

**National Assembly for Wales**  
Legislation Committee No. 2

Proposed Welsh Language (Wales) Measure

Stage 1 Committee Report  
July 2010



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## **Legislation Committee No. 2**

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### **Powers**

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### **List of relevant reports published by Legislation Committees**

<i>Report title</i>	<i>Date of publication</i>
Report of Legislation Committee No.5 on the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009	June 2009

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## **Committee membership**

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
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Val Lloyd (chair)	Labour	Swansea East
Mike German (9/12/08 - 6/07/10)	Welsh Liberal Democrats	South Wales East
Gareth Jones	Plaid Cymru	Aberconwy
Rhodri Morgan	Labour	Cardiff West
Jenny Randerson (6/07/10 - )	Welsh Liberal Democrats	Cardiff Central
Brynle Williams	Welsh Conservative Party	North Wales



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## **Summary of conclusions and recommendations**

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### **Chapter 3 - General principles and the need for legislation**

**We support the need for legislation to update and modernise the existing framework of Welsh language legislation.** In so doing, we have noted the support for such an approach from consultees, although we recognise that for many, there are aspects of the legislation which need improving or changing. [Paragraph 111]

We have considered carefully the aims and objectives of the proposed Measure as set out in paragraph 3.10 of the Explanatory Memorandum. However, in our view there is a clear statement of principle missing from the proposed Measure. We believe that an overarching statement needs to be incorporated into the proposed Measure clearly stating that the purpose of the legislation is to promote and develop the Welsh language, consistent with retaining the support and goodwill of non-Welsh speakers. Such a statement would act as a benchmark against which the success of the wider aims and objectives of the proposed Measure (as set out in paragraph 3.10 of the Explanatory Memorandum) should be judged. Accordingly, **we recommend that the long title of the proposed Measure is amended to include a clear statement of principle against which the success of the proposed Measure can be judged in the future.** In addition, **we recommend that the Minister for Heritage gives consideration to making a Ministerial statement clarifying the overall purpose of the proposed Measure and how this relates to its wider aims and objectives. Such a statement should be made during the remaining passage of the proposed Measure through the National Assembly.** [Paragraph 112]

We note that there have been no objections to the inclusion in the proposed Measure of provisions relating to the official status of the Welsh language, although we comment in detail on the nature of those provisions in Chapter 4 of this report. We also, like most consultees, support the creation of the post of Welsh Language Commissioner. We comment in detail on the post's functions in Chapter 5 of this report and the importance of the transition from the Welsh Language Board to the Commissioner in Chapter 11. [Paragraph 113]

In our view, and reflecting much of the evidence we have received, it is too early to state whether the move from language schemes to

standards will provide for a more streamlined, administratively simpler and therefore effective framework for the delivery of Welsh language services. We consider that the information provided in the Explanatory Memorandum was insufficient to aid our understanding of how the new system will operate in practice. We do however recognise that standards are aimed at being more citizen friendly than the existing language schemes. We welcome this intention and wish to ensure that it is delivered. For this reason, and despite our concerns outlined at the start of this paragraph, **we acknowledge that the new system of standards has the potential to be an improvement on the existing legislative framework and provide a vehicle for increasing the use of the Welsh language.** [Paragraph 114]

We believe that the extension of statutory language obligations to certain private sector organisations that carry out quasi-public service functions is an improvement on the current position. In reaching this view, we acknowledge and welcome the progress that has been made in respect of their voluntary language schemes. Nevertheless, we have noted that the application of a standard to a particular person, including organisations in the private sector, is subject to a test of reasonableness and proportionality, which includes the right of challenge. On this basis, **we are content, in general terms, that the proposed Measure should apply to private sector organisations that carry out quasi-public service functions (save for our recommendation at paragraph 372). This is because we believe Welsh speaking citizens and consumers will benefit as a result.** [Paragraph 115]

In reaching our view we note the evidence we received from private sector organisations suggesting that the take-up of Welsh language services is low. **We recommend that the new Commissioner, once appointed, should use his or her powers under section 3 of the proposed Measure to address both the reasons behind low take-up and the best solutions to it.** [Paragraph 116]

We are concerned that two of the objectives of the proposed Measure as set out in paragraph 3.10 of the Explanatory Memorandum conflict with each other. Given the diverse linguistic communities that exist across Wales, we do not see how it can be possible to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh, while at the same time establishing a system that will both ensure that duties imposed on

bodies are both reasonable and proportionate and create a level playing field within sectors. [Paragraph 117]

In this regard, we note the provisions of section 43 of the proposed Measure (which provides that the Commissioner may require a person to comply with a particular standard in some circumstances, but not in other circumstances and/or in some area or areas, but not in other areas) and section 53 (which provides for the right of challenge on whether or not the requirement to comply with a standard, or to comply with it in a certain respect, is unreasonable or disproportionate). [Paragraph 118]

Relating to our recommendation in paragraph 112, **we therefore recommend that any Ministerial statement prepared by the Minister for Heritage should clarify the position regarding the ability of the proposed Measure to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh, and at the same time respect the principles of reasonableness and proportionality.** [Paragraph 119]

We have considered the evidence which suggests that the proposed Measure should have included specific provisions to deal with Welsh-medium education. We have not been persuaded that this legislation is the place for provisions that relate to one particular service and are content with the proposed Measure in this regard. In reaching this view, we note that the proposed Measure would allow for the imposition of standards on bodies involved with education, such as local authorities and higher and further education institutions. This would permit the setting of standards that relate specifically to education that would build on the schemes relating to Welsh education developed under the *Welsh Language Act 1993*. [Paragraph 120]

On balance, and while we have concerns about the lack of clarity in moving from language schemes to standards, **we agree the general principles of the proposed Measure.** [Paragraph 121]

We comment later in this report on the nature of some of the amendments submitted by consultees as part of our consideration of the substantive provisions of the proposed Measure. However, many of the amendments submitted were of a detailed, technical nature. Given the nature of Stage 1 scrutiny, it has not been possible to undertake any significant detailed examination of them. As such, **we**

**recommend that the Minister reviews the submissions referred to in Annex 2, with a view to bringing forward appropriate amendments as he sees fit.** [Paragraph 122]

Many consultees told us when questioned that they had not been consulted prior to the introduction of the proposed Measure. Given the complexity of the proposed Measure, the significant changes in approach it introduces to the provision of Welsh language services and its importance in terms of the future of the Welsh language, we find this disappointing. While we acknowledge that the Welsh Government is anxious to enact this important legislation before the end of the current Assembly in 2011, **we consider that the Welsh Government should have published a draft Measure for consultation prior to its formal introduction into the National Assembly.** We consider that this would have enabled the general public and interested organisations to develop a better understanding of what was being proposed and in particular, would have enabled more effective Stage 1 scrutiny of the implications of moving from language schemes to standards. [Paragraph 123]

In addition, we would like also to comment on the Explanatory Memorandum. We acknowledge and agree with the Minister's view that the Explanatory Memorandum met the requirements of Standing Orders. However, these are procedural requirements and are not used as a tool to assess the quality of information provided. Such an assessment is a matter for the scrutiny process. As such, the requirements in Standing Orders are different from the need to explain clearly the precise intention of the provisions of the proposed Measure, how they relate to each other and consequently their practical effect. [Paragraph 124]

In the course of our scrutiny it was necessary to seek further information from the Minister about certain provisions. We acknowledge the helpful information we received. **We see no logical reason why the information provided by the Minister during the course of our scrutiny could not have been included at the outset in the Explanatory Memorandum, particularly given the complexity of the proposed Measure.** [Paragraph 125]

Providing better and more comprehensive information about this legislation and its practical effect through the Explanatory Memorandum would have enabled organisations throughout Wales to gain a better understanding of the proposed Measure as a whole and in particular, the working of the new standards system being introduced by the proposed Measure. Consequently, this too would have led to a more effective and efficient scrutiny of the proposed Measure at Stage 1. [Paragraph 126]

#### **Chapter 4 - Part 1: Official status of the Welsh language**

We have considered carefully the Minister's views on section 1 of the proposed Measure. [Paragraph 165]

We have also considered and acknowledge the weight of evidence in favour of a clear and unambiguous statement about the Welsh language having official status in Wales. We agree with this view. [Paragraph 166]

We believe that section 1 of the proposed Measure, as currently drafted, makes no change to the status of the language, but acts merely as a signpost to provisions in this and other legislation which relate to the Welsh language. It contains no declaration as to the status of the Welsh language. In our view such a declaration is necessary. It would strengthen the position of the language, encourage its use in official and public situations and, as part of that, lay to rest a feeling amongst many people in Wales that Welsh has a status that is subordinate relative to English. [Paragraph 167]

We also strongly believe that in a nation in which two languages are spoken widely, both must be treated equally. [Paragraph 168]

Accordingly, **we recommend that section 1 of the proposed Measure is replaced by a clear statement regarding the official status of our languages, which could read as follows:**

**English and Welsh are the official languages of Wales, and have equal validity and status.**

[Paragraph 169]

Our view has been influenced by the lack of any clear evidence as to why it has been necessary to draft section 1 of the proposed Measure as a list of provisions. As such, we can see no reason why a declaratory statement about the official status of Welsh and English in Wales cannot be included in the proposed Measure. [Paragraph 170]

We believe that an amendment of the type we have proposed is within the legislative competence of the National Assembly. We also believe that it provides more clarity about the status of the Welsh language than is currently provided for in the existing wording of section 1 and will help to underpin the other provisions of the proposed Measure. [Paragraph 171]

We also believe that this approach will make a major contribution to the confidence and frequency of use of the Welsh language by Welsh speakers, which forms a key part of the overarching principle we refer to in our conclusions on the general principles. [Paragraph 172]

## **Chapter 5 - Part 2: The Welsh Language Commissioner**

We acknowledge the majority of evidence in favour of the appointment of the Welsh Language Commissioner by the National Assembly. [Paragraph 245]

We have considered carefully the evidence of the Minister in favour of the Welsh Language Commissioner being appointed by the First Minister. [Paragraph 246]

We have also considered the evidence noting that the Welsh Language Commissioner will have the power to impose sanctions on Welsh Ministers and take regulatory action against them. [Paragraph 247]

In the circumstances, **we take the view that there needs to be a more open and transparent approach in which a mechanism is included in the proposed Measure whereby the Welsh Language Commissioner is nominated by the First Minister and approved by the National Assembly. Accordingly, we recommend that the Minister brings forward an amendment to that effect.** [Paragraph 248]

**We also recommend that the Minister reviews those provisions of the proposed Measure which arguably exert some form of Ministerial control over the Welsh Language Commissioner, with a view to bringing forward amendments that give effect to our recommendation in the previous paragraph.** In our view these provisions are: section 10(4) (approval to the making of grants or loans); section 11(6) (approval for employing staff); section 15 (general power of direction); section 63 (power to direct a standards investigation); section 66 (codes of practice) and section 97 (approval of enforcement policy documents). [Paragraph 249]

We agree with the views of a number of consultees who have suggested that the proposed Measure needs to include a clearer statutory principle or purpose to drive the work of the Welsh Language Commissioner, similar to that included for the Children's Commissioner for Wales (in section 72A of the *Care Standards Act 2000*). We believe that such a statement would provide absolute clarity about the principal purpose of the Welsh Language Commissioner and provide a benchmark against which his or her performance should be judged. In our view such a statutory purpose should take account of the overarching principle we refer to in paragraph 112 of our report on the general principles. Therefore **we recommend that the Minister brings forward an amendment which provides a clear statutory purpose for the Welsh Language Commissioner.** [Paragraph 250]

We have considered very carefully the evidence which suggests that the function of promoting the Welsh language should not sit with the Welsh Language Commissioner or Welsh Ministers (as provided for by section 134 of the proposed Measure), but in a separate, newly constituted body. We note that the Minister is not minded to set up such a body. We also note from evidence received that other public bodies operate with promotional and regulatory functions. Given the current financial climate and our concern that there may be insufficient work to justify the creation of an additional body, **we are content with the provisions of the proposed Measure in this regard.** [Paragraph 251]

However, as to whether the promotional work should rest with the Welsh Language Commissioner, the Welsh Ministers or is to be split between the two, we note that the Minister has made no final decision on this matter. **While we consider that it is inevitable that Welsh Ministers and the Welsh Language Commissioner will have**

**promotional roles, as is the case with the current framework, we recommend that the Minister should announce his decision on this issue prior to the start of Stage 2 proceedings. [Paragraph 252]**

Whatever decision is taken, and reflecting some of the concerns raised in evidence, **we strongly recommend that the budget for regulating and promoting the Welsh language is subject to annual scrutiny by a committee of the National Assembly to ensure that each function is appropriately funded.** Our view on this matter is that the regulatory budget should never be increased at the expense of the budget for promoting the Welsh language. [Paragraph 253]

### **Chapter 6 - Part 3: Advisory Panel to the Welsh Language Commissioner**

**We agree with the Minister and some consultees that there is a need for an Advisory Panel to the Welsh Language Commissioner. [Paragraph 273]**

We consider this to be an important role to act as sounding board for testing and bringing forward new ideas. We also agree with consultees who suggested that the Advisory Panel needs broad sectoral representation. In our view, the Advisory Panel should represent the diversity of the whole of Wales. Accordingly, **we recommend that the Minister brings forward an amendment to paragraph 5(4) of Schedule 4 to take account of this view on diversity and clarify the relevant knowledge and experience a member of the Advisory Panel must have. [Paragraph 274]**

We consider that the current limit on the number of members for the Advisory Panel provided in section 22(3) would undermine its ability to represent the diversity of the whole of Wales. Therefore, **we recommend that the Minister brings forward an amendment to increase the number of members that may sit on the Advisory Panel at any one time. [Paragraph 275]**

As regards the appointment of the Advisory Panel, in line with our recommendation on the appointment of the Welsh Language Commissioner, **we consider that members of the Advisory Panel should be nominated by Welsh Ministers and approved by the National Assembly. Accordingly, we recommend that the Minister brings forward an amendment to that effect. [Paragraph 276]**

We have considered the apparent discrepancy between the requirement of Welsh Ministers to consult the Commissioner on the dismissal of Advisory Panel members but not on appointment. On reflection we are content with this approach. If the Commissioner is required to provide views on candidates, it could be considered to be unfair if some are known to him or her while others are not. Such a position will not arise in relation to dismissal when the Commissioner will have had experience of working with the Advisory Panel members. [Paragraph 277]

**We recommend that any decision of Welsh Ministers to dismiss a member of the Advisory Panel should be subject to approval by the National Assembly.** [Paragraph 278]

#### **Chapter 7 - Part 4: Standards**

We have already commented in our discussion in Chapter 3 on the general principles about the extent to which the proposed Measure provides greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh. [Paragraph 356]

We note that some consultees have been critical of the failure of the proposed Measure to specify any clear rights to Welsh language services; in particular, in relation to certain basic core rights in respect of at least certain Welsh language services which Welsh-speaking citizens should be able to enjoy, regardless of where in Wales they might live. We have some sympathy for such arguments, particularly in the context of the reference in the One Wales Agreement to “*linguistic rights* in the provision of services” (emphasis added). [Paragraph 357]

However, we recognise that, in spite of the desirability of greater clarity and consistency in Welsh language service provision, and in spite of the considerable progress made under the 1993 Act, there are still considerable differences in the demand for, and the capacity to provide Welsh language services in different parts of Wales and across and within different sectors. We also recognise in this context, absolute consistency in Welsh language service provision may not be possible, unless basic commitments are set at very low levels. [Paragraph 358]

In our view, the key issue is how to reconcile guaranteed and generalised levels of service provision with the local diversity that exists in Wales in a way that improves the current position.

[Paragraph 359]

While Part 4 of the proposed Measure creates a methodology for the creation of standards, it makes no provision with respect to the content of any standards (aside from Schedule 9, which lists activities to which, under section 41(2), service delivery standards created by regulations under section 38 by Welsh Ministers must make reference). [Paragraph 360]

We have already acknowledged that the standards mechanism has the potential to deliver improvements in service provision (see paragraph 114). However, we are unable to conclude definitively whether it will actually deliver such changes in the absence of any substantive provisions on the face of the proposed Measure regarding the contents of the standards. [Paragraph 361]

In our view, it is partly for this reason that many consultees have asked for further clarification from Welsh Ministers with respect to the actual content of standards, perhaps through the circulation of draft standards which would provide clear examples of the different sorts of standards contemplated under the proposed Measure. **We recommend that the Minister provides such clarification through the preparation and publication of draft standards of the different sorts contemplated under the proposed Measure.** [Paragraph 362]

We have also said it is too early to state whether the move from language schemes to standards will provide for a more streamlined, administratively simpler and therefore effective framework for the delivery of Welsh language services. [Paragraph 363]

We note that the flexibility inherent in the standards mechanism could lead to a significant range of different standards. We also note that the Minister has recognised that persons to whom standards will apply will still probably have to draw up action plans to implement the standards in their organisations. We also note that in the process of setting standards, there will, as the Minister also notes, be considerable opportunity for consultation with persons to whom standards will apply. We are concerned that the process of agreeing standards together with the potential need to develop an

implementation plan could therefore, if anything, increase the administrative burdens for some organisations. **We recommend that the Minister considers ways in which this potential burden can be minimised, without affecting the need for appropriate consultation.** [Paragraph 364]

We note that the Minister indicated that Welsh Ministers would specify standards following recommendations from the Commissioner.<sup>1</sup> However, there is no indication in Chapter 2 of Part 4 of the proposed Measure that this is the case. We consider it to be important that the proposed Measure should explain clearly the purpose of standards and how the process for making standards is intended to operate, and therefore **we recommend that it be amended in this way and in accordance with the Minister's evidence.** [Paragraph 365]

We note the Minister's evidence that in general, standards will only be developed by Ministers in response to a standards investigation initiated by the Commissioner, and that in any such investigation, persons potentially subject to standards will be required to be consulted. In our view, however, it is still possible for Welsh Ministers to make standards under section 25 without consulting either with the Commissioner or with persons to whom they might ultimately be applied, as it would appear that Welsh Ministers may make standards in the absence of a standards investigation. In addition, we consider that the regulations prepared by Welsh Ministers on standards under section 25 should be the subject of consultation and we see no reason why such a requirement should not be explicitly provided for on the face of the proposed Measure. Accordingly, **we recommend that section 25 be amended on this basis.** In addition, for similar reasons, we believe that there should be a duty to consult organisations on regulations that provide for standards to be specifically applicable to them under section 38. Therefore, **we recommend that section 38 is amended on this basis.** [Paragraph 366]

Linked to our recommendations in respect of sections 25 and 38 and the need for consultation, we have considered the perception shared by many consultees about the limited role for the citizen in the process of creating standards. It has been noted, for example, that

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<sup>1</sup> For example, RoP, paragraph [129], 17 June 2010, Legislation Committee No. 2

under section 61 of the proposed Measure, with respect to the carrying out of a standards investigation by the Commissioner, the Commissioner is required to consult persons to whom the standards may ultimately apply, as well as the Advisory Panel, but is not required to consult anyone else, including the public. [Paragraph 367]

While we recognise that the public may not have any particular interest in certain technical aspects of certain standards which may be the subject of a standards investigation, we are not convinced that this justifies leaving the matter of consultation with the public solely to the discretion of the Commissioner in all standards investigations, particularly when Welsh users may have a very significant interest in many standards investigations. We are therefore of the view that it would be better for section 61 to presume that the Commissioner should indeed consult the public, and **we recommend that section 61(2) be amended to provide that in carrying out a standards investigation, the Commissioner must also consult the public.** [Paragraph 368]

With regard to the application of the standards mechanism beyond the public sector, we have already commented in our consideration of the general principles, that the present regime should be extended in principle to private sector organisations that carry out quasi-public service functions. [Paragraph 369]

We are, however, of the opinion that the concerns of organisations which are to be subject to the new regime should be carefully considered. We also believe that the standards mechanism does contain significant provisions for the participation of organisations in the setting of standards of relevance to them, through for example the requirement under section 61 that the Commissioner consult with them in any standards Investigation, and we note that organisations have a right to appeal to the Tribunal should they be of the view that the imposition of any standard would not be reasonable or proportionate. [Paragraph 370]

We note the significant evidence we heard about the positive steps that many organisations, which are not presently subject to the 1993 Act's provisions, have taken in relation to the provision of Welsh language services under voluntary language schemes. While, as noted, we support the extension of the regulatory regime to some private sector organisations with quasi-public service functions, we believe

that the preparation of voluntary schemes should still be encouraged, and we note that there does not appear to be any mechanism under the proposed Measure which facilitates this. We were also impressed by the idea of a Charter Mark which could be developed for organisations which are not subject to the standards mechanism. **We therefore recommend that the Minister considers how provision may be made for the creation of a Charter Mark which would bear some form of official approval, perhaps from the Commissioner.** [Paragraph 371]

We have heard evidence on the position in which LPG providers find themselves, in which all of their main competitors would appear to be free from the application of the proposed Measure because the National Assembly's legislative competence does not extend to these competitors. We consider that this is at odds with the aim of ensuring a level playing field within sectors. Although the imposition of any standards on them could be appealed on the basis that such imposition was neither reasonable or proportionate, we are of the view that the best way of dealing with their situation would simply be to exclude them from the application of the proposed Measure until such time as their competitors come within the scope of the legislative competence of the National Assembly. **We therefore recommend that Schedule 8 be amended to clarify that the standards will not apply to LPG providers.** [Paragraph 372]

