with, for the purposes of, or in consequence of an amendment made by order under subsection (7). An order made under 20 (8) will be subject to the **negative procedure** unless it amends primary legislation, in which case it will be subject to the **affirmative procedure**.

*Power to disclose information*

29. **Section 21** of the proposed Measure deals with information which has been obtained by the Commissioner in the exercise of his or her duties and the control of that information. Section 21 (10) gives the Welsh Ministers the power, by order, to amend the definition of “permitted persons” in subsection (8).

30. **Procedure:** An order made under this section would be subject to the **affirmative procedure**.

*The imposition of standards on persons specified in the Measure*

*Specification of standards*

31. **Section 25 (1)** gives regulation making powers to the Welsh Ministers to specify standards that will be applicable in relation to persons.

32. **Procedure:** These regulations will be subject to the **affirmative procedure**.

*Amendment of persons and categories specified in Schedule 6 and 8*

33. **Sections 34 and 37** give Welsh Ministers the power by order to amend Schedules 6 and 8 respectively, which specify the persons or categories of persons which are liable to be subject to standards.

34. **Procedure:** These orders will be subject to the **affirmative** procedure unless the order is made as a consequence of a change in a person's name, in which case it will be subject to the **negative** procedure.

*Amendment to the amount of public money a person must receive to be included within the description of a person in entry (5) of schedule 5*

35. **Paragraph 1(1) of Schedule 5** gives the Welsh Ministers the power, by order, to amend entry (5) in the table by replacing the relevant amount of public money with any other amount that is not less than £400,000.

36. **Procedure:** An order under this section will be subject to the **affirmative** procedure.

*Making standards specifically applicable to a person*

37. **Section 38** gives regulation making powers to the Welsh Ministers to authorise the Commissioner to give a compliance notice to a person requiring that person to comply with a standard.

38. **Procedure:** Regulations made under this section will be subject to the **affirmative** procedure.

*Duty to make certain service delivery standards specifically applicable*

39. **Section 41** gives order making powers to the Welsh Ministers to amend the list of activities in Schedule 9 in relation to which service delivery standards must be specified.

40. **Procedure:** Orders made under this section will be subject to the **affirmative** procedure.

*Supply of information to the Commissioner*

41. **Section 68** gives regulation making powers to the Welsh Ministers to make provisions about the supply to the Commissioner of

information contained in records kept by a person who is subject to a record keeping standard.

42. **Procedure:** Regulations made under this section will be subject to the **affirmative** procedure.

### ***The imposition of civil penalties***

43. **Section 82** of gives the Welsh Ministers the power, by order, to substitute a different amount for the maximum £5,000 civil penalty that could be imposed in respect of a breach of a relevant requirement.

44. **Procedure:** Orders made under this section will be subject to the **affirmative** procedure.

### ***The Tribunal's rules of practice and procedure***

45. **Section 112** requires the Tribunal's President to make rules governing the practice and procedure of the Tribunal. The rules are subject to the approval of the Welsh Ministers, who must make a statutory instrument containing the rules.

46. **Procedure:** The rules governing the day to day operation of the Tribunal will be subject to the **negative** procedure.

### ***Transitional and consequential provision***

47. **Section 143** empowers Welsh Ministers by order to make transitional provision and amendments consequential on the Measure.

48. **Procedure:** Orders made under this section will be subject to the **negative** procedure.

### ***Commencement Provision***

49. **Section 145 (2)** empowers Welsh Ministers to make orders bringing the Measure into force (Commencement Orders).

### ***The abolition of the Welsh Language Board and the transfer of its functions***

50. **Schedule 12, paragraphs 1 and 2** contain two order making powers that will enable the Welsh Ministers to make provisions for the staff of the Welsh Language Board to transfer to the Commissioner or

Welsh Ministers and deal with the property, rights and liabilities of the Board.

51. **Procedure:** These orders would be subject to the **negative** procedure.

## **Issues arising from evidence and recommendations of the Committee**

---

52. The Constitutional Affairs Committee considered the Proposed Welsh Language (Wales) Measure on 27 May 2010 and received written and oral evidence from the Minister for Heritage Alun Ffred Jones AM and his officials.

### **General**

53. The Committee is satisfied that the proposed Measure generally achieves the correct balance between powers on its face and the subordinate legislation powers given to Welsh Ministers.

54. The Committee is also content that although there are a considerable number of regulation making powers in the proposed Measure, it will not be unnecessarily complex.

55. From the perspective of the subordinate legislation provisions it contains, the Committee sees no reason why the National Assembly should not agree to the general principles of the Proposed Measure.

### **Appointment arrangements for the Welsh Language Commissioner**

56. The First Minister must appoint the Language Commissioner and must do so in line with provisions to be made in regulations by the Welsh Ministers. These Regulations will all fall to be made by the negative procedure.

57. The arrangements for the appointment of a Commissioner (or similar public appointment) should ensure reasonable independence to carry out their role. We have received advice from our legal advisers (see list of written evidence) about the different arrangements that can apply. These can range from appointment by the Queen following nomination by the National Assembly to appointment by Welsh Ministers. Other arrangement, such as term of office may also impact on the perceived independence of the Commissioner. There is no hard

and fast rule that can be applied and the degree of independence will vary depending on the nature of the appointment, the functions to be carried out and the degree of political control and direction that is appropriate.