As regards the definition of the telecommunications sector, we have noted and accept the Minister's reassurances and position on this issue. [Paragraph 373]

With regard to the application of promotion standards only to Welsh Ministers, County Borough Councils and County Councils, the Minister, while explaining the rationale for this limited scope of application, also expressed a willingness to consider expanding the range of organisations to which promotional standards could be applied. [Paragraph 374]

Whilst it is understandable that health services bodies, police authorities and other bodies with specific functions should not be included, it is not clear why the line has been drawn at principal local authorities to the exclusion of town and community councils. [Paragraph 375]

It is also unclear why the proposed Measure should exclude bodies for which the use of language is a central function. We can see no reason why the proposed Measure should prevent the imposition of promotion standards on bodies such as the Arts Council of Wales, the National Library of Wales, Sianel 4 Cymru and the Welsh Books Council. **We recommend that the proposed Measure be amended to permit the imposition of promotion standards on such bodies.** More generally, **we recommend that the Minister reconsiders the bodies to which promotion standards should apply and brings forward amendments as he sees appropriate.** [Paragraph 376]

As regards record keeping standards, we have noted the views of the Minister. **It is our view that it would be beneficial for clear record keeping standards to be applied to all organisations for the purpose of checking the success or otherwise of any standard set.** **We recommend that the Minister considers bringing forward an appropriate amendment to make this a statutory requirement.** [Paragraph 377]

## **Chapter 8 - Part 5: Enforcement of standards**

We recognise that the enforcement of standards will be facilitated by the clarity and precision with which the standards are drawn. However, we do not consider that the variety of standards (as opposed to their clarity) would necessarily present problems in the enforcement of standards. **We are broadly content with the enforcement regime system set out in Part 5 of the proposed Measure, save for our specific comments set out below.** [Paragraph 409]

With regard to the involvement of the citizen in the enforcement process, we note that there is provision for citizen involvement in that process under sections 72 (determination of investigation), 84 (consultation before final determination) and 94 (consideration of whether to investigate if conduct complained about). We are therefore of the view that the proposed Measure does provide for some ongoing involvement of the citizen in the investigation process by the Commissioner. [Paragraph 410]

However, we are unsure of whether the overall role of the citizen in the process of enforcement is sufficient, and we share the view that aside from bringing a complaint to the Commissioner, the citizen has very limited powers to ensure enforcement measures are taken. In our

view, the concerns expressed by several consultees that there is insufficient provision for citizen involvement in the complaints process are well-founded. [Paragraph 411]

We are therefore concerned that the level of citizen involvement is not as great as it could be and should be strengthened. [Paragraph 412]

We note the contrast between section 100 of the proposed Measure, which provides for individuals to apply to the Commissioner to investigate an alleged interference with a right to communicate in Welsh, and section 70, which makes no similar provision in relation to investigations into failures to comply with standards. **We recommend that section 70 be amended to highlight the capacity of individuals to initiate the process of investigations and for the Commissioner to be required to explain a decision not to investigate, similar to the requirement in section 103(6).** [Paragraph 413]

Provision could also be made for the complainant to appeal to the Tribunal against decisions by the Commissioner. Accordingly, **we also recommend that the Minister considers other ways that highlight the role of members of the public in achieving the aims of the proposed Measure and brings forward appropriate amendments.** [Paragraph 414]

With regard to the maximum civil penalty of £5,000, we note that the civil penalty may, as was recognised by the Minister's officials, be imposed several times on the same organisation, for each separate finding of a failure to observe a standard. We are also sensitive to the differential impact that a civil penalty of this amount would have, depending on the size and resources of the organisation in question. However, we note that the civil penalty is a maximum, and that a lesser civil penalty could be imposed, or none whatsoever, depending on the circumstances. [Paragraph 415]

We believe that the matters set out in section 82(2) to which the Commissioner must have regard in determining the level of any civil penalty will ensure that any penalty imposed will be reasonable and proportionate. We also note the possibility of an appeal to the Tribunal. **We are therefore satisfied with the proposals with regard to civil penalties.** [Paragraph 416]

## Chapter 9 - Part 6: Freedom to use Welsh

We note the evidence received from organisations who believe that the freedom to use Welsh is an important and worthwhile provision in the proposed Measure. Although we acknowledge that such instances are relatively uncommon, we accept that situations occur where people are not allowed to speak Welsh with one another and that safeguards should be put in place to prevent such situations happening.

[Paragraph 456]

We note the concerns of certain consultees who believe that the powers given to the Commissioner are not effective or strong enough to provide the individual affected with an adequate resolution in cases where their freedom to use Welsh has been interfered with. However, given that the Commissioner is given wide ranging powers under section 3 of the proposed Measure, we are not persuaded by the arguments of consultees that the Commissioner's enforcement and investigatory functions should be extended. **We believe that adequate provisions already exist in other sections of the proposed Measure, namely under section 3, that will allow the Commissioner to deal with a grievance relating to a person's freedom to use Welsh.** [Paragraph 457]

We note and accept the evidence received from organisations and individuals who feel that Part 6 of the proposed Measure is unclear, complex and cumbersome. We also accept the suggestion that instances where an individual's freedom to use Welsh is interfered with is better dealt with by current equalities legislation. **For the sake of clarity and accuracy therefore, and in addition to the powers available to the Commissioner, we believe that any instances concerning an individual's freedom to use Welsh should be dealt with by current race relations and equality legislation.**

[Paragraph 458]

Despite assurances from the Minister to monitor carefully this provision once implemented, we believe that **if the Minister accepts our recommendation to include a clear statement regarding the official status of the Welsh language in Part 1 of the proposed Measure, then a subsequent provision to protect a person's freedom would not be necessary. Such a statement would automatically safeguard an individual's freedom to use Welsh in practice. If such changes are made to the proposed Measure, we**

**believe that Part 6 should be removed in its entirety.**

[Paragraph 459]

## **Chapter 10 - Part 7: Welsh Language Tribunal**

**We accept the Minister's arguments regarding the administrative arrangements for the Tribunal.** [Paragraph 469]

As regards the appointment of the Tribunal, In line with our recommendation on the appointment of the Welsh Language Commissioner and his or her Advisory Panel, we consider that members of the Tribunal **should be nominated by Welsh Ministers and approved by the National Assembly. Accordingly, we recommend that the Minister brings forward an amendment to that effect.** [Paragraph 470]

## **Chapter 11 - Part 9: Welsh Language Board, Welsh Language Schemes etc.**

We note that many consultees have raised concerns about the transition from the existing system to the new system under the proposed Measure. [Paragraph 487]

It is apparent from the evidence we have received that the approach and work of the Welsh Language Board has been strongly supported and well-received by the organisations it has dealt with. In particular we have noted how many organisations have said how good and effective their working relationships with the Welsh Language Board have been, which has been heartening to hear and will clearly have resulted in benefits for the future of the Welsh language.

[Paragraph 488]

It is therefore vital in our view that the experience, expertise and collective memory of the Welsh Language Board is not lost in the transitional process. In addition, it is equally important that the goodwill towards the Welsh language that has been built up through the development of voluntary language schemes is not lost; that applies equally to those organisations that will become subject to the provisions of the proposed Measure and those that will not.

[Paragraph 489]

Therefore, **we strongly recommend that the Minister works closely with the Welsh Language Board to plan effectively for the transition to the new system to ensure that the momentum built up in promoting the Welsh language and regulating the provision of Welsh language services is maintained.** [Paragraph 490]

## **Chapter 12 - Financial implications**

We share the concerns of consultees at the lack of information available in the Explanatory Memorandum on the financial impact of the proposed Measure's aims and objectives. [Paragraph 509]

We are aware that the National Assembly's Finance Committee is looking at the cost implications of the proposed Measure. However, **we consider it very important that the Welsh Government works openly with all organisations subject to this legislation to ensure that any future regulatory impact assessments that arise as a consequence of this proposed Measure accurately reflect the cost of implementing its provisions.** [Paragraph 510]

# 1. Introduction

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1. On 4 March 2010, the Minister for Heritage, Alun Ffred Jones AM (the Minister), introduced the *Proposed Welsh Language (Wales) Measure*<sup>2</sup> (the proposed Measure) and accompanying Explanatory Memorandum<sup>3</sup>. He made a statement in a plenary meeting of the National Assembly the following day.<sup>4</sup>

2. At its meeting on 2 March 2010, the National Assembly's Business Committee agreed to refer the proposed Measure to Legislation Committee No. 2 for consideration of its general principles (Stage 1), in accordance with Standing Order 23.21. It also agreed that the Committee must report on the proposed Measure no later than 16 July 2010. Following our request, the Business Committee extended this deadline to 23 July 2010.<sup>5</sup>

## Terms of scrutiny

3. At our meeting on 10 March 2010, we agreed the following framework for scrutinising the general principles of the proposed Measure:

To consider:

- i) the need for a proposed Measure to deliver the Welsh Government's stated aims, as set out in paragraph 3.10 of the Explanatory Memorandum, namely:
  - to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh;
  - to reduce the administrative demands placed upon those subject to duties by moving the focus away from the preparation of schemes;
  - to establish a system that will ensure that duties imposed on bodies are both reasonable and proportionate;

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<sup>2</sup> Available at <http://www.assemblywales.org/ms-ld7944-e.pdf>

<sup>3</sup> Welsh Assembly Government, *Explanatory Memorandum to the Proposed Welsh Language (Wales) Measure 2010*, 4 March 2010. Available at: <http://www.assemblywales.org/ms-ld7944-em-e.pdf>

<sup>4</sup> RoP, pages [36 - 61], 10 March 2010

<sup>5</sup> Business Committee Minutes, BC(3)11-10, 20 April 2010, paragraph 4(i)

- within particular sectors, ensuring that there is consistency in terms of those bodies subject to duties with the aim of ensuring a level playing field;
  - to develop the responsibility of the Welsh Assembly Government and local authorities in Wales with regard to promoting the use of Welsh more widely;
  - to develop a more effective enforcement regime in relation to any duties that will be imposed;
  - to provide a strong and independent voice for the Welsh language through the establishment of the Commissioner as an identifiable champion and advocate for the language;
  - to make further provision with regard to the status of the Welsh language; and
  - to make provisions with regard to investigating and reporting on those instances of interference with people’s freedom to use Welsh with one another.”<sup>6</sup>
- ii) whether the proposed Measure achieves its stated objectives;
  - iii) the key provisions set out in the proposed Measure and whether they are appropriate to deliver its objectives;
  - iv) potential barriers to the implementation of the key provisions and whether the proposed Measure takes account of them;
  - v) the views of stakeholders who will have to work with the new arrangements.

## **Our approach**

4. We issued a general call for evidence and invited key stakeholders to submit written evidence to inform our work<sup>7</sup>. A list of consultation responses is available at the end of this report.

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<sup>6</sup> EM, paragraph 3.10

<sup>7</sup> A copy of our consultation letter is available at:  
[http://www.assemblywales.org/lc2\\_wl\\_letter\\_to\\_consultees-e\\_new\\_template.pdf](http://www.assemblywales.org/lc2_wl_letter_to_consultees-e_new_template.pdf)

5. We took oral evidence from a number of witnesses, a list of which is also available at the end of this report.
6. In particular, we would like to thank Bernat Joan Í Mari, who gave evidence on behalf of the Government of Catalonia. We also acknowledge and thank the Mobile Broadband Group, Arriva Trains Wales, Scottish Power and the UK Competitive Telecommunications Association for agreeing to provide additional evidence, at our request, on practices in other multilingual countries and nations in which they have business interests. This evidence has been useful in providing us with an international context for our work.
7. We are grateful to all those who provided written and oral evidence.
8. We appointed Dr Robert Dunbar, of the University of Aberdeen as an expert adviser and we are grateful to him for all his advice and guidance based on his very extensive international experience in the field of language legislation.
9. The following report and recommendations represent the conclusions we have reached on the evidence received during the course of our work. We would like to thank all those who contributed to our report.

## 2. Background

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### **The National Assembly's legislative competence to make the proposed Measure**

10. The principal power enabling the National Assembly to make a Measure in relation to the Welsh language is contained in Matters 20.1 and 20.2 of Schedule 5 to the *Government of Wales Act 2006*. These matters are set out in Annex 1.

### **The Explanatory Memorandum**

11. The Welsh Assembly Government's Explanatory Memorandum, which accompanied the proposed Measure, explains the role that legislation has played in promoting and facilitating the use of the Welsh language, in particular through the *Welsh Language Act 1993* (the 1993 Act) and the *Government of Wales Act 2006* (the 2006 Act)<sup>8</sup>.

12. The 1993 Act is founded on the need to "promote and facilitate the use of the Welsh language and the treatment of the English and Welsh languages on a basis of equality"<sup>9</sup>. These functions are conferred by the 1993 Act upon the Welsh Language Board<sup>10</sup>.

13. The 1993 Act lists certain categories of persons which the Welsh Language Board can require to prepare language schemes. These schemes specify the measures that those persons propose to take, in the provision of services to the public in Wales, to give effect to the principle that the English and Welsh languages should be treated on a basis of equality. The 1993 Act also confers powers on the Welsh Language Board to investigate alleged breaches of schemes and requires it to report on its investigations.<sup>11</sup>

14. The Explanatory Memorandum states that the purpose of the proposed Measure is to:

"... modernise the existing legal framework largely governed by the Welsh Language Act 1993 regarding the use of the Welsh language in the delivery of public services."<sup>12</sup>

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<sup>8</sup> EM, paragraphs 2.4 – 2.10

<sup>9</sup> EM, paragraph 2.6

<sup>10</sup> *ibid*

<sup>11</sup> EM, paragraph 2.7

<sup>12</sup> EM, paragraph 1.1

15. Modernisation of this existing framework is explained as being necessary for a number of reasons including the following:

- Welsh speakers can still face inconsistencies and difficulties in accessing services through the medium of Welsh;<sup>13</sup>
- arrangements for delivering public services have changed since 1993 and the 1993 Act doesn't enable these changes to be taken account of consistently, creating the potential for an uneven playing field within certain sectors and uncertainty about the services Welsh-speaking customers can expect to receive;<sup>14</sup>
- the agreement and development of language schemes has been resource-intensive and can be a bureaucratic burden.<sup>15</sup>

16. The introduction of the proposed Measure is also intended to fulfil a commitment arising from the *One Wales* programme of government<sup>16</sup>, namely “to legislate by Measure to: confirm official status for both Welsh and English; linguistic rights in the provision of services; and, the establishment of the post of Language Commissioner.”<sup>17</sup>

17. The proposed Measure is also intended “to provide a foundation for the Welsh Ministers’ delivery of policies in respect of the language”<sup>18</sup>, currently contained in *Iaith Pawb*.<sup>19</sup>

18. The Explanatory Memorandum sets out the aims of the proposed Measure in detail at paragraph 3.10 (set out in the terms of reference at paragraph 3 above and paragraph 19 on the next page).

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<sup>13</sup> EM, paragraph 3.1

<sup>14</sup> EM, paragraph 3.2

<sup>15</sup> EM, paragraph 3.3

<sup>16</sup> Welsh Government, *One Wales Agreement*, June 2007, page 34. Available at: <http://wales.gov.uk/strategy/strategies/onewales/onewalese.pdf?lang=en>

<sup>17</sup> EM, paragraph 3.7

<sup>18</sup> EM, paragraph 3.9

<sup>19</sup> Welsh Government, *Iaith Pawb: A National Action Plan for a Bilingual Wales*, February 2004. Available at: <http://wales.gov.uk/depc/publications/welshlanguage/iaithpawb/iaithpawbe.pdf?lang=en>

### **3. General principles and the need for legislation**

#### **Background**

19. The proposed Measure's overall aims are:

- to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh;
- to reduce the administrative demands placed upon those subject to duties by moving the focus away from the preparation of language schemes;
- to establish a system that will ensure that duties imposed on bodies are both reasonable and proportionate;
- within particular sectors, ensuring that there is consistency in terms of those bodies subject to duties with the aim of ensuring a level playing field;
- to develop the responsibility of the Welsh Assembly Government (Welsh Government) and local authorities in Wales with regard to promoting the use of Welsh more widely;
- to develop a more effective enforcement regime in relation to any duties that will be imposed;
- to provide a strong and independent voice for the Welsh language through the establishment of the Commissioner as an identifiable champion and advocate for the language;
- to make further provision with regard to the status of the Welsh language; and
- to make provisions with regard to investigating and reporting on those instances of interference with people's freedom to use Welsh with one another.<sup>20</sup>

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<sup>20</sup> EM, paragraph 3.10

## Evidence from consultees

### *General comments*

20. While there was a range of views on both general aspects of the proposed Measure and its substantive provisions, the publication of the proposed Measure itself was welcomed by many consultees. Emyr Lewis, a lawyer<sup>21</sup>, said:

“I see the Measure as a historical opportunity to lay a firm foundation stone for the future of the Welsh language in Wales. This is the best opportunity for centuries to form a legislative framework to protect and promote the Welsh language, by a legislature where every party understands the value of the language, and is committed to supporting it.”<sup>22</sup>

21. Mentrau Iaith Cymru felt that:

“. . . the Measure is a great opportunity to strengthen the position of the language for generations to come, and it is important to ensure that the Measure strengthens the position of the language substantially.”<sup>23</sup>

22. Dwr Cymru Welsh Water supported the proposed Measure in principle and did not feel that it would change anything significantly for their organisation.<sup>24</sup> Nevertheless, they went on to say that:

“The Measure should promote consistency and ensure that the same level of services are offered by many of the other major organisations in Wales, in both the private and public sectors. Therefore, for the Welsh speaking public in Wales this can only be regarded as a positive move as there is likely to be more consistency in the services offered.”<sup>25</sup>

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<sup>21</sup> Emyr Lewis is also the United Kingdom’s member of the Council of Europe’s Committee of Experts investigating the compliance of states with the European Charter for Regional and Minority Languages

<sup>22</sup> Written Evidence, MI 9

<sup>23</sup> Written Evidence, MI 53

<sup>24</sup> Written Evidence, MI 11

<sup>25</sup> *ibid*

23. They also suggested that the impact of the proposed Measure could result in more people becoming aware of the services offered by organisations through the medium of Welsh.<sup>26</sup>

24. The National Childminding Association Cymru said:

“NCMA Cymru is supportive of the stated objectives of the Measure and believes the Measure is needed in order to update existing legislation and ensure Welsh speakers have access to more consistent and clearer provisions regarding the language. NCMA Cymru welcomes the move towards standards for organisations to work towards, which will help ensure service providers and service users have clarity and consistency about Welsh language services and duties.”<sup>27</sup>

25. Even where organisations had concerns about aspects of the proposed Measure—for example in its application to the private sector—there was generally support for core aspects of the rationale for introducing the proposed Measure. E.ON UK said that “the principles of the proposed Measure appear to be sound”<sup>28</sup>, while Scottish Power recognised:

“that greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Wales across various sectors could be valuable. We can also see the benefit of having some consistency within sectors in creating a more level playing field. As such, we welcome the new Welsh Language (Wales) Measure in principle.”<sup>29</sup>

26. They also felt that the sort of regulation contemplated in the proposed Measure might be beneficial:

“We already have a strong commitment for Welsh language service provision, so the possibility of regulation may be beneficial in ensuring that our competitors offer similar standards”.<sup>30</sup>

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<sup>26</sup> Written Evidence, MI 11

<sup>27</sup> Written Evidence, MI 34

<sup>28</sup> Written Evidence, MI 17

<sup>29</sup> Written Evidence, MI 15

<sup>30</sup> *ibid*

27. When questioned, Scottish Power added:

“We see it as a challenge and an opportunity to improve our service to customers in Wales. However, that is provided that there is clarity about the standards and that they are workable and achievable.”<sup>31</sup>

28. RWE npower said they supported the need for the proposed Measure to deliver six<sup>32</sup> of the proposed objectives in paragraph 3.10 of the Explanatory Memorandum “given the cultural and historical significance of the Welsh language to the Welsh nation”.<sup>33</sup> They were not able to support the need for a level-playing field within sectors because they believed “that within our particular sector (gas and electricity supply), the competitive market can and should deliver an appropriate level of Welsh language provision.”<sup>34</sup> This theme of competition being the means by which Welsh language service provision should be delivered in the private sector is considered later in this chapter and Chapter 7 on standards.

29. While having misgivings about the move from a voluntary to a statutory approach for some private sector companies, the Confederation of British Industry Wales (CBI Wales) were nevertheless positive about the proposed Measure as a piece of legislation, subject to a caveat on the provisions relating to standards. They said:

“We find it disappointing that we are now going to move to a mandatory legislative approach for Welsh-language services in the private sector. However, given that that is where we are, we think that the proposed Measure is, as it stands, and as far as it relates to private sector provision of services, a pretty sensible document, and one that I think most companies will be able to work with. The big caveat is to do with the level of standards that will be required of services to be provided by private sector companies. Frustratingly, we still have no visibility of the likely level of services. It is nigh on impossible to give meaningful comment on costs and acceptability until we have some clarity on that.”<sup>35</sup>

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<sup>31</sup> RoP, paragraph [240], 29 April 2010, Legislation Committee No. 2

<sup>32</sup> Written Evidence, MI 29

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> RoP, paragraph [207], 10 June 2010, Legislation Committee No. 2

30. In broadly agreeing to the proposed Measure in principle, Arriva Trains Wales said:

“We see it as trying to establish some consistency in the way schemes and, eventually, standards are delivered in terms of the Welsh language. We are looking for consistency where schemes are currently self-determined by the various businesses and bodies.”<sup>36</sup>

31. In expressing support for the proposed Measure, Consumer Focus Wales said that:

“The introduction of Standards should make it clearer to consumers about what levels of service to expect and who they can expect to receive a Welsh language service from. This move towards consistency and clarity is a positive step forward for Welsh language consumers.”<sup>37</sup>

32. They added that their research findings “show that there is inconsistency between different bodies within the public and private sectors, so we welcome the development of a level playing field.”<sup>38</sup> They also felt that their research on Welsh language services “clearly shows the need for greater consistency across sectors”<sup>39</sup> and said that “consumers feel that providing Welsh-language services is important to keep the language alive and they feel at a disadvantage if they are unable to express themselves in the language of their choice.”<sup>40</sup>

33. The Aneurin Bevan Health Board noted that the existing lack of clarity about what language services Welsh-speakers might expect had itself a negative impact on the use of Welsh:

“We have anecdotal evidence that our service users sometimes lack confidence in stating their preferred language as they are unclear regarding the service they can expect.”<sup>41</sup>

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<sup>36</sup> RoP, paragraph [86], 20 May 2010, Legislation Committee No. 2

<sup>37</sup> Written Evidence, MI 37

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> RoP, paragraph [309], 10 June 2010, Legislation Committee No. 2

<sup>41</sup> Written Evidence, MI 45

34. One Voice Wales said in their comments on the objectives for the proposed Measure:

“The stated objectives in the explanatory memorandum appear sensible and worthwhile. In a situation where we are striving for citizen-centred public service delivery, it clearly makes sense to have those services delivered consistently.”<sup>42</sup>

35. They also felt that:

“the broad picture—the shift from a scheme to standard—looks straightforward, as does an enhanced enforcement regime with more options, because there is clearly some sense in that.”<sup>43</sup>

36. They also noted the potential of standards to reduce bureaucracy but added a note of caution. They said that the new system:

“... offers the potential to reduce bureaucracy; that is the principle behind replacing schemes with standards. Avoiding what might be seen as protracted discussions to arrive at a scheme could be a saving ... So, while the principle of a standard looks attractive, there is a slight concern that it could lead to more, rather than less, bureaucracy. At the moment, you have one document: that is your agreed Welsh language scheme and it is clear to members of the council and the public if they want to see that scheme. We need to ensure that we are not making things more complicated when we are trying to make them simpler.”<sup>44</sup>

37. The Children’s Commissioner for Wales was broadly supportive of the proposed Measure stating that its objectives were:

“...appropriate, especially in relation to clarity of what the citizen should expect, having a strong advocate and champion of the Welsh language, affording official status to the Welsh Language and providing a level of accountability and recourse via a more effective reinforcement regime.”<sup>45</sup>

38. Nevertheless, the Children’s Commissioner for Wales also sounded a cautionary note:

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<sup>42</sup> RoP, paragraph [7], 20 May 2010, Legislation Committee No. 2.

<sup>43</sup> RoP, paragraph [48], 20 May 2010, Legislation Committee No. 2.

<sup>44</sup> RoP, paragraph [46], 20 May 2010, Legislation Committee No. 2.

<sup>45</sup> Written Evidence, MI 266

“It is unclear how the Proposed Measure builds on the provisions of the Welsh Language Act 1993 in terms of empowering the citizen. It is questionable whether or not the balance of power between service provider (and their statutory obligations) and the rights of the citizen ... has been achieved.”<sup>46</sup>

39. Agored Cymru<sup>47</sup> supported the aim of providing greater clarity and consistency in Welsh language services, but highlighted a potential risk:

“We support minimising unnecessary bureaucracy. There is a risk however that by moving to the proposed system, a new set of bureaucracy and potentially costly processes will be put in place at a time of increasing budgetary constraints.”<sup>48</sup>

40. A few respondents, while supporting in principle the introduction of the proposed Measure, appeared to be reasonably satisfied with the existing framework for the language (with particular reference to Welsh language schemes created under the *Welsh Language Act 1993*).

41. The Association of Chief Police Officers in Wales said:

“We are not sure where the notion has come from that Schemes are not an effective or efficient way of managing the planning and provision of language choice”.<sup>49</sup>

42. The Confederation of Passenger Transport Wales also expressed general satisfaction with the present system of language regulation and the role that the Welsh Language Board has played. It said:

“The contact members have enjoyed with the Welsh Language Board has been invariably ... described as positive and constructive. Any change in this would not be generally welcomed by CPT Cymru and its members”<sup>50</sup>

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<sup>46</sup> Written Evidence, MI 266

<sup>47</sup> Agored Cymru is an awarding organisation that develops qualifications tailored to meet the needs of learners in Wales.

<sup>48</sup> Written Evidence, MI 244

<sup>49</sup> Written Evidence, MI 21

<sup>50</sup> RoP, paragraph [309], 20 May 2010, Legislation Committee No. 2.

43. A number of organisations did however express concern about aspects of the proposed Measure.

44. When asked whether the proposed Measure was, as a whole, an improvement on the status quo, Cymdeithas yr Iaith Gymraeg said they did not believe so in any significant way, adding that “it does not deliver some of the ‘One Wales’ commitments on the Welsh language.”<sup>51</sup>

45. They went on to say:

“... the proposed Measure does not provide an unambiguous statement that Welsh is an official language in Wales. It does not provide the people of Wales with a general right to receive a service in Welsh, nor does it create an inspection regime that is more independent of the Government than the current system with the Welsh Language Board...”<sup>52</sup>

46. Cymdeithas yr Iaith Gymraeg did however acknowledge that the proposed Measure:

“... is an improvement on the status quo in that the scope of the bodies that come under the proposed Measure is slightly wider than in the current Act. That is, the public utilities are included. However, that is a small step forward...”<sup>53</sup>

47. Concerns were also expressed by Celebrating Our Language, who said:

“We believe that the proposed Measure is, without doubt, an opportunity to create conditions that would improve the current situation of the Welsh language. However, there are obvious weaknesses in the proposed Measure as it stands, and there is room for concern that they could lead to a situation that is even worse and even more ambiguous than at present under the 1993 Act. The important thing for us is to ensure that the individual is at the heart of this legislation. The

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<sup>51</sup> RoP, paragraph [5], 27 May 2010, Legislation Committee No. 2.

<sup>52</sup> RoP, paragraph [6], 27 May 2010, Legislation Committee No. 2.

<sup>53</sup> RoP, paragraph [9], 27 May 2010, Legislation Committee No. 2.

proposed Measure does not place the individual at its heart, and it is ambiguous for that reason.”<sup>54</sup>

48. In a similar vein, Mentrau Iaith Cymru, who considered that the proposed Measure “is a step in the right direction”,<sup>55</sup> said that the proposed Measure “feels as though it inclines away from the citizen”.<sup>56</sup> By way of an example, they noted that there are plenty of opportunities for an organisation to complain in respect of standards it is required to achieve, but there is not a right of appeal for an individual if he or she does not agree with a decision made by the Commissioner in respect of an organisation, or a decision made in a Tribunal.<sup>57</sup> This point was echoed by a number of consultees including the Children’s Commissioner for Wales who said:

“Others have noted the irony that the only rights explicitly afforded by the Proposed Measure is the right for service providers to challenge the standards [with] which they have a duty to comply.”<sup>58</sup>

49. Some respondents were critical of the proposed Measure because they perceived it to be weak. Some 200 respondents wrote in similar terms expressing disappointment that the proposed Measure doesn’t grant people legal rights to use the language in their everyday lives; doesn’t grant the Welsh language official status; doesn’t establish a sufficiently independent Language Commissioner; doesn’t grant people rights to Welsh medium education and doesn’t give workers the right to use Welsh in their workplace.<sup>59</sup>

50. A small number of respondents did not accept the need for the proposed Measure at all, for a variety of reasons. For example, one member of the public felt that the proposed Measure would be costly in a time of general restraint<sup>60</sup> while another member of the public made the comment that:

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<sup>54</sup> RoP, paragraph [133], 27 May 2010, Legislation Committee No. 2.

<sup>55</sup> Written Evidence, MI 53

<sup>56</sup> RoP, paragraph [272], 27 May 2010, Legislation Committee No. 2

<sup>57</sup> RoP, paragraph [272], 27 May 2010, Legislation Committee No. 2

<sup>58</sup> Written Evidence, MI 266

<sup>59</sup> For example, Written Evidence, MI 7

<sup>60</sup> Written Evidence, MI 3

“I personally do not want Welsh forced on me and I would like all my services in **English Only** so that I am afforded the same rights as anyone who wants their services in Welsh.”<sup>61</sup>

51. A number of consultees suggested specific and technical amendments to the legislation and a list of their submissions is provided at Annex 2.

*Principal provisions introduced by the proposed Measure*

52. The principal provisions introduced by the proposed Measure relate to provision in relation the official status of the Welsh language, the creation of the post of the Welsh Language Commissioner (and the corresponding abolition of the Welsh Language Board) and the replacement of language schemes with standards.

53. As regards the official status of the Welsh language, many consultees raised concerns about section 1 of the proposed Measure but none disagreed with the view that there was a need for such a provision and none objected to such a provision being included.

54. There was widespread support for the creation of the post of Welsh Language Commissioner.

55. As regards the move from schemes to standards, this generated considerable discussion from consultees. The issues that arose are considered below and in more detail in Chapter 7.

*Concerns about the delivery of greater clarity and consistency in service provision*

56. As the preceding paragraphs covering comments of a general nature demonstrate, many organisations welcomed the aim of the proposed Measure to deliver greater clarity and consistency in service provision for Welsh speakers. However, many consultees raised concerns about whether this aim could be achieved, in particular because of the nature of the standards framework.

57. The Welsh Local Government Association highlighted the potential difficulties that could arise in achieving the objective of delivering greater clarity and consistency:

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<sup>61</sup> Written Evidence, MI 5 (Emphasis included in the evidence itself).

“there is a need for greater clarity and consistency for the citizen to understand the level of service they can expect to receive with regard to the Welsh language. The supply and demand for Welsh language services varies greatly from region to region, and the proposed Measure will need to address this challenging issue.”<sup>62</sup>

58. On this last point, the Welsh Local Government Association emphasised that “there continues to be a need for enough flexibility to respond to local needs”, noting that “a ‘one size fits all’ approach in terms of Welsh language provision is not realistic or objective.”<sup>63</sup> Similar points were made by One Voice Wales<sup>64</sup> and Bridgend County Borough Council, who also noted that “achieving a balance between Wales-wide consistency and local proportionality could prove a difficult task.”<sup>65</sup>

59. Having welcomed the role of the Welsh Language Commissioner and the greater regulatory powers for that post<sup>66</sup>, the Welsh Language Board, when asked about the new standards framework said:

“I do not see the argument being made that this is a step forward. I believe that more clarity is needed regarding the standards, and it should also be noted that this proposed Measure abolishes language schemes ... You are therefore building standards on a structure that you have just abolished. I feel that that is hard to understand in a legal context.”<sup>67</sup>

60. They added:

“I hope that the standards will lead to clarity, but, again, we must recognise that there is insufficient detail about the standards in the proposed Measure to make that decision. However, we recognise that we need a system that empowers the citizen. I do not see evidence of that when reading this proposed Measure. What we will have is a structure, based on

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<sup>62</sup> Written Evidence, MI 23

<sup>63</sup> *ibid*

<sup>64</sup> RoP, paragraphs [7 - 8], 20 May 2010, Legislation Committee No. 2

<sup>65</sup> Written Evidence, MI 26

<sup>66</sup> RoP, paragraph [7], 29 April 2010, Legislation Committee No. 2

<sup>67</sup> RoP, paragraph [90], 29 April 2010, Legislation Committee No. 2

standards, that places responsibilities on the provider, rather than giving rights to the citizen.”<sup>68</sup>

61. The Wales Governance Centre also expressed concerns about the approach of the proposed Measure. They said:

“It is impossible to decide whether the Measure provides greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh without seeing the draft of the standards proposed to be made under clause 25. This is considered to be particularly necessary in order to understand what would be the difference between such standards and the current provisions in schemes made under 1993 Act.

It is not considered that there would be a reduction in the administrative demands placed upon those subject to duties under the Measure by moving the focus away from the preparation of 1993 Act schemes. This is because in order to implement the standards applying to them, bodies will have to set out in what manner they intend to meet the requirements of the standards. This seems no different to the work involved in preparing schemes under the current legislation which set out how the body intends to conduct its business in both languages on the basis of equality. In addition, it does not appear that the Measure would create a “system” because what is being established by prescribing standards depends on what is reasonable and proportionate in the particular circumstances of a particular body. Can a general “system” be established on the basis of a variety of applicable standards?”<sup>69</sup>

62. They also suggested that in order to ensure ‘a level playing field’, deficiencies in the existing 1993 Act could have been overcome by amending it and this could equally have achieved consistency.<sup>70</sup>

63. Cymdeithas yr Iaith Gymraeg made the point that:

“The Measure will not ensure that people know what their rights are in relation to using the Welsh language, because the system is totally dependent upon standards that vary from

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<sup>68</sup> RoP, paragraph [93], 29 April 2010, Legislation Committee No. 2

<sup>69</sup> Written Evidence, MI 27

<sup>70</sup> *ibid*

body to body and from area to area. There is no certainty that people will not continue to endure a standard of inferior service either ... ”<sup>71</sup>

*The need to retain some form of language schemes*

64. The Welsh Language Board said that:

“... what is important in introducing standards and developing them is that they dovetail with, and build on, the structure with language schemes. We are not sure whether that has been expressed clearly in the proposed Measure.”<sup>72</sup>

65. The Welsh Language Board also noted that:

“The 1993 Act and this proposed Measure puts the emphasis on the provider. We feel, in terms of standards, that that internal dialogue would not occur to the same extent. Standards would place expectations on organisations and therefore that dialogue, which allows schemes to grow within organisations, would not take place. That is our biggest concern in this regard: the loss of the sense of ownership that we see so evidently at present in organisations.”<sup>73</sup>

66. Professor Colin Williams of the School of Welsh, Cardiff University, was of the view that the creation of standards would not eliminate the need for organisations to create something similar to language schemes in order to implement standards:

“Before the proposed Measure appeared, I have to admit that I expected the standards to be a symbolic and significant layer—not to replace language schemes, but to protect them so that national standards would be applied to the education system, the health service, the Government and so on. That is how I still view them, namely as something on a mezzo level, and, underlying them, something similar to the traditional language schemes will continue to operate.”<sup>74</sup>

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<sup>71</sup> Written Evidence, MI 47

<sup>72</sup> RoP, paragraph [78], 29 April 2010, Legislation Committee No. 2g

<sup>73</sup> RoP, paragraph [95], 29 April 2010, Legislation Committee No. 2

<sup>74</sup> RoP, paragraph [215], 22 April 2010, Legislation Committee No. 2

67. Similar views about the need for some form of language schemes in addition to standards were expressed by the Wales Governance Centre<sup>75</sup>, the Welsh Centre for Language Planning<sup>76</sup> and a member of the public with experience of language schemes, who said:

“... it seems to many people, including myself, who are entirely supportive of the idea of standards, that the Measure will be weaker than the current Act if the standards do not have some sort of corresponding language schemes ... Would it not be an idea to work to improve and develop what we have now, with the aid of the Measure, rather than starting from scratch and throwing away all the good work that is being done, despite the shortcomings of the 1993 Act and all of the problems?

...

Instead, we are in a situation where it feels as though we are about to miss our only chance in a generation to do some good work and to move forward sensibly and positively with language planning in Wales.”<sup>77</sup>

68. The Federation of Small Businesses Wales also highlighted a related concern:

“If standards are replacing schemes, what effect will that have on current voluntary schemes that are open to businesses and not covered by any legislation.”<sup>78</sup>

#### *Extending regulation to the private sector*

69. Many submissions from organisations or representatives of the private sector were not supportive of the extension of regulation beyond the state sector. Frequently, they noted that organisations in the private sector already provided Welsh-medium services and often did so under a voluntary Welsh language scheme (prepared in cooperation with the Welsh Language Board), and that this represented a more effective means of extending the use of Welsh in the private sector.

70. The Internet Service Providers Association said:

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<sup>75</sup> Written Evidence, MI 27

<sup>76</sup> Written Evidence, MI 54

<sup>77</sup> Written Evidence, MI 263

<sup>78</sup> Written Evidence, MI 24

“ISPA is keen to ensure that the Measure is underpinned by a thorough process that balances the development of the Welsh language with the impact on those subject to the measure.

The internet sector is ... characterised by varied services, footprints and business models .... ; This means that obligations placed on the sector will affect different players in different ways and any regulations that are drafted should take this into account. There is a concern that by drawing the Measure too widely, it may hamper the development of the sector and services to the Welsh market.”<sup>79</sup>

71. The UK Competitive Telecommunications Association also expressed concern about the impact of the proposed Measure on the telecommunications sector and in particular about moving away from the voluntary approach:

“So, potentially, the move from a voluntary arrangement, where you do something that fits ... to a situation where our members suddenly have nothing but costs, we fear that it may lead to some people exiting or not entering the market in Wales. It is a barrier to entry.”<sup>80</sup>

72. If services were not available to customers in Wales as a result, they felt this “would be a perverse outcome.”<sup>81</sup>

73. BT in Wales told us that it fully supported “the principle that legislation pertaining to the Welsh language should be made in Wales, but we disagree over the extension of compulsory measures to the private sector.”<sup>82</sup>

74. As we have already seen from the comments of RWE npower the issue of competition was raised by many in the private sector. In particular a number of organisations felt that the provision of Welsh language services by private sector companies should be market driven, rather than enshrined in legislation. Good Energy felt that:

“... where the service provided is part of a competitive market, where the user can switch the provider of such services, then

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<sup>79</sup> Written Evidence, MI 42

<sup>80</sup> RoP, paragraph [182], 13 May, Legislation Committee No. 2

<sup>81</sup> RoP, paragraph [183], 13 May 2010, Legislation Committee No. 2

<sup>82</sup> Written Evidence, MI 30

competitive pressures should prevail, and customers should seek out providers who offer services in the language of their choosing.”<sup>83</sup>

75. E.ON UK made this comment with regard to the extension of the standards mechanism to the private sector:

“We are concerned that the proposed Standards will be very prescriptive in terms of the Welsh language service to be offered. This may be appropriate for the public bodies covered by the Measure, but this is not appropriate for companies, like ours, operating in a competitive market ... The key objective of a Standard relating to organisations operating in a competitive market should be to ensure transparency of the services offered, not to define the level of service. In the competitive market it is legitimate for companies to offer different standards so consumers have a choice; it could become an element on which companies compete ... We would suggest that the Standard could be in the form of a Charter Mark whereby companies are accredited according to the level of Welsh language services they provide.”<sup>84</sup>

76. British Gas did not consider that service delivery standards would necessarily lead to clarity and consistency for consumers, and felt that:

“it will be difficult for the proposed Measure to marry the principles of a level playing field and tests of proportionality and reasonableness. Companies who occupy the same sector do not necessarily share the same characteristics in terms of market share, growth, customer profile and product and service provision. There is also no mention of demand, which ought to have some bearing on service provision in a competitive market.”<sup>85</sup>

77. British Gas also referred to a voluntary approach and competition as being the drivers for Welsh language services in the private sector:

“... a voluntary approach to service provision, delivered by the competitive energy market, represents a better way to raise the level of provision of Welsh language service. . . . British Gas

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<sup>83</sup> Written Evidence, MI 25

<sup>84</sup> Written Evidence, MI 17

<sup>85</sup> Written evidence, MI 22

believes that an increase in the use of services would drive improved standard of services and points of competitive differentiation between companies. Uplift in service use and provision on this basis could deliver more useful customer benefits than through prescriptive application of arbitrary standards envisaged by the proposed Measure.”<sup>86</sup>

78. When questioned, British Gas explained why they felt the proposed Measure did not represent the best solution to increasing the use of Welsh language services:

“I am not aware of any evidence that a Measure would make people use Welsh-language services more than they do now. That is why I suggested that it would perhaps be better to try to create demand for services in the first place and then to have companies, voluntarily, provide the services to meet that increased demand ... ”<sup>87</sup>

79. Notwithstanding, CBI Wales’ overall view of the proposed Measure (see paragraph 29), they expressed similar views to British Gas, noting that the proposed Measure:

“... will shift the focus of those companies that are covered by the legislation to compliance and costs rather than to the promotion and enhancement of service that the voluntary approach has engendered so far.”<sup>88</sup>

80. CBI Wales felt that a voluntary approach “would in the long run ... achieve a better level of provision”<sup>89</sup> and added that:

“The answer to the question of whether the voluntary approach is sufficient depends on your aim and ultimate goal. If you want every supplier of a service to provide Welsh-language services, you will probably end up legislating. In the absence of strong customer demand, you will end up legislating. However, if the provision of Welsh language services in the private sector was static and had not shifted for the past 20 years, I would give more credence to that view. My strong impression is that we

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<sup>86</sup> Written Evidence, MI 22

<sup>87</sup> RoP, paragraph [120], 10 June 2010, Legislation Committee No. 2

<sup>88</sup> RoP, paragraph [209], 10 June 2010, Legislation Committee No. 2

<sup>89</sup> RoP, paragraph [243], 10 June 2010, Legislation Committee No. 2

are making progress with the voluntary approach and we will continue to do so, but we are where we are now.”<sup>90</sup>

81. The Confederation of Passenger Transport Wales said:

“More importantly, the proposed Measure refers to a framework of language standards which are not as yet defined. We are concerned that these standards will not reflect (nor be sympathetic to) the differing usage of Welsh within Wales. The current arrangement where companies can agree a policy and the development of that policy with the Welsh Language Board is flexible enough to achieve this balance whilst maintaining ‘pressure’ to increase the use of the language where appropriate.”<sup>91</sup>

82. The Federation of Small Business Wales felt that legislation could turn out to be detrimental to the Welsh language:

“. . . we do not believe that it would be a positive move to try and strengthen the language through further legislation, and in fact during our consultation with our membership we feel that we have evidence to show that it would actually be detrimental to the language itself. . . . 59% [of our members] chose customer demand as the single measure most likely to generate use of Welsh in their business. . . . FSB statistics clearly show that business will respond to customers more than legislation . . .”<sup>92</sup>.