58. We do not believe it is part of our remit to comment on whether the appointment arrangements in this case strike the right balance between political direction and independence. However, we believe that the issue will be a key factor in establishing the credibility of the Commissioner in due course. We believe it is an area where Members of the National Assembly should have the opportunity to consider and decide whether the arrangements that are finally proposed get this balance right. For this reason we believe that the relevant appointment regulations should be made by the affirmative resolution procedure.

**Recommendation 1. We recommend that regulations under paragraph 7 of Schedule 1, making provision about the appointment of the Commissioner, should be made by the affirmative resolution procedure.**

### **The imposition of standards on persons specified in the Measure**

59. Section 25(1) of the proposed Measure gives regulation making powers to the Welsh Ministers to specify applicable standards. We were made aware of concerns expressed by a wide range of witnesses to Legislation Committee 2 that it is very difficult to know what the standards will look like and whether, therefore, they could support the proposals or not. The regulations made under Section 25(1) are, therefore, of considerable significance in that they will provide the definition of what Standards are.

60. In evidence<sup>1</sup>, the Minister and his officials emphasised their view that there was a practical need for flexibility. There were also concerns that, by specifying standards more prescriptively on the face of the Measure, it could mean that the Measure itself would have to be amended if any of the Standards were then the subject of a successful legal challenge.

---

<sup>1</sup> Record of Proceedings (RoP) – Constitutional Affairs (CA) Committee, 27 May 2010 paras 59-65



61. The Minister emphasised<sup>2</sup> that there would have to be consultation with those affected before Standards could be imposed. His officials<sup>3</sup> also pointed out that in Sections 27 to 31 there was a description of what the standards would do and that there was a list in Schedule 9 of specific activities that the standards relating to service provision will be expected to contain.

62. We are pleased that the Regulations setting Standards will be made using the affirmative resolution procedure, which we believe is wholly appropriate in the circumstances. We also note that Sections 27 to 31 give some indication of the types of the areas in which Standards are likely to be set.

63. While accepting that specifying Standards in detail on the face of the Measure carries legal risks, and may be too inflexible, we remain concerned that the Measure does not give those who may be affected by its provisions a clear idea of what Standards will look like in practice.

64. In evidence, the Minister indicated<sup>4</sup> a willingness to consider whether it would be possible to produce illustrative Standards to help inform the remaining consideration of the Measure. We understand that he has now written<sup>5</sup> to the Chair of Legislation Committee 2 illustrating what actual Standards might look like. We have not directly taken the Minister's letter into account but we think it is important that illustrative Standards should be as detailed as possible and published so that those who may be affected by them can contribute to public debate in this area.

**Recommendation 2. We recommend that relatively detailed illustrative Standards are published as a contribution to the public debate on this aspect of the Measure.**

65. Schedule 9 does, helpfully, list a number of activities in which service delivery standards must be specified. However, apart from service delivery, Ministers may also specify policy making, operational, promotion and record keeping standards. Given that it is possible to list activities that must be specified in relation to service delivery,

---

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ibid para 67

<sup>5</sup> Letter dated 14 June [http://www.assemblywales.org/afff\\_to\\_vl\\_june\\_2010-e.pdf](http://www.assemblywales.org/afff_to_vl_june_2010-e.pdf)

there seems to be no reason in principle why activities cannot be specified against the other standards, in particular operational standards. We believe this would be a helpful approach.

**Recommendation 3. We recommend that the Measure be amended to include a list of activities in relation to standards other than service delivery standards, similar to that contained in Schedule 9.**

### **Transitional and Consequential Provisions**

66. Section 143 empowers Welsh Ministers by order to make transitional provision and amendments consequential on the Measure. As this power is not specified in section 139, the negative procedure would apply to it. It is normal practice for such powers to be subject to an affirmative procedure if they amend Measures or Acts of Parliament. Examples can be seen in section 51 of the Local Government (Wales) Measure 2009 and section 12 of the NHS Redress (Wales) Measure 2008.

**Recommendation 4. We recommend that the Measure be amended to provide that an order under section 143, that amends primary legislation, be made subject to the affirmative procedure.**

## Witnesses

---

67. The following witnesses provided oral evidence to the Committee on 27 May 2010. A transcript of the session can be viewed in full at [www.assemblywales.org](http://www.assemblywales.org)

27 May 2010

Alun Ffred Jones AM	Minister for Heritage, Welsh Government
Dr Huw Onllwyn Jones	Head of Welsh Language and Media Policy Unit, Welsh Government
Nerys Arch	Legal Services Department, Welsh Government

## List of written evidence

---

68. The Committee considered the following written evidence. All written evidence can be viewed in full at [www.assemblywales.org](http://www.assemblywales.org)

Document	Reference
Proposed Welsh Language (Wales) Measure	CA(3)-15-10(p1)
Explanatory Memorandum	CA(3)-15-10(p2)
Legal Advisers' Report	CA(3)-15-10(p3)
Letter of 25 March from the Chair inviting the Minister to give evidence	CA(3)-15-10(p4)
The Minister's response of 17 May	CA(3)-15-10(p5)
Legal Advice Note – Accountability of Commissioners	CA(3)-18-10(p8)
Letter of 14 June from the Minister for Heritage to the Chair of Legislation Committee 2	CA(3)-18-10(p9)