83. The Mobile Broadband Group expressed a preference for the voluntary approach “on the grounds that mobile operators already do more on that basis than simple economics or apparent customer demand would dictate.”<sup>93</sup> In this context, other private sector consultees, such as SWALEC, felt that measures to encourage the take-up of existing services should be a higher priority than formal regulation of the private sector.<sup>94</sup>

84. Other businesses remarked that take-up of their Welsh language services is low. For example, Royal Mail Group noted that

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<sup>90</sup> RoP, paragraph [266], 10 June 2010, Legislation Committee No. 2

<sup>91</sup> Written Evidence, MI 38

<sup>92</sup> Written Evidence, MI 24

<sup>93</sup> Written Evidence, MI 31

<sup>94</sup> Written Evidence, MI 8

“We share the view of CBI Wales that it would be more beneficial for the Welsh Assembly Government to direct resources towards promotional activities ... From a business perspective, we would welcome increased usage by our customers of our current Welsh language services, which at present is disappointingly low”.<sup>95</sup>

85. They added:

“Like many other organisations within the business community in Wales, we would prefer to continue operating our Welsh Language Scheme on a voluntary basis ... the simple point is that it is easier to ensure our business units comply with the scheme if it is perceived by them as something we want to do rather than are compelled to do.”<sup>96</sup>

86. Consumer Focus Wales offered a possible explanation for the low take up of Welsh language services by Welsh speakers. According to one of their surveys “a lack of confidence in their own language skills was one of the biggest barriers to people using Welsh Language services” and that “this was true across all levels of fluency”.<sup>97</sup> In questioning they added:

“It is difficult for us to pull apart the reasons for that. There were issues with people not being aware of what services were available, and an issue about the quality or level of service that was being provided, but over and above everything else, confidence seemed to be the biggest issue—people just did not feel that they had the confidence, whether that was the confidence to ask if Welsh was available, or in their skills to speak in a formal way.”<sup>98</sup>

87. Scottish Power reflected on the limited application of regulation to selected sectors (including utilities), noting that they were cautious about extensions of regulation to the electricity and gas sectors, “unless they apply also to other goods and services that are essential

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<sup>95</sup> Written Evidence, MI 13

<sup>96</sup> *ibid*

<sup>97</sup> Written Evidence, MI 37

<sup>98</sup> RoP, paragraph [314], 10 June 2010, Legislation Committee No. 2

to people's everyday lives, such as supermarkets, banking and (in rural areas) supply of motor fuel."<sup>99</sup>

88. Cymdeithas yr Iaith Gymraeg were, however, critical of the possibility of excluding the private sector from the legislation, based on the perceived insufficiency of the voluntary approach. They said:

"The argument that the voluntary approach works is ridiculous, because current provision depends on the goodwill of individuals and organisations, and fails to get to grips with institutions that should be providing services through the medium of Welsh. Provision is entirely inconsistent and we have evidence that proves that depending on the voluntary approach and the whim and goodwill of companies leads to an unlevel playing field that changes from year to year. It does not provide stability to the individual or the community, and it allows grave inconsistencies."<sup>100</sup>

#### *Welsh-medium education*

89. Many consultees suggested that the proposed Measure should include specific provisions relating to Welsh medium education.

90. Cymdeithas yr Iaith Gymraeg told us:

"For the sake of completeness, we believe that Welsh language education should be included in the general aim of this proposed Measure. The language strategy, the education strategy and the proposed language Measure are all interrelated. At present, the language strategy is not statutory, so there are local authorities that produce schemes that run contrary to the strategy. It would make sense to include a section on education in the proposed Measure, combining the main aims and ambitions of the strategies which get to grips with the development of the Welsh language."<sup>101</sup>

91. Celebrating Our Language said that the proposed Measure should "give statutory powers to the Government's Welsh-medium Education

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<sup>99</sup> Written Evidence, MI 15

<sup>100</sup> RoP, paragraph [91], 27 May 2010, Legislation Committee No. 2

<sup>101</sup> RoP, paragraph [126], 27 May 2010, Legislation Committee No. 2

Strategy, to ensure that every child has the opportunity to benefit from being completely bilingual.”<sup>102</sup>

92. Parents for Welsh Medium Education commented that they “would like the proposed Measure to lead to a clear statement which would ensure the statutory right to Welsh education throughout the statutory and pre-statutory education period and within reasonable distance for every child in Wales.”<sup>103</sup> UCAC, the National Union of Teachers, Wales, deplored the fact that the proposed Measure does not provide every pupil in Wales with the right to Welsh medium education.<sup>104</sup>

### *The complexity of the proposed Measure*

93. Some respondents were critical of the overall structure of the proposed Measure. The Law Society said that “in places the legislation is detailed and prescriptive and in others there is not even a framework”.<sup>105</sup>

94. Others were critical of what they considered to be its overall complexity. In particular, there was much adverse comment about the perceived complexity of the standards mechanism.

95. The Confederation of Passenger Transport Wales said:

“Both the proposed Measure and the explanatory notes are lengthy, complicated and, in important places, very scant on detail. Clarification is needed in a number of areas.”<sup>106</sup>

96. The Wales Council for Voluntary Action also highlighted the difficulties caused by the complexity of the proposed Measure:

“The measure is very hard to understand and interpret, as well as being very long. The explanatory notes did not help, and whilst we welcome the fact that WAG officials were willing to meet us to help us work through the implications for our organisation and for the sector, the lack of clear, concise information is a barrier to smaller and a wider range of organisations being able to respond to this call for evidence

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<sup>102</sup> Written Evidence, MI 48

<sup>103</sup> Written Evidence, MI 50

<sup>104</sup> Written Evidence, MI 52

<sup>105</sup> Written Evidence, MI 10

<sup>106</sup> Written Evidence, MI 38

and get involved in this agenda which may or may not have implications for them.”<sup>107</sup>

97. The Welsh Language Board highlighted the lack of clarity surrounding the new standards system:

“In order to initiate a sensible discussion in the context of standards, it would be useful to obtain examples of different standards so that we might better understand what form they might take. In addition to this, it would be useful to have a simple explanation of all the steps in the new process - from the specification of standards to the provision of services.

Then we must be shown how the new regime is simpler and easier to operate, from the point of view of those practitioners who are currently involved in the operation of Language Schemes.”<sup>108</sup>

98. Emyr Lewis made similar comments:

“It would be a great help if the Government shared its vision of language standards, and give us a few examples, and also if it were to share its vision of compliance notifications to demonstrate how they are different from language schemes. It is the commissioner’s job to create these with the Government, but I feel that having a sample of what the Government intends would give us much more confidence to understand how things will be better. Having clear examples in the proposed Measure would be better still, but if we cannot have that, I would like an understanding of what is happening. As I said, I would prefer to see clear statements in the proposed Measure.”<sup>109</sup>

99. The need for examples to be provided of what standards might look like in practice was made by many other consultees.<sup>110</sup>

100. When questioned, most consultees said that they had not held discussions with the Welsh Government prior to the introduction of the proposed Measure, although some acknowledged that since then such discussions had taken place.

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<sup>107</sup> Written Evidence, MI 265

<sup>108</sup> Written Evidence, MI 14

<sup>109</sup> RoP, paragraph [92], 22 April 2010, Legislation Committee No. 2

<sup>110</sup> For example: Written Evidence, MI 34, MI 52 and MI 53

## Evidence from the Minister

101. The Minister outlined the aims of the proposed Measure as follows:

“The ‘One Wales’ programme of Government seeks to confirm the status of both the Welsh and English languages, to provide linguistic rights in the provision of services and the establishment of the post of the language commissioner. The aim of the legislation is to update the Welsh Language Act 1993. Among the aims of the proposed Measure is to provide greater clarity and consistency for Welsh speakers with regard to the services that they can expect, to develop a more effective enforcement regime and to provide a strong and independent voice for the Welsh language through the establishment of the commissioner.”<sup>111</sup>

102. He subsequently told us that

“I believe that the Measure, when made, will ... have a significant impact. The proposed Measure provides for the establishment of a high-profile champion for the Welsh language who will be able to investigate cases of interference with the freedom to communicate in Welsh, with significantly strengthened powers to ensure organisations’ compliance with the duties that are to be imposed on them. People will gain confidence from the fact that they are entitled to use Welsh in these contexts, safe in the knowledge that they can take the matter up with the commissioner if their rights are denied or their freedoms interfered with.”<sup>112</sup>

103. He added that he believed the proposed Measure is far-reaching and a major step forward in increasing the use of the Welsh language.<sup>113</sup>

104. He also provided the following explanation as to why the existing legal framework for the Welsh language was in need of modernisation:

“The arrangements for delivering services to the public in Wales have changed in many areas since 1993. The framework set

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<sup>111</sup> RoP, paragraph [9], 17 March 2010, Legislation Committee No. 2

<sup>112</sup> RoP, paragraph [65], 17 June 2010, Legislation Committee No. 2

<sup>113</sup> RoP, paragraph [75], 17 June 2010, Legislation Committee No. 2

out by the 1993 Act does not enable these changes, such as changes to the structure of certain key public services, to be taken into account consistently. The new ways of delivering services mean that the public face of certain key sectors fall outside the scope of the 1993 Act, which creates the potential for an uneven playing field within these sectors, and uncertainty about the services that Welsh-speaking customers can expect. The Welsh Language Board's experience since 1993 in developing, negotiating and agreeing schemes has shown the process to be resource intensive."<sup>114</sup>

105. The Minister said he believed that standards will provide greater clarity and consistency in service provision.<sup>115</sup> He said:

"The proposed Measure sets out a clear framework for the imposition of duties, made by Welsh Ministers through subordinate legislation, and they will be subject to further, more detailed, impact assessments."<sup>116</sup>

106. Much of the Minister's evidence on the issue of clarity and consistency of service provision and whether the new proposals would lead to an administratively simpler system, is interwoven with his more detailed comments about the standards system. On this basis, further evidence from the Minister on these issues is contained in Chapter 7 on standards.

107. When asked why the Welsh Government had not heeded the advice of Legislation Committee No. 5<sup>117</sup> to consult on the proposed Measure before it was introduced, the Minister said:

"It was not appropriate to consult until legislative competence was conferred on the National Assembly for Wales on 10 February. We wanted to introduce the proposed Measure at the earliest opportunity, because it is an important Measure and one that will fulfil the 'One Wales' commitments on the Welsh language. A three-month call-for-evidence exercise on the wider Welsh language strategy and policy direction was

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<sup>114</sup> RoP, paragraph [13], 17 March 2010, Legislation Committee No. 2

<sup>115</sup> RoP, paragraph [151], 17 June 2010, Legislation Committee No. 2

<sup>116</sup> *ibid*

<sup>117</sup> National Assembly for Wales Legislation Committee No. 5, *National Assembly for Wales (Legislative Competence) Welsh Language Order 2009*, Committee Report, June 2009, paragraph 3.92

undertaken between October and January, and I was involved in a number of public meetings. Therefore, I have been speaking to stakeholders regularly. Obviously, the committee has issued a call for evidence, which provides further opportunities for people to provide evidence.”<sup>118</sup>

108. When questioned on the level of information contained in the Explanatory Memorandum he told us:

“I understand that the memorandum follows the requirement set out in Standing Order No. 23.18 and has been deemed acceptable by Assembly Commission officials. However, if you seek further clarity, I will seek to provide it.”<sup>119</sup>

109. In response to our requests for further information, we received four letters from the Minister regarding varying aspects of our scrutiny work including the official status of the Welsh language, the independence of the Welsh Language Commissioner, details of the standards system and towards the end of our scrutiny work, some examples of what standards might look like in practice for illustrative purposes.<sup>120</sup>

110. As regards the issue of whether Welsh-medium education should come within the scope of the proposed Measure, the Minister indicated that the proposed Measure was not intended to enforce the Welsh Government’s recently published strategy on Welsh-medium education, which had been developed alongside it.<sup>121</sup> He also noted that the Commissioner would have a right to advise Welsh Ministers on education under section 3 of the proposed Measure and that they would have to take heed of that advice.<sup>122</sup>

## **Our view**

**111. We support the need for legislation to update and modernise the existing framework of Welsh language legislation.** In so doing, we have noted the support for such an approach from consultees,

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<sup>118</sup> RoP, paragraph [15], 17 March 2010, Legislation Committee No. 2

<sup>119</sup> RoP, paragraph [27], 17 March 2010, Legislation Committee No. 2

<sup>120</sup> All correspondence received from the Minister is available at:  
<http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-wl/business-legislation-measures-wl-reldocs.htm>

<sup>121</sup> RoP, paragraphs [269 - 270], 17 June 2010, Legislation Committee No. 2

<sup>122</sup> RoP, paragraph [271], 17 June 2010, Legislation Committee No. 2

although we recognise that for many, there are aspects of the legislation which need improving or changing.

112. We have considered carefully the aims and objectives of the proposed Measure as set out in paragraph 3.10 of the Explanatory Memorandum. However, in our view there is a clear statement of principle missing from the proposed Measure. We believe that an overarching statement needs to be incorporated into the proposed Measure clearly stating that the purpose of the legislation is to promote and develop the Welsh language, consistent with retaining the support and goodwill of non-Welsh speakers. Such a statement would act as a benchmark against which the success of the wider aims and objectives of the proposed Measure (as set out in paragraph 3.10 of the Explanatory Memorandum) should be judged. Accordingly, **we recommend that the long title of the proposed Measure is amended to include a clear statement of principle against which the success of the proposed Measure can be judged in the future.** In addition, **we recommend that the Minister for Heritage gives consideration to making a Ministerial statement clarifying the overall purpose of the proposed Measure and how this relates to its wider aims and objectives. Such a statement should be made during the remaining passage of the proposed Measure through the National Assembly.**

113. We note that there have been no objections to the inclusion in the proposed Measure of provisions relating to the official status of the Welsh language, although we comment in detail on the nature of those provisions in Chapter 4 of this report. We also, like most consultees, support the creation of the post of Welsh Language Commissioner. We comment in detail on the post's functions in Chapter 5 of this report and the importance of the transition from the Welsh Language Board to the Commissioner in Chapter 11.

114. In our view, and reflecting much of the evidence we have received, it is too early to state whether the move from language schemes to standards will provide for a more streamlined, administratively simpler and therefore effective framework for the delivery of Welsh language services. We consider that the information provided in the Explanatory Memorandum was insufficient to aid our understanding of how the new system will operate in practice. We do however recognise that standards are aimed at being more citizen friendly than the existing language schemes. We welcome this

intention and wish to ensure that it is delivered. For this reason, and despite our concerns outlined at the start of this paragraph, **we acknowledge that the new system of standards has the potential to be an improvement on the existing legislative framework and provide a vehicle for increasing the use of the Welsh language.**

115. We believe that the extension of statutory language obligations to certain private sector organisations that carry out quasi-public service functions is an improvement on the current position. In reaching this view, we acknowledge and welcome the progress that has been made in respect of their voluntary language schemes. Nevertheless, we have noted that the application of a standard to a particular person, including organisations in the private sector, is subject to a test of reasonableness and proportionality, which includes the right of challenge. On this basis, **we are content, in general terms, that the proposed Measure should apply to private sector organisations that carry out quasi-public service functions (save for our recommendation at paragraph 372). This is because we believe Welsh speaking citizens and consumers will benefit as a result.**

116. In reaching our view we note the evidence we received from private sector organisations suggesting that the take-up of Welsh language services is low. **We recommend that the new Commissioner, once appointed, should use his or her powers under section 3 of the proposed Measure to address both the reasons behind low take-up and the best solutions to it.**

117. We are concerned that two of the objectives of the proposed Measure as set out in paragraph 3.10 of the Explanatory Memorandum conflict with each other. Given the diverse linguistic communities that exist across Wales, we do not see how it can be possible to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh, while at the same time establishing a system that will both ensure that duties imposed on bodies are both reasonable and proportionate and create a level playing field within sectors.

118. In this regard, we note the provisions of section 43 of the proposed Measure (which provides that the Commissioner may require a person to comply with a particular standard in some circumstances, but not in other circumstances and/or in some area or areas, but not in other areas) and section 53 (which provides for the right of

challenge on whether or not the requirement to comply with a standard, or to comply with it in a certain respect, is unreasonable or disproportionate).

119. Relating to our recommendation in paragraph 112, **we therefore recommend that any Ministerial statement prepared by the Minister for Heritage should clarify the position regarding the ability of the proposed Measure to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh, and at the same time respect the principles of reasonableness and proportionality.**

120. We have considered the evidence which suggests that the proposed Measure should have included specific provisions to deal with Welsh-medium education. We have not been persuaded that this legislation is the place for provisions that relate to one particular service and are content with the proposed Measure in this regard. In reaching this view, we note that the proposed Measure would allow for the imposition of standards on bodies involved with education, such as local authorities and higher and further education institutions. This would permit the setting of standards that relate specifically to education that would build on the schemes relating to Welsh education developed under the *Welsh Language Act 1993*.

121. On balance, and while we have concerns about the lack of clarity in moving from language schemes to standards, **we agree the general principles of the proposed Measure.**

122. We comment later in this report on the nature of some of the amendments submitted by consultees as part of our consideration of the substantive provisions of the proposed Measure. However, many of the amendments submitted were of a detailed, technical nature. Given the nature of Stage 1 scrutiny, it has not been possible to undertake any significant detailed examination of them. As such, **we recommend that the Minister reviews the submissions referred to in Annex 2, with a view to bringing forward appropriate amendments as he sees fit.**

123. Many consultees told us when questioned that they had not been consulted prior to the introduction of the proposed Measure. Given the complexity of the proposed Measure, the significant changes in approach it introduces to the provision of Welsh language services and

its importance in terms of the future of the Welsh language, we find this disappointing. While we acknowledge that the Welsh Government is anxious to enact this important legislation before the end of the current Assembly in 2011, **we consider that the Welsh Government should have published a draft Measure for consultation prior to its formal introduction into the National Assembly.** We consider that this would have enabled the general public and interested organisations to develop a better understanding of what was being proposed and in particular, would have enabled more effective Stage 1 scrutiny of the implications of moving from language schemes to standards.

124. In addition, we would like also to comment on the Explanatory Memorandum. We acknowledge and agree with the Minister's view that the Explanatory Memorandum met the requirements of Standing Orders. However, these are procedural requirements and are not used as a tool to assess the quality of information provided. Such an assessment is a matter for the scrutiny process. As such, the requirements in Standing Orders are different from the need to explain clearly the precise intention of the provisions of the proposed Measure, how they relate to each other and consequently their practical effect.

125. In the course of our scrutiny it was necessary to seek further information from the Minister about certain provisions. We acknowledge the helpful information we received. **We see no logical reason why the information provided by the Minister during the course of our scrutiny could not have been included at the outset in the Explanatory Memorandum, particularly given the complexity of the proposed Measure.**

126. Providing better and more comprehensive information about this legislation and its practical effect through the Explanatory Memorandum would have enabled organisations throughout Wales to gain a better understanding of the proposed Measure as a whole and in particular, the working of the new standards system being introduced by the proposed Measure. Consequently, this too would have led to a more effective and efficient scrutiny of the proposed Measure at Stage 1.

## 4. Part 1: Official status of the Welsh language

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### Background

127. Section 1 of the proposed Measure “lists those Parts of the Measure and the sections of other legislation that make provision about the official status of the Welsh language in Wales”.<sup>123</sup> The Explanatory Memorandum states that the status of the English language in Wales is unaffected by the proposed Measure.<sup>124</sup>

### Evidence from consultees

128. While many respondents offered few or no specific observations on the detail of section 1 of the proposed Measure, many supported the aim of making “further provision with regard to the official status of the Welsh language”<sup>125</sup> as outlined in paragraph 3.10 of the Explanatory Memorandum.

129. Amongst those who did comment on the detail of section 1, there was widespread support for a clear statement of the status of Welsh, and concern at the perceived failure of the proposed Measure to do so.

130. The Welsh Local Government Association supported the inclusion in the proposed Measure of “a clear statement providing equal and official status for both Welsh and English languages in Wales.”<sup>126</sup>

131. A member of the public said “it appears that there is a reluctance to grant full status to the Welsh language.”<sup>127</sup>

132. The Law Society said:

“Looking at section 1, it does not operate to create official status for Welsh, and it does not deal specifically with English either. So, the objective, taken from ‘One Wales’, to confirm official status for both Welsh and English is not delivered through section 1.”<sup>128</sup>

133. They added:

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<sup>123</sup> EM, Part 3: Explanatory Notes

<sup>124</sup> *ibid*

<sup>125</sup> EM, paragraph 3.10

<sup>126</sup> Written Evidence, MI 23

<sup>127</sup> Written Evidence, MI 18

<sup>128</sup> RoP, paragraph [8], 13 May 2010, Legislation Committee No. 2

“Signalling the law is not what we need. We need clear legislation. We need to be clear that problems that can be foreseen are dealt with at the time of law making and that we do not leave any queries and issues as grey areas. So, we would say that the legislation should deal with these topics thoroughly and clearly at this stage.”<sup>129</sup>

134. Emyr Lewis also expressed concern at the lack of clarity in section 1:

“I do not see much point in this section, because all that it does is list sections of other laws. Indeed, later in the proposed Measure, one of those is repealed.”<sup>130</sup>

135. He suggested a new section 1 for the proposed Measure, namely:

“Welsh and English are the official languages of Wales, and have equality of status.”<sup>131</sup>

136. He explained that in his view “it would be appropriate to confirm that anything that is done through the medium of Welsh within Wales is as legally valid as it would be if it were done in English.”<sup>132</sup>

137. Emyr Lewis also explained why it is important to refer to the English language:

“We cannot bestow official status upon the Welsh language without giving it to the English language as well. We have to treat both equally; that is essential in this particular field ... If you accept that you need a statement that the Welsh language is an official language in Wales, it follows logically that, in order to treat both equally, you have to do the same for the English language.”<sup>133</sup>

138. He did not consider that such an approach would create a difference in status for the English language in Wales as compared to the rest of the UK:

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<sup>129</sup> RoP, paragraph [12], 13 May 2010, Legislation Committee No. 2

<sup>130</sup> RoP, paragraph [6], 22 April 2010, Legislation Committee No. 2

<sup>131</sup> Written Evidence, MI 9

<sup>132</sup> *ibid*

<sup>133</sup> RoP, paragraph [29], 22 April 2010, Legislation Committee No. 2

“I had always believed that one of the purposes of devolution was to ensure that things could sometimes work differently in different parts of the United Kingdom. I do not see what detriment or harm the fact that the Welsh legislature is making a clear statement that the Welsh language and the English language have equal status would do to the devolution settlement or to any other part of the United Kingdom.”<sup>134</sup>

139. On this specific issue, a similar point was also made by Professor Colin Williams:

“... this is part of the logical progress of devolution. With devolution flowing entirely in one particular direction, it would be strange if, for some reason, we do not take the rational step emanating from the fact that differences exist in the United Kingdom. That would be irrational.”<sup>135</sup>

140. In making his suggested amendment to the proposed Measure Emyr Lewis also said:

“... to those who are nervous about the idea of declaring that something is official without defining in detail what ‘official’ means, I say that there is a precedent for that within British legislation and within Commonwealth legislation.”<sup>136</sup>

141. Other organisations who expressed dissatisfaction with section 1 of the proposed Measure also offered suggestions as to how the status of the Welsh language might be described.

142. The Welsh Language Board felt that there was “considerable ambiguity and a lack of clarity”<sup>137</sup> in section 1 of the proposed Measure and said:

“Why not use some such wording as ‘The Welsh language is an official language in Wales’?”<sup>138</sup>

143. They also said:

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<sup>134</sup> RoP, paragraph [27], 22 April 2010, Legislation Committee No. 2

<sup>135</sup> RoP, paragraph [146], 22 April June 2010, Legislation Committee No. 2

<sup>136</sup> RoP, paragraph [19], 22 April 2010, Legislation Committee No. 2

<sup>137</sup> RoP, paragraph [9], 29 April 2010, Legislation Committee No. 2

<sup>138</sup> Written Evidence, MI 14

“ . . . if the status of Welsh is already confirmed in several Acts, why can't its status be declared simply and unambiguously in this legislation?”<sup>139</sup>

144. When questioned they added:

“That statement on status has legal value. You can build on that afterwards in law. There is specific psychological and cultural value to that statement, too. It creates linguistic confidence. Therefore, we as a board see two elements.”<sup>140</sup>

145. They also remarked:

“... we see from all of our research work that one of the most key factors with regard to the use of the Welsh language is the speaker feeling that that language has status and entitlement.”<sup>141</sup>

146. Cymdeithas yr Iaith Gymraeg also suggested a change in the wording of section 1. They suggested the replacement of section 1(1) with words “The Welsh language is a unique language of Wales” and the replacement of sections 1(2) and 1(3) with the words “The Welsh language is an official language in Wales.”<sup>142</sup>

147. In explaining their rationale for these changes they said that:

“The principle of making the Welsh language the unique language of Wales means recognising the special position that Welsh occupies in relation to the people of Wales, as our national language.”<sup>143</sup>

148. In addition they said that acknowledging Welsh as a unique language “explains to people why there is a need to treat the Welsh language differently”<sup>144</sup> and also noted that such an approach underpins linguistic legislation in the Basque Country and Catalonia.<sup>145</sup>

149. As regards their reasons for not including a reference to the English language in section 1, Cymdeithas yr Iaith Gymraeg said:

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<sup>139</sup> Written Evidence, MI 14

<sup>140</sup> RoP, paragraph [18], 29 April 2010, Legislation Committee No. 2

<sup>141</sup> RoP, paragraph [121], 29 April 2010, Legislation Committee No. 2

<sup>142</sup> Written Evidence, MI 47

<sup>143</sup> RoP, paragraph [25], 27 May 2010, Legislation Committee No. 2

<sup>144</sup> RoP, paragraph [26], 27 May 2010, Legislation Committee No. 2

<sup>145</sup> RoP, paragraph [27], 27 May 2010, Legislation Committee No. 2

“Our opinion as a society is that the status of the English language does not need to be changed, as it is a strong global language and the only de facto language in Wales at present. The aim of the proposed Measure is to promote and facilitate the use of the Welsh language. The English language does not need legislative assistance, as it is safe enough as a language in Wales, the UK and throughout the world.”<sup>146</sup>

150. The Welsh Centre for Language Planning proposed the inclusion of a reference to the equal validity of the Welsh language:

“In addition to declaring that Welsh is an official language in Wales, we also suggest that it would be possible to expand on what the Welsh Language Act 1993 states with regard to the equal validity of the Welsh and English languages, with a declaration on the general legal validity of the Welsh language in Wales.”<sup>147</sup>

151. As has been indicated in earlier parts of this chapter, for a range of organisations, the inclusion of a clear statement on the official status of the Welsh language would have symbolic and practical effects.

152. The Children’s Commissioner for Wales felt that “there is a danger of missing an opportunity of affording official status and equal status to the Welsh and English languages ... and that the current wording does not provide for this.”<sup>148</sup> He felt that such statement “could have the impact of promoting a sense of national ownership of the Welsh Language, by Welsh speakers and non-Welsh speakers alike.”<sup>149</sup>

153. Mentrau Iaith Cymru said:

“There needs to be a clear statement in the Measure that the Welsh language is an official language in Wales. . . . Giving the Welsh language official status would be a key step forward. In our opinion, it would have a positive effect on people’s

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<sup>146</sup> RoP, paragraph [18], 27 May 2010, Legislation Committee No. 2

<sup>147</sup> Written Evidence, MI 54

<sup>148</sup> Written Evidence, MI 266

<sup>149</sup> *ibid*

attitudes toward the language and would boost the confidence of Welsh speakers”<sup>150</sup>

154. The Association of Chief Police Officers in Wales said that “it is important that the Measure contains an unequivocal statement to the effect that Welsh has official status in Wales in order to ensure clarity of the special position that it plays in our culture, history and daily life.”<sup>151</sup>

155. The Welsh Centre for Language Planning felt “that the current wording of the proposed Measure is a missed opportunity” and added:

“We believe that a clear and unambiguous statement on the official status of the Welsh language is needed ... A statement of this kind would send out a clear message that would have a positive impact on people’s perceptions of the Welsh language, both in Wales and beyond.”<sup>152</sup>

156. Celebrating Our Language considered that stating clearly and unambiguously that the Welsh language has official status in Wales:

“... would bring about a fundamental shift that would ensure that the Welsh language is not marginalised or seen as peripheral. We fear that if that does not happen, we will have lost an opportunity to change fundamentally the way the people of Wales view and consider the Welsh language. As a result, they would have the confidence to use it without fear and to request Welsh-language services. That interrelationship and the practical impact of that are crucial.”<sup>153</sup>

157. In emphasising this point, they said that such a statement would enable people to use the language “without feeling that they are asking for something unreasonable, being a nuisance, or making people go out of their way”.<sup>154</sup>

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<sup>150</sup> Written Evidence, MI 53

<sup>151</sup> Written Evidence, MI 21

<sup>152</sup> Written Evidence, MI 54

<sup>153</sup> RoP, paragraph [135], 27 May 2010, Legislation Committee No. 2

<sup>154</sup> RoP, paragraph [139], 27 May 2010, Legislation Committee No. 2

158. UCAC said clearly stating that the Welsh language is an official language “would provide a firm basis for all the Measure’s other objectives.”<sup>155</sup>

### **Evidence from the Minister**

159. In questioning about section 1 of the proposed Measure, the Minister told us:

“We believe that it does make a clear statement about the official status of the language and confirms that the Welsh language has official status in Wales, but that this proposed Measure makes further provision and defines that further provision clearly in terms of the official status of the language.”<sup>156</sup>

160. He added:

“It will have consequences. Section 1 also signals to any court considering issues in relation to the Welsh language that the Welsh language enjoys official status in Wales.”<sup>157</sup>

161. In a subsequent evidence session, the Minister re-iterated his view:

“I do not agree that the proposed Measure is unclear. I repeat that section 1 makes clear and explicit provision in relation to the official status of the Welsh language.”<sup>158</sup>

162. He subsequently acknowledged that “this is the first time that the term ‘official status’ appears in legislation as regards the Welsh language.”<sup>159</sup>

163. When asked whether he was in favour of Emyr Lewis’ suggestion to amend section 1 (see paragraph 135 above), the Minister said:

“The work of this committee has generated significant and welcome interest. I have listened carefully to the evidence

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<sup>155</sup> Written Evidence, MI 52

<sup>156</sup> RoP, paragraph [30], 17 March 2010, Legislation Committee No. 2

<sup>157</sup> RoP, paragraph [32], 17 March 2010, Legislation Committee No. 2

<sup>158</sup> RoP, paragraph [73], 17 June 2010, Legislation Committee No. 2

<sup>159</sup> RoP, paragraph [85], 17 June 2010, Legislation Committee No. 2

presented to you, and I look forward to reading your views and suggestions. I do not think that I can elaborate on that.”<sup>160</sup>

164. After the Minister’s final evidence session, we subsequently wrote to the Minister asking if he could explain the legal objections, if any, that may exist for including a clear and concise statement that the English and Welsh languages have official status in Wales.<sup>161</sup> The Minister replied:

“... we are clear as to the benefits that a statement confirming the official status of the Welsh language can bring...

... I have also been conscious of the need to give effect to this commitment in a manner which avoids legal uncertainty. The Welsh Language Measure confirms the official status of the Welsh language, contains provisions which indicate what is meant by official status and makes further provision with regard to official status. This is in contrast to some of the more declaratory proposals which have been submitted to the Committee. In the absence of the sort of precision contained within the Measure, open ended statements would in due course fall to the court to be determined.

I have made clear that I am prepared to consider proposals aimed at improving the provisions contained within the Measure. I will, however, be concerned to avoid proposals that give rise to legal and policy uncertainty. The underpinning aim of the Measure is to strengthen the rights of Welsh speakers with regards to the delivery of services. I do not think that we would further this aim by generating legal uncertainty. The development of Welsh language standards will make clear to Welsh speakers the nature of the Welsh language services they can expect to receive. It is not clear to me what practical benefit Welsh speakers would derive from legislative provisions which were of uncertain effect and which would merely serve to give rise to uncertainty which would to be resolved by the courts. I do not believe that it is right that Welsh speakers

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<sup>160</sup> RoP, paragraph [63], 17 June 2010, Legislation Committee No. 2

<sup>161</sup> Letter from Val Lloyd AM to Alun Ffred Jones AM, the Minister for Heritage, 25 June 2010

should need to have recourse to the courts in order to receive services in the language of their choice.”<sup>162</sup>

## **Our view**

165. We have considered carefully the Minister’s views on section 1 of the proposed Measure.

166. We have also considered and acknowledge the weight of evidence in favour of a clear and unambiguous statement about the Welsh language having official status in Wales. We agree with this view.

167. We believe that section 1 of the proposed Measure, as currently drafted, makes no change to the status of the language, but acts merely as a signpost to provisions in this and other legislation which relate to the Welsh language. It contains no declaration as to the status of the Welsh language. In our view such a declaration is necessary. It would strengthen the position of the language, encourage its use in official and public situations and, as part of that, lay to rest a feeling amongst many people in Wales that Welsh has a status that is subordinate relative to English.

168. We also strongly believe that in a nation in which two languages are spoken widely, both must be treated equally.

169. Accordingly, **we recommend that section 1 of the proposed Measure is replaced by a clear statement regarding the official status of our languages, which could read as follows:**

**English and Welsh are the official languages of Wales, and have equal validity and status.**

170. Our view has been influenced by the lack of any clear evidence as to why it has been necessary to draft section 1 of the proposed Measure as a list of provisions. As such, we can see no reason why a declaratory statement about the official status of Welsh and English in Wales cannot be included in the proposed Measure.

171. We believe that an amendment of the type we have proposed is within the legislative competence of the National Assembly. We also believe that it provides more clarity about the status of the Welsh language than is currently provided for in the existing wording of

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<sup>162</sup> Letter from Alun Ffred Jones AM, the Minister for Heritage, 1 July 2010

section 1 and will help to underpin the other provisions of the proposed Measure.

172. We also believe that this approach will make a major contribution to the confidence and frequency of use of the Welsh language by Welsh speakers, which forms a key part of the overarching principle we refer to in our conclusions on the general principles.

## 5. Part 2: The Welsh Language Commissioner

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### Background

173. Sections 2 - 21 of Part 2 of the proposed Measure, and Schedules 1 - 3, establish the office of the Welsh Language Commissioner (the Commissioner) and make provision about the Commissioner's general functions. In particular, section 2 provides that the Commissioner is appointed by the First Minister.

174. The establishment of the office of the Welsh Language Commissioner is accompanied by the abolition of the Welsh Language Board under section 134 of Part 9 of the proposed Measure.

175. Section 3(1) of the *Welsh Language Act 1993* gave the Welsh Language Board the function of promoting and facilitating the use of the Welsh language. This function is given to the Commissioner in section 3(1) of the proposed Measure, but with the additional function of promoting equality between the Welsh and English languages.

176. Section 3(2) of the proposed Measure gives examples of ways in which the Commissioner may carry out those functions. The general powers available to the Commissioner are set out in section 10 of the proposed Measure, and generally correspond with the Welsh Language Board's powers under sections 3(3) and 3(4) of the 1993 Act.

177. This is therefore consistent with section 134(2) of the proposed Measure which transfers the Board's functions to the Commissioner. However section 134(3) provides that transfer is subject to the power of Welsh Ministers to make an order under section 143 of the proposed Measure to transfer functions to themselves as well as, or instead of, to the Commissioner.

### Evidence from consultees

#### *The need for a Welsh Language Commissioner*

178. Many respondents expressed support in principle for the creation of the office of Welsh Language Commissioner.

179. The Welsh Language Board welcomed “the intention to establish a Commissioner who will act as an advocate for the speakers of Welsh”.<sup>163</sup>

180. The Association of Chief Police Officers in Wales also welcomed “the establishment of the role of the Commissioner as a champion for Welsh Language matters.”<sup>164</sup>

181. The Welsh Local Government Association said:

“The WLGA welcomes the establishment of an office and post of Welsh Language Commissioner. It is important that a statutory voice, separate from Government is established to act as an advocate for the Welsh language, with wide-ranging investigative and enforcement powers.”<sup>165</sup>

182. The Aneurin Bevan Health Board said in relation to the establishment of the Commissioner:

“We believe this is a model that already works well in Wales in relation to Older People and Children and would support this model in relation to the Welsh language.”<sup>166</sup>

*The independence of the Welsh Language Commissioner and the process of appointment*

183. A significant number of consultees expressed the view that maintaining the independence of the Commissioner was a paramount consideration. For many who took this view, this implied the need for accountability to the National Assembly rather than to Welsh Ministers, and the need for appointment by the National Assembly rather than by the First Minister.<sup>167</sup>

184. Mentrau Iaith Cymru explained their reasoning for this approach:

“Generally, we would like to see the Commissioner being accountable to the Assembly rather than Government Ministers or the First Minister. This would be more open and transparent. It would strengthen the independent status of the

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<sup>163</sup> Written Evidence, MI 14

<sup>164</sup> Written Evidence, MI 21

<sup>165</sup> Written Evidence, MI 23

<sup>166</sup> Written Evidence, MI 45

<sup>167</sup> For example, Written Evidence, MI 50

Commissioner, and would distance him/her from Governmental and ministerial influence ... The Assembly should appoint the Commissioner ... ”<sup>168</sup>

185. The Children’s Commissioner for Wales said:

“I would suggest that the Welsh Language Commissioner would be better served to be appointed under the same procedures as the Public Services Ombudsman and appointed by the National Assembly for Wales, rather than by the First Minister. This would seem more appropriate, especially given the powers of the Commissioner to impose sanctions on and bring proceedings against Welsh Ministers. The influence of Welsh Ministers in their ability to instruct the Commissioner as well as the role of Welsh Ministers in specifying standards under section 25 also merits further consideration.”<sup>169</sup>

186. The ability of the Commissioner to impose sanctions on Welsh Ministers was cited by a number of consultees as a reason for the National Assembly to appoint the Commissioner. Emyr Lewis said:

“The First Minister is responsible for appointing and removing the Commissioner ... That is consistent with the positions of the Children’s Commissioner for Wales and the Older People’s Commissioner for Wales. But there is a basic difference between the proposed Language Commissioner and these other Commissioners, namely that the Language Commissioner will be able to impose sanctions on Welsh Ministers . . . or bring proceedings against Welsh Ministers as a part of his/her regulatory functions. The other Commissioners do not have similar powers. It is therefore fair to ask, whether the National Assembly itself should not make this appointment.”<sup>170</sup>

187. When questioned Emyr Lewis told us he “would prefer the commissioner not to be appointed by the First Minister”, adding that

“... it is odd that the Executive should appoint a person who would be able to regulate the Executive and penalise it. I would feel more comfortable if the commissioner were to be

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<sup>168</sup> Written Evidence, MI 53

<sup>169</sup> Written Evidence, MI 266

<sup>170</sup> Written Evidence, MI 9

appointed in a similar way to the ombudsman or the auditor general. That is, by the National Assembly for Wales.”<sup>171</sup>

188. He also went on to say that “it appears to be a matter of constitutional principle and ... would make more sense for the democratic element rather than the executive element to appoint this official.”<sup>172</sup>

189. Professor Colin Williams also suggested that the Commissioner should be accountable to the National Assembly “following the experiences of other countries, and not because I am suspicious of Welsh Ministers, whoever they may be.”<sup>173</sup> He also agreed with Emyr Lewis that the role of the Commissioner was closer to that of the Auditor General and Public Services Ombudsman rather than Children’s Commissioner for Wales or the Commissioner for Older People in Wales<sup>174</sup>, as did UCAC.<sup>175</sup>

190. The Welsh Language Board noted that

“One thing that we found in our regulatory and monitoring work as a board is that a large part of the regulatory work relates to the Government. That is one of the key areas of monitoring and regulation. If the commissioner is appointed by the First Minister, a question arises about the political element that comes into that appointment and whether political pressure is brought to bear. It would be very difficult for the commissioner to regulate Government work independently.”<sup>176</sup>

191. They assumed “that, certainly, half the commissioner’s work would relate to the Government and to local government”.<sup>177</sup> Professor Colin Williams noted that in Canada “around 90 per cent of complaints of non-compliance ... concern civil servants”<sup>178</sup>.

192. In supplementary evidence, One Voice Wales said that its National Executive’s Policy Committee:

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<sup>171</sup> RoP, paragraph [55], 22 April 2010, Legislation Committee No. 2

<sup>172</sup> RoP, paragraph [57], 22 April 2010, Legislation Committee No. 2

<sup>173</sup> RoP, paragraph [149], 22 April 2010, Legislation Committee No. 2

<sup>174</sup> RoP, paragraphs [151-2], 22 April 2010, Legislation Committee No. 2

<sup>175</sup> Written Evidence, MI 52

<sup>176</sup> RoP, paragraph [45], 29 April 2010, Legislation Committee No. 2

<sup>177</sup> RoP, paragraph [48], 29 April 2010, Legislation Committee No. 2

<sup>178</sup> RoP, paragraph [159], 22 April 2010, Legislation Committee No. 2

“... was of the view that, in the interests of political neutrality, it was preferable for the appointment to be made by the National Assembly for Wales. Furthermore, the Committee was in agreement with the point I made in the evidence session regarding consistency of titles regarding Commissioners being appointed by WAG and roles appointed by the Assembly being given some other title.”<sup>179</sup>

193. Cymdeithas yr Iaith Gymraeg also suggested that a source of funding that is not dependent upon the decisions of the Welsh Government would help ensure the independence of the Commissioner’s office. They also suggested that the National Assembly should use a different appointment system for the Commissioner including pre-appointment public hearings.<sup>180</sup> When questioned, they explained their thinking further:

“An important part of the role of the commissioner would be to regulate the Government of the day. Our suggestion is that the best method of appointing the commissioner would be for Welsh Ministers to nominate a person with the agreement of the Assembly as a whole.

It is fair to say that no one model would ensure that the commissioner is entirely independent, but if the First Minister has sole responsibility for appointing the commissioner, one could question the extent to which the commissioner would feel free to criticise the work of the Government.

One other possible advantage to having the Assembly decide would be that sector stakeholders could take part in the process of appointing the commissioner. It would also increase the accountability of the commissioner to the people of Wales.”<sup>181</sup>

194. The Wales Governance Centre suggested a similar approach involving the National Assembly and noted that:

“Given the unique nature of the post and its effects on the future of the Welsh language should there at least be a

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<sup>179</sup> Supplementary Written Evidence, MI 245; see also RoP, paragraph [32], 20 May 2010, Legislation Committee No. 2

<sup>180</sup> Written Evidence, MI 47

<sup>181</sup> RoP, paragraphs [46 – 48], 27 May 2010, Legislation Committee No. 2

statutory requirement that the person whom WAG wishes to appoint as Commissioner has to appear before a relevant Assembly Committee to enable the Assembly [t]o decide on the Committee’s recommendation whether or not the appointment should be endorsed?”<sup>182</sup>

195. Parents for Welsh Medium Education also put forward another approach, suggesting that “a National Assembly for Wales committee, that does not include a majority from any party, should make the appointment.”<sup>183</sup>

196. Some organisations also questioned whether the Commissioner’s independence was restricted by some of the sections of the proposed Measure. For example, Mentrau Iaith Cymru noted that sections 10, 11, 15, 63, 66 and 97 refer to the powers that Welsh Ministers have over the Commissioner, and asked “How can the Commissioner be independent with these clauses in the Measure?”<sup>184</sup>

197. BT in Wales said that they did not have a set view on the method of appointment and that while a more comprehensive appointment process would give the impression of more independence from Government, ultimately how the commissioner operates after appointment is more important.<sup>185</sup> They added:

“It is important that the process is transparent and that it follows the Nolan principles, so that everyone can be entirely confident that everything has been done in an appropriate manner.”<sup>186</sup>

### *The transfer of promotional and regulatory functions to the Welsh Language Commissioner*

198. Several respondents expressed support for giving the Commissioner regulatory powers. Dwr Cymru Welsh Water said:

“Establishing a system to monitor duties imposed on organisations would seem a fair and reasonable way of

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<sup>182</sup> Written Evidence, MI 27

<sup>183</sup> Written Evidence, MI 50

<sup>184</sup> Written Evidence, MI 53

<sup>185</sup> RoP, paragraph [160], 13 May 2010, Legislation Committee No. 2

<sup>186</sup> RoP, paragraph [162], 13 May 2010, Legislation Committee No. 2

ensuring that organisations are providing a service through the medium of Welsh.”<sup>187</sup>

199. Many respondents recommended that it would be inappropriate to task the Commissioner with both language promotion and language regulation / compliance. Cymdeithas yr Iaith Gymraeg felt that:

“One of the main weaknesses of the Welsh Language Board at present is that it is expected to be responsible for language schemes and carry out inquiries into complaints, as well as promoting the Welsh language and encouraging companies and organisations to use it. It is impossible to try to regulate and promote simultaneously.”<sup>188</sup>

200. Many organisations therefore suggested the need to separate the promotion and regulation functions, with most of these respondents generally supporting the retention by the Commissioner of the regulatory role. The Welsh Centre for Language Planning said:

“We welcome the establishment of a Welsh Language Commissioner, which we have been advocating since August 2004. However, we feel strongly that the Commissioner’s main functions should be limited to the field of regulating Welsh-language services ... we believe that it is important to separate regulatory activities – which could entail elements of enforcement and sanctions – from ‘softer’ activities that rely, to a significant degree, on eliciting goodwill, influencing values and changing people’s habits voluntarily”.<sup>189</sup>

201. In supplementary written evidence, Emyr Lewis said that he tended:

“... to agree that the Commissioner should not have promotional functions, except to the extent that he/she is promoting good practice in terms of providing services through codes of practice and so on. Language promotion itself should not be the role of the Commissioner.”<sup>190</sup>

202. The Welsh Language Board said that:

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<sup>187</sup> Written Evidence, MI 11

<sup>188</sup> RoP, paragraph [41], 27 May 2010, Legislation Committee No. 2

<sup>189</sup> Written Evidence, MI 54

<sup>190</sup> Supplementary Written Evidence, MI 9

“... this is not a Language Commissioner model that has been reflected in other countries ... Should one, therefore, not consider a model for Wales which keeps the regulatory and promotional functions apart? ... Would it not be preferable to consider a model in which the Commissioner acts as an advocate for the speakers of Welsh, and engages in regulation only when there is non-compliance in the context of Welsh Language Schemes? A good example of this model is the work of the Languages Commissioner in the Irish Republic.”<sup>191</sup>

203. When questioned, the Welsh Language Board explained the practical reasons for keeping the promotion and regulation functions apart:

“There is tension when someone has strong regulatory powers as well as promotional powers. At the moment, from the board’s position, I believe that they can sit quite comfortably together, but the board does not have those strong powers. When there are strong powers, and it becomes necessary to tell someone that you are taking legal action, it is difficult to return the next day and ask, for example, ‘Would you like to work with us, and share some funding to develop a project promoting Welsh in the Amman valley?’. So, there are tensions; there is no doubt about that, and we have had a small taster of that over the years.”<sup>192</sup>

204. Other organisations made similar points regarding the potential difficulties that a Commissioner could face with this dual role. BT in Wales said:

“BT in Wales has some concerns about the Commissioner acting as both regulator and advocate of the Welsh language. BT recognises and supports the need for an independent champion of the Welsh language ... but how will the individual when carrying out this championing role reconcile this role, which requires building partnerships with external partners in the public, private and voluntary sector with applying strict

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<sup>191</sup> Written Evidence, MI 14

<sup>192</sup> RoP, paragraph [54], 29 April 2010, Legislation Committee No. 2

regulations and evaluating the impact of their activities on these partners.”<sup>193</sup>

205. They also said:

“We must remember that it is easier to gain the trust and co-operation of private bodies when they deal with a solely promotional body rather than a body that is responsible for promotion on one level and policing on another.”<sup>194</sup>

206. Celebrating Our Language thought:

“... that having a body to promote the Welsh language that is separate from the commissioner’s office makes sense. For instance, if the commissioner were to threaten to prosecute or to name an organisation for not offering a Welsh-language service of a high enough standard, the commissioner would not be the best person to go to the same organisation the following week to try to encourage it to improve its language scheme and offer a better service in a positive way.”<sup>195</sup>

207. In expressing a personal view, a representative of the Royal Mail Group said:

“A frequent error in the public sector is to fail to appreciate the cost of promotion. So, you may find that a group that has both functions is likely, over time, to see its resource directed towards compliance rather than promotion.”<sup>196</sup>

208. The Wales Governance Centre offered a similar view, suggesting that “given the possible variety of different standards that will be applicable ... it could be that the Commissioner’s resources will be concentrated on enforcement rather than encouragement.”<sup>197</sup>

Celebrating Our Language also felt that “placing both duties in the same office would perhaps mean that one is prioritised at the expense of the other.”<sup>198</sup>

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<sup>193</sup> Written Evidence, MI 30

<sup>194</sup> RoP, paragraph [152], 13 May 2010, Legislation Committee No. 2

<sup>195</sup> RoP, paragraph [169], 27 May 2010, Legislation Committee No. 2

<sup>196</sup> RoP, paragraph [185], 29 April 2010, Legislation Committee No. 2

<sup>197</sup> Written Evidence, MI 27

<sup>198</sup> RoP, paragraph [157], 27 May 2010, Legislation Committee No. 2

209. While the majority of those commenting on this issue felt that the promotion of the Welsh language should not rest with the Commissioner, some alternative views were also expressed.

210. One Voice Wales felt that:

“In principle, it probably makes sense to split the roles. However, I think that it could be seen as a bit of a luxury in the current financial climate, when there are clearly going to be pressing constraints on public finances.”<sup>199</sup>

211. Although Emyr Lewis suggested in later supplementary evidence that he tended to agree that the promotion function should not rest with the Commissioner (see paragraph 201), he nevertheless offered a solution as to how the promotion and regulation functions could be dealt with, reflecting his concerns about the transitional arrangements in moving to the new system. He said:

“Why abolish the Welsh Language Board? Why not retain the legal entity, change its name to ‘the commissioner’ or ‘the commission for the Welsh language’, and have a commissioner, chief commissioner and deputy commissioner, as in the proposed Measure? That would make it easier to ensure continuity in the work, it would be easier to dovetail the two regulatory streams, and also, although I am not certain about this, it could be much cheaper. The money saved could be used to promote the Welsh language, or for whatever the Government wants to use it for in these difficult times.”<sup>200</sup>

212. Professor Colin Williams also put forward a similar suggestion:

“... the element of the board’s work that deals with promotion and is more radical than having civil servants working independently should be retained, as should the board’s regulatory element, only empower it by appointing a new head, namely the language commissioner and deputy commissioner, and separating the two functions. In the past, the board, its members and its staff, would have suggested doing it the other

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<sup>199</sup> RoP, paragraph [36], 20 May 2010, Legislation Committee No. 2

<sup>200</sup> RoP, paragraph [112], 22 April 2010, Legislation Committee No. 2

way, namely that both functions could be retained within one body called a language commission.”<sup>201</sup>

213. The Law Society said:

“We do not have a specific view in relation to the Welsh language commissioner, but, again, I would draw parallels with other established commissions in England and Wales that satisfy the role of an adviser and a regulator, for example, the Charity Commission and the Equality and Human Rights Commission. It is a way of operating that is already established within our system.”<sup>202</sup>

214. They added,

“The commissioners of the Equality and Human Rights Commission are appointed by the Secretary of State. They serve this dual role of enforcement and providing advice and support, and they would also come into contact with areas in which Ministers have acted. So, they would be testing Ministers in a similar way.”<sup>203</sup>

*Transfer of promotional functions to Welsh Ministers or another body*

215. Many of the respondents who did support a separation of the promotional and regulatory functions, with the Commissioner retaining the latter, were also concerned about the transfer of promotional functions to Welsh Ministers by order under section 143 of the proposed Measure. Concerns raised included the potential politicisation of language promotional activities, the perception of the harm that this could cause and the manner in which government operates would not be conducive to promotional activities.

216. Emyr Lewis felt that transferring the promotional work to the Welsh Government would risk language strategy and planning work being sidelined, and the loss of expertise, “as a result of political compromises when determining priorities and resources, which are part of every government’s daily life”.<sup>204</sup> In supplementary written evidence he re-iterated that he was not convinced “that within

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<sup>201</sup> RoP, paragraph [164], 22 April 2010, Legislation Committee No. 2

<sup>202</sup> RoP, paragraph [31], 13 May 2010, Legislation Committee No. 2

<sup>203</sup> RoP, paragraph [33], 13 May 2010, Legislation Committee No. 2

<sup>204</sup> Written Evidence, MI 9

Government is the most appropriate place for that promotional work to happen”.<sup>205</sup> In making this case, he noted that:

“The Welsh Language Board has succeeded because it has not been part of the Government. It is sufficiently independent to be able to operate creatively and flexibly, and to ask difficult questions of the Government and other authorities on policy matters. In my opinion, its arm’s length nature as a promoter is as valuable as its functions as a Regulator. It should also be added that the Board’s model, and its ways of operating, are recognised across Europe and the rest of the world as excellent examples of how to promote a minority language within the context of a modern democracy.”<sup>206</sup>

217. The Welsh Language Board noted that:

“The proposed Measure offers only two alternatives so far as this promotional work is concerned: to give the Board’s promotional functions either to the Commissioner or to Central Government. We do not believe that the culture of Central Government is apposite to engage in language promotion. We have already referred to the risks of conflict if both the promotional and compulsory functions are given to the Commissioner. A further option, therefore, would be to bestow the promotional functions on a separate body”.<sup>207</sup>

218. The creation of a new body to deal with language promotion was raised by some consultees.

219. Cymdeithas yr Iaith Gymraeg suggested the creation of a Welsh Language Council to replace the Welsh Language Board. Such a body “should be established as a corporate body appointed by the National Assembly of Wales that would be a totally separate body to the Commissioner.”<sup>208</sup> It would be an inclusive forum for the Welsh language and involve “the participation of a wide range of statutory, voluntary and private bodies in the work of creating a future for the Welsh language<sup>209</sup>”.

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<sup>205</sup> Supplementary Written Evidence, MI 9

<sup>206</sup> *ibid*

<sup>207</sup> Written Evidence, MI 14

<sup>208</sup> Written Evidence, MI 47

<sup>209</sup> *ibid*

220. They added that:

“... organisations that work to promote the Welsh language could create a new dynamic of sharing good practice, to share language planning skills and move towards a sensible approach towards Welsh-language promotion in all parts of Wales.”<sup>210</sup>

221. A similar proposal was put forward by Mentrau Iaith Cymru, who said:

“One model, perhaps, could be to create a consortium of organisations involved in the Welsh language throughout Wales and which have experience of promoting the language. A consortium like that could come together to do the promotional work or could decide on the best way to promote the language.”<sup>211</sup>

222. The Welsh Centre for Language Planning proposed the following:

“We believe that the task of promoting the Welsh language in a broader sense, along with building its viability, should reside with another organisation ... That organisation could be a unit within the Welsh Assembly Government, or an external organisation (or organisations) that would operate within the policy framework set by the Welsh Assembly Government”.<sup>212</sup>

223. A few other respondents were also not concerned about the assumption of the promotional role by Welsh Ministers:

“On a strategic level, ColegauCymru considers there is scope for the Welsh Assembly Government to take on a greater promotional role. We therefore very much endorse the proposal to give the WAG responsibility for promoting the Welsh language”.<sup>213</sup>

224. However, this consultee went on to express some limitations to this approach:

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<sup>210</sup> RoP, paragraph [61], 27 May 2010, Legislation Committee No. 2

<sup>211</sup> RoP, paragraph [260], 27 May 2010, Legislation Committee No. 2

<sup>212</sup> Written Evidence, MI 54

<sup>213</sup> Written Evidence, MI 41

“Whilst ColegauCymru is very supportive of the proposal that the WAG be given responsibility for the promotion of Welsh language on a strategic level, it is less convinced that the WAG is best placed to deliver on the operational level. . . . It is possible that, if the type of hands-on training and promotional role (entailing the training of individual members of the public in face to face interactions) ... were expected of civil servants, that language promotion could be seen as a politically flavoured enterprise.”<sup>214</sup>

225. In addition, the Welsh Local Government Association, while requesting more clarity on how the Commissioner could undertake both a regulatory and promotional role, felt that the promotional roles of the Welsh Language Board:

“... can easily be transferred to the new Commissioner’s Office or into the Welsh Assembly Government .... All other Welsh Language Board functions could be merged with the Welsh Assembly Government, either as a specific department dealing with all issues relating to the Welsh language or into the most relevant departments ...”<sup>215</sup>

#### *Other functions of the Commissioner*

226. Cymdeithas yr Iaith Gymraeg were disappointed at the lack of a statutory principle or purpose driving the work of the Commissioner and the absence of a duty on the Commissioner to protect rights “or even protect standards.”<sup>216</sup>

227. When questioned, they referred to the fact that the Children’s Commissioner for Wales has a clear objective and focus<sup>217 218</sup>. They said:

“the fundamental point is that there should be a series of principles and a main objective to drive the commissioner, to

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<sup>214</sup> Written Evidence, MI 41

<sup>215</sup> Written Evidence, MI 23

<sup>216</sup> Written Evidence, MI 47

<sup>217</sup> RoP, paragraphs [55-56], 27 May 2010, Legislation Committee No. 2

<sup>218</sup> As set out in section 72A of the *Care Standards Act 2000*. It provides that the principal aim of the Commissioner in exercising his functions is to safeguard and promote the rights and welfare of children to whom Part V of the 2000 Act applies.

motivate him or her to use his or her powers to their full potential.”<sup>219</sup>

228. They added:

“... if there is no underlying principle to drive the work of the commissioner, in the absence of rights, there is no reason why the commissioner would set standards in the first place.”<sup>220</sup>

and posed the following question:

“Why not have an aim that drives the work of the commissioner that states that there is a reason for imposing standards on organisations in particular situations? There is nothing like that in the proposed Measure at the moment.”<sup>221</sup>

229. Celebrating Our Language expressed similar sentiments:

“We feel that the context is unclear and ambiguous and that making a clear statement about the role, aims and objectives of the commissioner would be a step towards ensuring that the purpose of the post is quite clear and that the commissioner achieves his or her duties. The proposed Measure, in its current form, means that all that is totally dependent on the personality of the individual who is finally appointed. We also want to ensure that Welsh citizens are crystal clear about the role of that individual and the purpose of the commissioner’s remit. At present, we feel that that is not entirely clear to the people of Wales.”<sup>222</sup>

230. In also making a comparison with the aim of the Children’s Commissioner for Wales, Celebrating Our Language said:

“Why does the Language Commissioner not have a similar aim, such as safeguarding the interests of the people of Wales in terms of the Welsh language and promot[ing] the rights of citizens to the language? Since there are many international conventions that include linguistic rights to some extent, would

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<sup>219</sup> RoP, paragraph [55], 27 May 2010, Legislation Committee No. 2

<sup>220</sup> RoP, paragraph [44], 27 May 2010, Legislation Committee No. 2

<sup>221</sup> RoP, paragraph [101], 27 May 2010, Legislation Committee No. 2

<sup>222</sup> RoP, paragraph [184], 27 May 2010, Legislation Committee No. 2.

it not make sense to place a duty on the Commissioner to promote and safeguard these rights?”<sup>223</sup>

231. Consumer Focus Wales wanted to add additional responsibilities to the duties of the Commissioner:

“... we believe that the monitoring and evaluation of the use of services, as well as the use of the language, should be included in the Measure as one of the Commissioner’s duties”<sup>224</sup>

### **Evidence from the Minister**

232. When questioned whether the Commissioner would be independent of Ministerial control, the Minister told us:

“... the relationship between the Welsh language commissioner and the Government is similar to that of other commissioners who have been appointed in Wales. They are intended to be independent and can be critical of the Government, if they so wish. There is a clear statement in the proposed Measure that Welsh Ministers must take due regard of any advice offered by the commissioner, which suggests that the commissioner has wide-ranging powers. The proposed Measure sets out a clear role for the commissioner to promote and facilitate the use of the Welsh language and to promote equality between English and Welsh. There will be a clear and public expectation on the commissioner to perform and achieve these aims and duties placed on him or her in relation to the standards and enforcement system, which will require the commissioner to act impartially and independently.”<sup>225</sup>

233. An official accompanying the Minister added:

“The proposed Measure sets out ways for the commissioner to investigate non-compliance with duties imposed via standards. Inquiries are a totally separate issue. As the Minister said, if the commissioner wants to inquire into the use of Welsh by the private sector or the use of Welsh by young people, the proposed Measure sets out the formal process to do that, to

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<sup>223</sup> Written Evidence, MI 48

<sup>224</sup> Written Evidence, MI 37

<sup>225</sup> RoP, paragraph [40], 17 March 2010, Legislation Committee No. 2

ensure that the terms of reference are understood by everyone, that people have an opportunity to submit evidence. It shows another aspect in which the commissioner will be independent of Government, in that he or she will be able to inquire into anything that he or she considers appropriate.”<sup>226</sup>

234. The Minister also noted that the commissioner will have “the right to provide assistance to an individual without asking for the permission of a Minister or anyone else.”<sup>227</sup>

235. In response to a question asking whether it would be difficult for the Commissioner to regulate Government work independently, given the evidence of the Welsh Language Board that a large part of its regulatory work relates to the Government, the Minister disagreed. He said:

“The commissioner will play a significant role in delivering Parts 4 and 5 of the proposed Measure, which deal with the imposition of duties upon persons through standards, and the enforcement of those standards. In so doing, he or she will deal with a wide range of organisations, including the more than 550 organisations that currently operate Welsh language schemes. This demonstrates that a large part of the commissioner’s work will not involve the Government, and he or she will be able to operate independently of Government as that work is undertaken.”<sup>228</sup>

236. The Minister acknowledged that the Children’s Commissioner for Wales and Commissioner for Older People in Wales cannot place sanctions on Welsh Ministers (in the way the proposed Welsh Language Commissioner would be able to).<sup>229</sup> However, he said:

“There are, however, existing examples of other commissioners or similar bodies able to place sanctions on Government Ministers where those same Ministers make appointments to those bodies. These include the Health and Safety Executive and the Equality and Human Rights Commission. There is no

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<sup>226</sup> RoP, paragraph [76], 17 March 2010, Legislation Committee No. 2

<sup>227</sup> RoP, paragraph [84], 17 March 2010, Legislation Committee No. 2

<sup>228</sup> RoP, paragraph [91], 17 June 2010, Legislation Committee No. 2

<sup>229</sup> RoP, paragraph [93], 17 June 2010, Legislation Committee No. 2

off-the-shelf model for commissioners. This model is tailor-made for the Welsh situation.”<sup>230</sup>

237. When asked why the proposed Measure provides, in section 11, for the Commissioner to obtain approval for the number of staff he or she employs, and their terms and conditions, the Minister replied:

“I do not believe that the commissioner has to obtain permission to appoint a specific number of staff, but the Minister will have the right to set a maximum number. You do not want to see a body such as this starting to spend money unnecessarily, building an empire and paying unreasonable salaries, as has happened in some organisations that were funded or established by the Government. So, this is a kind of checks and balances system.”<sup>231</sup>

238. The Minister also explained that Welsh Ministers’ powers of direction in section 15 were “necessary as part of the checks and balances” and that the power should be available for use “in exceptionally rare cases, for instance if there was concern about the performance of the commissioner.”<sup>232</sup> An official accompanying the Minister added:

“It is a power that is contained within the 1993 Act, as regards the language board. That power has never been used, as far as I understand, in relation to the work of the board. As the Minister said, it is a power that is to be used carefully; it is not there to enable Ministers to interfere in the daily work of the commissioner. If Ministers use the power in an inappropriate manner, then a judicial review could be brought against them.”<sup>233</sup>

239. The Minister provided further information about the checks and balances provided in the proposed Measure to ensure the independence of the Commissioner in a letter to us dated 23 April 2010.<sup>234</sup>

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<sup>230</sup> RoP, paragraph [93], 17 March 2010, Legislation Committee No. 2

<sup>231</sup> RoP, paragraph [90], 17 March 2010, Legislation Committee No. 2

<sup>232</sup> RoP, paragraph [92], 17 March 2010, Legislation Committee No. 2

<sup>233</sup> RoP, paragraph [94], 17 March 2010, Legislation Committee No. 2

<sup>234</sup> Letter from Alun Ffred Jones AM, the Minister for Heritage, 23 April 2010

240. As regards the actual appointment process of the Commissioner, the Minister said he was satisfied that the procedures set out in the proposed Measure were appropriate<sup>235</sup> and that the process:

“... is consistent with the appointment of the Children’s Commissioner for Wales and the Older People’s Commissioner for Wales. The proposed Measure contains a provision in paragraph 3(1) of Schedule 1 to allow the First Minister to take the views of the Assembly—an Assembly committee or Assembly Members—into account when appointing the commissioner.”<sup>236</sup>

241. On the issue of whether the Commissioner should be responsible for both regulating the Welsh language and promoting it, the Minister told us:

“There are two views. One is that the two roles should be combined, and retained along the current model. The other is that they should be separate. We are in discussions with the Welsh Language Board and others on this matter. I can say that I am not minded to retain the Welsh Language Board or establish another body in order to undertake any promotional role that may not be appropriate for the commissioner. As I have said, however, the balance with regard to the regulatory and promotional role is something that I am discussing with the board and others, and I will be consulting with regard to promoting the use of Welsh when I publish the Government’s draft Welsh language strategy later this year. I will be interested to hear the committee’s views on the matter.”<sup>237</sup>

242. He added that:

“In terms of promoting the language, it should be remembered that most of the work of promoting Welsh is not undertaken by the board itself; it is undertaken by organisations such as the Urdd, *mentrau iaith*, the National Eisteddfod, young farmers clubs and the *papurau bro*—a whole host of bodies.

There are also many other Government-funded bodies involved, including the Welsh Books Council, as well as S4C and Radio

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<sup>235</sup> RoP, paragraph [95], 17 June 2010, Legislation Committee No. 2

<sup>236</sup> RoP, paragraph [49], 17 March 2010, Legislation Committee No. 2

<sup>237</sup> RoP, paragraph [99], 17 June 2010, Legislation Committee No. 2

Cymru. All of those are involved in one way or another with promoting the language. Therefore, it should not be seen as something that happens in a single body, whatever that body might be.”<sup>238</sup>

243. He subsequently indicated that the issue of where the promotional work should sit was still to be decided upon.<sup>239</sup>

244. As regards whether there should be a statutory principle or purpose to drive the work of the Commissioner as suggested by some consultees, the Minister said that “the proposed Measure is clear with regard to the role of the commissioner”.<sup>240</sup>

### **Our view**

245. We acknowledge the majority of evidence in favour of the appointment of the Welsh Language Commissioner by the National Assembly.

246. We have considered carefully the evidence of the Minister in favour of the Welsh Language Commissioner being appointed by the First Minister.

247. We have also considered the evidence noting that the Welsh Language Commissioner will have the power to impose sanctions on Welsh Ministers and take regulatory action against them.

248. In the circumstances, **we take the view that there needs to be a more open and transparent approach in which a mechanism is included in the proposed Measure whereby the Welsh Language Commissioner is nominated by the First Minister and approved by the National Assembly. Accordingly, we recommend that the Minister brings forward an amendment to that effect.**

249. **We also recommend that the Minister reviews those provisions of the proposed Measure which arguably exert some form of Ministerial control over the Welsh Language Commissioner, with a view to bringing forward amendments that give effect to our recommendation in the previous paragraph.** In our view these provisions are: section 10(4) (approval to the making of

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<sup>238</sup> RoP, paragraphs [101-102], 17 June 2010, Legislation Committee No. 2

<sup>239</sup> RoP, paragraph [115], 17 June 2010, Legislation Committee No. 2

<sup>240</sup> RoP, paragraph [97], 17 June 2010, Legislation Committee No. 2

grants or loans); section 11(6) (approval for employing staff); section 15 (general power of direction); section 63 (power to direct a standards investigation); section 66 (codes of practice) and section 97 (approval of enforcement policy documents).

250. We agree with the views of a number of consultees who have suggested that the proposed Measure needs to include a clearer statutory principle or purpose to drive the work of the Welsh Language Commissioner, similar to that included for the Children's Commissioner for Wales (in section 72A of the *Care Standards Act 2000*). We believe that such a statement would provide absolute clarity about the principal purpose of the Welsh Language Commissioner and provide a benchmark against which his or her performance should be judged. In our view such a statutory purpose should take account of the overarching principle we refer to in paragraph 112 of our report on the general principles. Therefore **we recommend that the Minister brings forward an amendment which provides a clear statutory purpose for the Welsh Language Commissioner.**

251. We have considered very carefully the evidence which suggests that the function of promoting the Welsh language should not sit with the Welsh Language Commissioner or Welsh Ministers (as provided for by section 134 of the proposed Measure), but in a separate, newly constituted body. We note that the Minister is not minded to set up such a body. We also note from evidence received that other public bodies operate with promotional and regulatory functions. Given the current financial climate and our concern that there may be insufficient work to justify the creation of an additional body, **we are content with the provisions of the proposed Measure in this regard.**

252. However, as to whether the promotional work should rest with the Welsh Language Commissioner, the Welsh Ministers or is to be split between the two, we note that the Minister has made no final decision on this matter. **While we consider that it is inevitable that Welsh Ministers and the Welsh Language Commissioner will have promotional roles, as is the case with the current framework, we recommend that the Minister should announce his decision on this issue prior to the start of Stage 2 proceedings.**

253. Whatever decision is taken, and reflecting some of the concerns raised in evidence, **we strongly recommend that the budget for**

**regulating and promoting the Welsh language is subject to annual scrutiny by a committee of the National Assembly to ensure that each function is appropriately funded.** Our view on this matter is that the regulatory budget should never be increased at the expense of the budget for promoting the Welsh language.

## 6. Part 3: Advisory Panel to the Welsh Language Commissioner

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### Background

254. Sections 22 and 23 of Part 3 of the proposed Measure, and Schedule 4, provide for the appointment of an Advisory Panel to the Commissioner. Panel Members are to be appointed by Welsh Ministers, and there can be at least three but no more than five Members at any one time.

### Evidence from consultees

255. While only a minority of respondents commented on the Advisory Panel to the Welsh Language Commissioner, two distinct views emerged.

256. One view was that the Advisory Panel was simply unnecessary. The Law Society told us:

“We question the necessity of having an appointed panel to work with the commissioner. There are areas on which the commissioner must consult the advisory panel, as well as many optional areas in which consultation can occur. The main section on the advisory panel states that the commissioner may consult on anything, but, crucially, the consultation at section 23(3) is with any or all of the panel members, so we would say that it lacks teeth. Even where consultation is required by the sections where a ‘must’ appears, many of the areas might involve only certain members of the advisory panel, rather than a consensus among all of them. We do not feel that the advisory panel is a necessary part of the whole mechanism, particularly given the additional areas of operation in the proposed Measure. It is perhaps unnecessary.”<sup>241</sup>

257. The Wales Governance Centre said:

“Many advisory panels are appointed to advise the Assembly Government and other public bodies on their work without the need for specific statutory provision. It is not understood why

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<sup>241</sup> RoP, paragraph [50], 13 May 2010, Legislation Committee No. 2

it is considered necessary to have such specific provision in relation to this Advisory Panel”.<sup>242</sup>

258. Celebrating Our Language did not think a panel of three to five members was adequate to “reflect the expertise required by the commissioner in that role.”<sup>243</sup> They said they would like to see:

“... the field being adequately represented either by calling on experts in relevant fields from time to time as the need arises, or by creating a language council, to support the language society’s idea, to represent a wide range of organisations involved with the language.”<sup>244</sup>

259. Cymdeithas yr Iaith Gymraeg did not believe that a panel is “fundamentally necessary”, adding:

“The commissioner can appoint people without a statutory role and therefore without including this provision in the proposed Measure. What worries us is that, through creating an advisory panel, you are recreating a language quango, rather than creating an independent regulator, with clear accountability to the citizens of Wales. So, to some extent, the advisory panel would muddy the waters, so to speak.”<sup>245</sup>

260. Professor Colin Williams compared the intention to create an Advisory Panel with the position in other countries. He said:

“It is not necessary. It depends on which system you are trying to establish ... the Irish language commissioner, the justice department in Finland and Catalunya’s very powerful department ask experts for advice and pay for that advice.”<sup>246</sup>

but went to say:

“... the role of commissioner can be a lonely one—from being the most popular person when advocating in favour of French, Irish or Welsh and being everyone’s hero, to being the least popular person in the country when reprimanding the Government ... So, it is not necessary, but it is a useful political

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<sup>242</sup> Written Evidence, MI 27

<sup>243</sup> RoP, paragraph [190], 27 May 2010, Legislation Committee No. 2

<sup>244</sup> *ibid*

<sup>245</sup> RoP, paragraph [70], 27 May 2010, Legislation Committee No. 2

<sup>246</sup> RoP, paragraph [211], 22 April 2010, Legislation Committee No. 2

tactic to provide that foundation on which to share the responsibility behind the scenes.”<sup>247</sup>

261. The other view expressed by consultees was that the Commissioner’s office could benefit from an advisory body of some sort. Mentrau Iaith Cymru stated:

“We applaud the idea of establishing an advisory panel to bring together all the knowledge and expertise on legal issues, language planning and language policy issues, and other issues that the Commissioner will need. Some of this expertise can come from the Commissioner’s office but it is also useful to have an independent opinion from outside the process in order to get an objective opinion. We would also like to see the advisory panel make use of international expertise.”<sup>248</sup>

262. The Welsh Language Board also supported the proposed advisory panel arguing “that having that input from different places and interests in Wales is important”<sup>249</sup>. They went on to say:

“... many of the functions in the proposed Measure and in the new framework will fall squarely on the shoulders of one person. We know from personal experience that the scope of this area is very wide and the responsibilities are great. So, it would be beneficial to ensure that there is a group of people who can advise this individual who will be very high profile as regards his or her actions.”<sup>250</sup>

263. For those who supported the proposals for an Advisory Panel, the question of ensuring broad representation was an issue. Carmarthenshire County Council considered that “every sector should be represented”<sup>251</sup>, while the Farmers Union of Wales “felt that members of the proposed Commissioner’s Advisory Committee should represent Wales’ towns and rural communities as well as the working sector—namely public voluntary and trade sectors of all sizes.”<sup>252</sup>

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<sup>247</sup> RoP, paragraph [211], 22 April 2010, Legislation Committee No. 2

<sup>248</sup> Written Evidence, MI 53

<sup>249</sup> RoP, paragraph [66], 29 April 2010, Legislation Committee No. 2

<sup>250</sup> RoP, paragraph [67], 29 April 2010, Legislation Committee No. 2

<sup>251</sup> Written Evidence, MI 49

<sup>252</sup> Written Evidence, MI 46

264. Consumer Focus Wales said:

“In order to truly reflect the voice of the people, the Commissioner must ensure that he or she builds a dialogue with the public. This should also be reflected through the members of the Advisory Panel, with at least one member representing the varied needs of service users. It is vital that the Panel reflects the diversity within Welsh speaking communities in Wales, not only in terms of regions of Wales and levels of Welsh but also to be able to better connect Welsh issues and broader diversity issues such as disability.”<sup>253</sup>

265. When questioned, Consumer Focus Wales suggested that the Commissioner and the Advisory Panel could consider engaging with consumers directly through the use of regular consumer panels.<sup>254</sup> They said:

“These could be one-off engagements with groups of consumers to discuss particular issues, so the advisory group would meet the consumer panel to discuss developing a particular standard or to look into a particular service area. That would be a key part of maintaining an ongoing dialogue with members of the public. That can also be done through a range of voluntary organisations that can also represent more hard-to-reach groups.”<sup>255</sup>

266. The question of the number of advisory panel members also arose. Parents for Welsh Medium Education said:

“It is difficult to understand why there will be between 3 and 5 members on the Welsh Language Commissioner’s panel. It is difficult to imagine that such a small figure could represent the different fields which require urgent action with regard to protecting the Welsh language”.<sup>256</sup>

267. As with the Commissioner itself, the appointment of the Advisory Panel was an issue for some respondents. UCAC favoured appointment by the National Assembly, reflecting their support for the National

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<sup>253</sup> Written Evidence, MI 37

<sup>254</sup> RoP, paragraph [341], 10 June 2010, Legislation Committee No. 2

<sup>255</sup> *ibid*

<sup>256</sup> Written Evidence, MI 50

Assembly to appoint the Commissioner.<sup>257</sup> Parents for Welsh Medium Education said:

“The panel should again be appointed by an Assembly committee, of which no party should have a majority”<sup>258</sup>

268. Nevertheless the Welsh Language Board felt that:

“What is important is not who appoints the panel but who appoints the commissioner in the first place. That is the element of independence that is most crucial.”<sup>259</sup>

### **Evidence from the Minister**

269. The Minister explained the rationale for the Advisory Panel as follows:

“The commissioner is a person with quite broad powers and is in a position of power. However, the idea was that it would be wise to have an advisory panel that would not interfere with the daily work of the commissioner. The advisory panel has no executive role in the daily work of the commissioner. However, I would expect these people to have the necessary professional experiences in order to be able to advise the commissioner, if he or she so wishes, and also to be sounding board if the commissioner needed it. It is also part of the checks and balances in the system. So, if the commissioner started to behave unreasonably in any way, then you have a body in place that can ... temper that behaviour”<sup>260</sup>

270. He also emphasised “that the advisory panel is not the board mark II, but people who are there solely to advise”.<sup>261</sup> An official accompanying the Minister added that the panel is appointed for a period of three years and is “an opportunity to bring fresh ideas and new blood into the commissioner’s team.”<sup>262</sup>

271. When questioned about the size of the Advisory Panel, the Minister said:

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<sup>257</sup> Written Evidence, MI 52

<sup>258</sup> Written Evidence, MI 50

<sup>259</sup> RoP, paragraph [66], 29 April 2010, Legislation Committee No. 2

<sup>260</sup> RoP, paragraph [96], 17 March 2010, Legislation Committee No. 2

<sup>261</sup> RoP, paragraph [100], 17 March 2010, Legislation Committee No. 2

<sup>262</sup> RoP, paragraph [101], 17 March 2010, Legislation Committee No. 2

“Having a membership of no more than five will ensure that the panel does not become unwieldy and a bureaucratic burden for the commissioner to manage, rather than being a sounding board, which it is intended to be. It will also reduce the costs for the commissioner if it is a comparatively compact body.”<sup>263</sup>

272. We also questioned the Minister about why Welsh Ministers are required to consult the Commissioner on the dismissal of Advisory Panel members but not before their appointment.<sup>264</sup> The Minister replied:

“Ministers are not required to consult the commissioner before appointment; that does not mean that they will not. The whole point of the advisory panel is that it acts as a sounding board for the commissioner, to act as a check and a balance, and to ensure that the strategic direction taken by the commission is reasonable. As such, the panel will require a degree of independence from the commissioner. That is why the panel members will be appointed by Ministers. However, with regard to dismissing panel members, it will be possible for Ministers to dismiss them on the grounds that they are unable or unwilling to act as a member of the panel or unfit to continue as a member, for whatever reason.”<sup>265</sup>

### **Our view**

**273. We agree with the Minister and some consultees that there is a need for an Advisory Panel to the Welsh Language Commissioner.**

274. We consider this to be an important role to act as sounding board for testing and bringing forward new ideas. We also agree with consultees who suggested that the Advisory Panel needs broad sectoral representation. In our view, the Advisory Panel should represent the diversity of the whole of Wales. Accordingly, **we recommend that the Minister brings forward an amendment to paragraph 5(4) of Schedule 4 to take account of this view on diversity and clarify the relevant knowledge and experience a member of the Advisory Panel must have.**

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<sup>263</sup> RoP, paragraph [122], 17 June 2010, Legislation Committee No. 2

<sup>264</sup> RoP, paragraph [123], 17 June 2010, Legislation Committee No. 2

<sup>265</sup> RoP, paragraph [124], 17 June 2010, Legislation Committee No. 2

275. We consider that the current limit on the number of members for the Advisory Panel provided in section 22(3) would undermine its ability to represent the diversity of the whole of Wales. Therefore, **we recommend that the Minister brings forward an amendment to increase the number of members that may sit on the Advisory Panel at any one time.**

276. As regards the appointment of the Advisory Panel, in line with our recommendation on the appointment of the Welsh Language Commissioner, **we consider that members of the Advisory Panel should be nominated by Welsh Ministers and approved by the National Assembly. Accordingly, we recommend that the Minister brings forward an amendment to that effect.**

277. We have considered the apparent discrepancy between the requirement of Welsh Ministers to consult the Commissioner on the dismissal of Advisory Panel members but not on appointment. On reflection we are content with this approach. If the Commissioner is required to provide views on candidates, it could be considered to be unfair if some are known to him or her while others are not. Such a position will not arise in relation to dismissal when the Commissioner will have had experience of working with the Advisory Panel members.

**278. We recommend that any decision of Welsh Ministers to dismiss a member of the Advisory Panel should be subject to approval by the National Assembly.**

## 7. Part 4: Standards

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### Background

279. Sections 24 - 69 of Part 4 of the proposed Measure establish a new system for placing duties in relation to the Welsh language upon persons in the form of standards. The proposed Measure creates five types of standards: service delivery; policy making; operational; promotion and record keeping (sections 27 - 31).

280. The system established by the proposed Measure will enable Welsh Ministers to detail, in regulations under section 25, the particular standards under each of the five types of standard. By virtue of section 38, the Minister may also by regulations identify those persons that may be required to comply with each particular standard. In making decisions regarding the form and manner in which particular standards should apply to a person, Welsh Ministers will have to have due regard to any report produced by the Commissioner following the exercise by the Commissioner of specific powers of investigation into standards (sections 59 - 61). Investigations will, amongst other matters, enable the Commissioner to examine which particular standards a person would have to comply with, and the form those standards should take.<sup>266</sup>

281. Under section 43 of the proposed Measure, the Commissioner may issue compliance notices to organisations. A compliance notice sets out or refers to one or more of the standards specified by the Welsh Ministers in regulations made under section 25, and requires compliance with the standard or standards set out or referred to. A compliance notice may require a person to comply with a particular standard in some circumstances, but not in other circumstances and/or in some area or areas, but not in other areas.<sup>267</sup> Section 43 therefore gives the Commissioner some discretion as to the extent to which and how a particular standard will apply to a particular person.

282. The Explanatory Memorandum suggests a number of reasons for the move to the standards mechanism set out in Part 4 of the proposed Measure, namely:

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<sup>266</sup> EM, paragraph 3.38

<sup>267</sup> EM, Part 3, Explanatory Notes

- Welsh speakers can still face inconsistencies and difficulties in accessing services through the medium of Welsh;<sup>268</sup>
- changes to the structure of certain, key public services and new ways of delivering services mean that the public face of some sectors and certain key services fall outside the scope of the 1993 Act resulting in the potential for an uneven playing field within these sectors and uncertainty about the services that Welsh speaking customers can expect to receive;<sup>269</sup>
- developing, negotiating and agreeing language schemes on a case by case basis has revealed the process to be resource-intensive, and the task of ensuring that language schemes reflect developments in service delivery (e.g. technological change) can be a bureaucratic burden.<sup>270</sup>

283. In summarising the Welsh Government’s aims in relation to the provisions on standards, the Explanatory Memorandum referred to the following:

- to provide greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh;
- to reduce the administrative demands placed upon those subject to duties by moving the focus away from the preparation of language schemes;
- to establish a system that will ensure that duties imposed on bodies are both reasonable and proportionate; and
- within particular sectors, ensuring that there is greater consistency in terms of those bodies subject to duties with the aim of ensuring a level playing field.<sup>271</sup>

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<sup>268</sup> EM, paragraph 3.1

<sup>269</sup> EM, paragraph 3.2

<sup>270</sup> EM, paragraph 3.3

<sup>271</sup> EM, paragraph 3.10

## Evidence from consultees

### *General comments*

284. Chapter 3 on the general principles considered the views of consultees on the four objectives referred to in paragraph 283 above. In order to provide context to this part of the report, these can be summarised as follows:

- there was broad agreement among consultees of the desirability of providing greater clarity and consistency for Welsh speakers in terms of the Welsh language services;
- there was also, however, widespread concern that the mechanism of standards, as set out in the proposed Measure, might not necessarily ensure greater clarity and consistency.
- with regard to the goal of reducing the administrative demands on those subject to duties in respect of the Welsh language, several consultees expressed uncertainty or even doubt that the proposed mechanism of standards would in fact deliver this goal;
- the proposed standards are unnecessarily complex, and their practical implications are therefore not easy to understand.

### *Clarifying the content of standards*

285. The proposed Measure provides that the precise content of the standards is not specified on the face of the legislation; instead, Welsh Ministers will create standards by regulations (under section 25). This gave rise to a considerable amount of adverse comment, with a call for greater clarity on the face of the legislation. The Law Society felt that:

“Although the framework for the type of standards is set out in the proposed Measure there is no indication of the form or content of the standards.

The imposition of standards upon providers of services to the public is the driver for this legislation. Therefore, the primary legislation should give a clear and detailed outline of the substance of the standards.”<sup>272</sup>

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<sup>272</sup> Written Evidence, MI 10

286. UCAC said that:

“ . . . it is not easy to understand the implications as the standards mentioned are subject to secondary legislation rather than appearing on the face of the Measure. . . . in the context of the Measure the standards are totally abstract ...

... despite the numerous sections found in the Measure, the nature of these standards remains unclear, along with how they will be implemented.”<sup>273</sup>

287. Some consultees noted that the Commissioner will have a crucial role in the process of imposing standards by issuing compliance notices under section 43, which gives the Commissioner some discretion as to the extent to which and how a particular standard will apply to a particular person. Such consultees noted that there did not appear to be any principle in the proposed Measure which would guide the manner in which the Commissioner should exercise such discretion. The Wales Governance Centre said:

“It does not seem to be clear on the face of the Measure what matters the Commissioner will take into account in coming to decisions ... ”<sup>274</sup>

288. In particular, many consultees noted that without any specifics with regard to the content of the standards, and without practical examples of what could be contained in them, it was impossible to comment on their effects and implications, and on whether they would, in fact, represent an improvement on the present Welsh language schemes. The Ordnance Survey said:

“While the Measure makes provision for Standards to be imposed on organisations ... there is currently no substantive indication of exactly what would be required under these standards”<sup>275</sup>

289. Similarly the Internet Service Providers’ Association said:

“... the exact nature of what is included will not be known until later in the process. This is confusing and unhelpful and makes

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<sup>273</sup> Written Evidence, MI 52

<sup>274</sup> Written Evidence, MI 27

<sup>275</sup> Written Evidence, MI 44

it hard for members to understand the practical implications for their business.”<sup>276</sup>

290. Where consultees were critical of the lack of clarity as to the content of the standards on the face of the proposed Measure, they frequently suggested options for addressing this. Often, consultees simply asked the Welsh Government to provide examples of standards, or some other form of guidance that would clarify the content of the standards. The National Childminding Association Cymru said:

“It would be useful if a guidance/advice document was produced to accompany the Measure once it has been approved. This document could contain examples relating to each standard to help demonstrate, for example, to organisations exactly what will be required of them and what these standards may look like in a more practical sense.”<sup>277</sup>

291. Partly because of these perceived uncertainties, a number of consultees wished to see greater consultation by Welsh Ministers during the preparation of standards. Scottish Power thought that:

“. . . in sections 25(1) and 38 ... Welsh Ministers should have a statutory duty to consult affected parties before making regulations setting any standards or making them specifically applicable.”<sup>278</sup>

292. The UK Competitive Telecommunications Association also considered there was a need for greater consultation and suggested that the proposed Measure “should contain a formal requirement for Welsh Ministers to commission a report considering fully the impact of any proposed regulations on the telecommunications sector” and that Ministers “should also be required to seek advice from Ofcom on the potential impact of their proposals on the extent of competition in the Welsh telecoms market.”<sup>279</sup>

293. The Mobile Broadband Group wished to see a greater role for the Welsh Language Commissioner in the preparation of standards and suggested that:

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<sup>276</sup> Written Evidence, MI 42

<sup>277</sup> Written Evidence, MI 34

<sup>278</sup> Written Evidence, MI 15

<sup>279</sup> Written Evidence, MI 19

“the Proposed Measure needs to give a formal role to the WLC to prepare an advisory report for Welsh Ministers. This process should be incorporated into the Proposed Measure and the Welsh Ministers should be legally required to receive and consider the WLC’s advisory report before draft Regulations for Standards are drawn up. At a minimum, the report should assess levels of demand, likely benefits to consumers and costs to providers.”<sup>280</sup>

294. A few respondents emphasised that the Commissioner should be required to consult with the public in the process of developing standards, noting that section 61 of the proposed Measure requires the Commissioner to consult the Advisory Panel and each relevant person, but does not require (and only permits) the Commissioner to consult others, including the public. Consumer Focus Wales said:

“... we are concerned that there is currently no duty either on the Commissioner to consult with the public in investigating service sectors to inform the development of the Standards, or in developing the Standards themselves. As we understand it, the only formal consultation is likely to be from the Welsh Assembly Government on the regulations that set out the Standards.”<sup>281</sup>

295. Cymdeithas yr Iaith Gymraeg criticised the perceived general exclusion of the public from the standard-setting process:

“... there is the absence of an individual’s ability to challenge any standard. Recently, when the Minister for Heritage held public meetings on the proposed Measure, he was asked whether it would be possible to create a standard for swimming lessons for children. The reply was that that would not be possible. We are concerned that individuals do not have the opportunity to challenge why a standard has not been set. That is all down to the fact that the principle of a right is not included in the proposed Measure.”<sup>282</sup>

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<sup>280</sup> Written Evidence, MI 31

<sup>281</sup> Written Evidence, MI 37

<sup>282</sup> RoP, paragraph [80], 27 May 2010, Legislation Committee No. 2

*‘Reasonable and proportionate’*

296. Several consultees welcomed the fact that, under section 53 of the proposed Measure, persons served with a compliance notice could challenge the requirement for them to comply with a standard on the basis that to do so would be ‘unreasonable or disproportionate’. However, the Ordnance Survey considered that the requirements of reasonableness and proportionality should be built into the process of setting of standards itself:

“We believe it would be helpful for the ‘reasonable and proportionate’ requirement to be clearly applied to any requirement that may be imposed on an organisation from the outset, rather than applied just as a grounds for challenge;”<sup>283</sup>

297. Furthermore, many of the consultees who welcomed the introduction of the concepts of reasonableness and proportionality also noted with concern that the criteria for deciding what was reasonable and proportionate were not clear. SWALEC argued that these terms were “open to interpretation and will give an enormous amount of discretion to the person deciding upon the definition”.<sup>284</sup> The Internet Service Providers’ Association felt that the definition of proportionate needed to be defined at the outset.<sup>285</sup> Careers Wales North West noted that the “definition of ‘reasonable’ and ‘proportionate’ would be welcomed, and could be determined following a consultation with organisations”.<sup>286</sup>

298. Other consultees noted that the introduction of the concept of ‘reasonableness and proportionality’, while welcome, could make the accomplishment of other objectives behind the standards scheme difficult, such as the creation of a ‘level playing field’ amongst participants in a particular sector. British Gas said:

“It will be difficult for the proposed Measure to marry the principles of a level playing field and tests of proportionality and reasonableness. Companies who occupy the same sector do not necessarily share the same characteristics in terms of market share, growth, customer profile and product and service provision. There is also no mention of demand, which

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<sup>283</sup> Written Evidence, MI 44

<sup>284</sup> Written Evidence, MI 8

<sup>285</sup> Written Evidence, MI 42

<sup>286</sup> Written Evidence, MI 43

ought to have some bearing on service provision in a competitive market.”<sup>287</sup>

299. CBI Wales made the following points about the interpretation of the terms ‘reasonable’ and ‘proportionate’:

“I think that the prime test of what is reasonable and proportionate should be the cost of providing services against the take-up and usage of those services. One can quickly move from tens of thousands of pounds to millions of pounds if one is taking a strict interpretation of treating the languages on a basis of equality. If you duplicate a fully functioning website, or if you ensure that you have a fully manned call centre with Welsh-language capacity on tap 24/7, costs will rise exponentially. That should be the prime test of reasonableness and proportionality. I would hope that there would be a very sensible dialogue between the commissioner and companies about that. It might have been helpful to state in the proposed Measure that those are the tests.”<sup>288</sup>

300. However, some witnesses, felt that concepts such as ‘reasonableness’ and ‘proportionality’ were well known legal concepts, which did not pose particular difficulties. Scottish Power said:

“‘Reasonable’ and ‘proportionate’ are general legal terms ... so we are comfortable that there will be a standard expectation of what is reasonable and proportionate, and that that will come out through the consultation process.”<sup>289</sup>

### *Impact of standards on competition*

301. The extension of the application of the standards mechanism beyond the public sector resulted in many comments from consultees from the private sector; in particular, with respect to the possible impact of standards on competitive relationships in certain sectors and amongst particular market participants. As noted in Chapter 3, some private sector consultees opposed the application of standards beyond the public sector preferring to rely on the use of voluntary schemes.

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<sup>287</sup> Written Evidence, MI 22

<sup>288</sup> RoP, paragraph [255], 10 June 2010, Legislation Committee No. 2

<sup>289</sup> RoP, paragraph [270], 29 April 2010, Legislation Committee No. 2

302. Some consultees, such as Consumer Focus Wales, welcomed the introduction of standards to the extent that similar standards might be imposed generally, or on all participants in a particular sector of the market, thereby promoting a ‘level playing field’.<sup>290</sup>

303. BT in Wales emphasised the importance of the application of similar standards to all competitors in particular markets:

“The concept of a level playing field is essential. In order to ensure consistency, similar standards have to be in place for all of us. Customers in Wales will expect a similar service from all the companies in the telecommunications sector.”<sup>291</sup>

304. Arriva Trains Wales saw reference to a level playing field as being a step forward and said that “as long as the standards that are applied afford consistency with regard to the Welsh language, we are fairly happy with that.”<sup>292</sup> Confederation of Passenger Transport Wales did not agree with this approach<sup>293</sup> and went on to say:

“If there are differing standards, we do not understand how consistency is dealt with within the explanatory memorandum. Dealing with the point about a level playing field, it depends who you consider the competition to be.”<sup>294</sup>

305. Others, however, noted that not all market participants in particular sectors were equally well placed to meet any particular standard, and that therefore flexibility had to be built in to the proposed system to take such differences into consideration. The Internet Service Providers’ Association noted that it “is important that the Measure affords flexibility and is pragmatic as the effects of the Measure will vary on different companies and sectors.”<sup>295</sup> This view was shared by several other consultees from the telecommunications sector. For example, the UK Competitive Telecommunications Association noted their concern that the proposed Measure

“... may have an adverse impact on competition in Wales since it does not take into account the multifaceted nature of the telecoms industry ...

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<sup>290</sup> Written Evidence, MI 37

<sup>291</sup> RoP, paragraph [174], 13 May 2010, Legislation Committee No. 2

<sup>292</sup> RoP, paragraph [144], 20 May 2010, Legislation Committee No. 2

<sup>293</sup> RoP, paragraph [145], 20 May 2010, Legislation Committee No. 2

<sup>294</sup> RoP, paragraph [159], 20 May 2010, Legislation Committee No. 2

<sup>295</sup> Written Evidence, MI 42

Since each operator's operational and geographic model will differ, any obligations imposed will impact companies in different ways. Proceeding on a "one size fits all" basis .... risks, in UKCTA's view, reducing rather than increasing the extent of competition in Wales."<sup>296</sup>

306. The Mobile Broadband Group noted that telecommunications was now an extremely complex market, and that the application of the concept of a 'level playing field' was itself complex:

"The main point is that this is a very complicated market, and I fear that the telecoms regulator will have to be consulted on the competition aspect, because it is not always obvious which playing field you are trying to level in the market."<sup>297</sup>

307. The Internet Service Providers' Association agreed and said:

"... Welsh Ministers, in drawing up the regulations, should ensure appropriate advice on competition issues is taken ...

The proposed Measure does not properly take into account the role of Ofcom. As the regulator of telecommunications in the UK, ISPA believes that Ofcom's expertise in the area should be used in an advisory capacity."<sup>298</sup>

308. One possibility which some consultees raised, in part to deal with the potential competitive impact of the uniform application of standards, was to create some flexibility in the application of Schedule 9. Under section 41 of the proposed Measure, any service standard which is created by regulation by Welsh Ministers must make specifications for all of the activities listed in Schedule 9. Some consultees suggested that such flexibility could be created by, for example, changing the word 'must' to 'may', allowing Welsh Ministers to create service standards which do not address all the listed activities.<sup>299</sup>

309. On the other hand, the Welsh Language Board, felt that the activities set out in Schedule 9 to the proposed Measure may not be extensive enough:

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<sup>296</sup> Written Evidence, MI 19

<sup>297</sup> RoP, paragraph [177], 13 May 2010, Legislation Committee No. 2

<sup>298</sup> Written Evidence, MI 42

<sup>299</sup> For example, Written Evidence, MI 31 and MI 42

“In terms of the list, I feel that there are some additional elements that need to be included, such as staffing matters and dealing with complaints. Also, we see an increasing need to include the role of officials who regulate licences.

. . . if you compare Schedule 9 to the proposed Measure with section 9 of the 1993 Act, I believe that there are some elements missing from the Schedule. Since 1993, organisations have gone much further than was required by the original Act. Some amended schemes go quite far and acknowledge the rights of Welsh speakers in the workplace, or give equal status to both languages as the operational languages of organisations. Those bodies, therefore, add to what is in the Act, and go further than what is contained in the proposed Measure.”<sup>300</sup>

310. A number of business responses from the Liquefied Petroleum Gas (LPG) sector raised concerns about the possible adverse impact of imposing standards on them, when their competitors would not be subject to the standards at all. Calor Gas Ltd noted:

“On this point of equity, the Measure would not affect the supply of our main competitors in rural areas - coal and oil. What is the logic for their omission?... this would be an extra cost and administrative burden on LPG, but not its main competitor fuels. It should be noted that the emissions profile for coal and oil are significantly worse both in terms of Air Quality emissions and greenhouse gas emissions. The perverse effect of the Measure in this respect is to incentivise a switch to more polluting fuels.”<sup>301</sup>

311. Another participant in this sector, Camgas, said that the proposed Measure “would require additional cost to cover the administrative burden on LPG, but not to our main competitors, coal & oil suppliers”<sup>302</sup> and expressed concern that “this is not a level playing field”.<sup>303</sup>

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<sup>300</sup> RoP, paragraphs [103 - 4], 29 April 2010, Legislation Committee No. 2

<sup>301</sup> Written Evidence, MI 2

<sup>302</sup> Written Evidence, MI 16

<sup>303</sup> RoP, paragraph [241], 13 May 2010, Legislation Committee No. 2

312. UKLPG<sup>304</sup> expressed the following concerns:

“As yet it is unclear what Standards may be required, but there is a huge amount of concern that the cost and administrative burden will put LPG at a competitive disadvantage.

... there are new energy sources coming to the rural market, and we remain concerned as to be the only one singled out for inclusion in the Measure.

The Board of UKLPG therefore asks the members of the Legislative Committee to exempt the distribution and supply of LPG from the proposed Measure on the grounds that its treatment should be consistent with its competitors.”<sup>305</sup>

313. UKLPG also explained that they function in areas that are off the gas grid and cannot compete with mains gas<sup>306</sup>, a point confirmed by British Gas.<sup>307</sup>

314. Because of the perceived adverse impact on competition of imposing standards on some smaller energy suppliers, Good Energy proposed that there should be some form of general exception for certain sectors and/or market participants:

“... smaller suppliers (Defined by OFGEM as the industry regulator as those serving less than 50,000 domestic customers in the UK) should be exempt from the Measure just as they are exempt from several other obligations which impose a disproportionate cost upon them compared to the big 6 suppliers.”<sup>308</sup>

315. By contrast, some consultees felt that certain sectors should be given special recognition in the proposed Measure, owing to their particularities. For example:

“ColegauCymru considers the key purposes and outputs of the Welsh-medium and bilingual education sector are substantively

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<sup>304</sup> UKLPG is the trade association representing producers and distributors of LPG and those who supply associated equipment and services.

<sup>305</sup> Written Evidence, MI 32

<sup>306</sup> RoP, paragraph [252], 13 May 2010, Legislation Committee No. 2

<sup>307</sup> RoP, paragraph [199], 10 June 2010, Legislation Committee No. 2

<sup>308</sup> Written Evidence, MI 25

different from most sectors, and that this should be reflected in the Proposed Measure.”<sup>309</sup>

### *Rights*

316. Some consultees had a more fundamental criticism of the standards mechanism, based on their view that the proposed Measure should create certain clear language rights for users of Welsh. Emyr Lewis made clear his view that the standards proposed in Part 4 of the Measure did not create rights. He emphasised the relationship between rights and remedies (see also Chapter 8), noting that if “the intention is to create rights, there needs to be some kind of outcome that compensates the wronged citizen.”<sup>310</sup> He said:

“As a lawyer, I believe that the word ‘right’ means that you have the right to do something that is justiciable in some way and eventually to have some sort of redress. The proposed Measure does not do that.”<sup>311</sup>

and

“... in my opinion, in order to establish a right, you need something that is justiciable and that leads to some sort of outcome, for the benefit of the holder of that right—some sort of redress or compensation ... The standards do not achieve that. They fall short.”<sup>312</sup>

317. Professor Colin Williams referred to Emyr Lewis’ evidence and said:

“I believe that the proposed Measure is missing a historic opportunity to discuss rights, for the exact same reason that Emyr gave. I hope that the standards will lead to some sort of practice and that in five years’ time people will understand that they have rights and will act as if they have rights, but that is not enough. If rights are established, they should be clear and definable rights that can be protected by the courts.

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<sup>309</sup> Written Evidence, MI 41

<sup>310</sup> RoP, paragraph [114], 22 April 2010, Legislation Committee No. 2

<sup>311</sup> RoP, paragraph [59], 22 April 2010, Legislation Committee No. 2

<sup>312</sup> RoP, paragraph [84], 22 April 2010, Legislation Committee No. 2

... I believe that we should tackle the question of rights now. I predict that this mess will get worse, unless we offer some statutory rights in the proposed Measure or as part of the package of activities that the Assembly is proposing. Otherwise, I believe that we will be a hostage to fortune, completely dependent on interpretation, rather than clarity.”<sup>313</sup>

318. The Welsh Language Board made the following comments:

“... we recognise that we need a system that empowers the citizen. I do not see evidence of that when reading this proposed Measure. What we will have is a structure, based on standards, that places responsibilities on the provider, rather than giving rights to the citizen.”<sup>314</sup>

319. They added:

“We do not feel that the proposed Measure achieves what we hoped that it would. To reiterate, there is no mention of rights in this legislation. What you have—again, as was the case with the 1993 Act—is the idea of strengthening the element of duties, which do not lead naturally to absolute legal rights.”<sup>315</sup>

320. The Welsh Language Board also spoke of the importance of providing for at least a core of language rights on the face of the proposed Measure:

“... we think that some crucial rights could be included in such a Measure. Offering three or four quite basic rights would send an important message, and that could be built upon within legislation a decade hence perhaps. The concept that Welsh speakers are aware of the status of the language brings us back to a question that we discussed at the outset, namely that we see from all of our research work that one of the most key factors with regard to the use of the Welsh language is the speaker feeling that that language has status and entitlement.”<sup>316</sup>

321. The Welsh Centre for Language Planning made these points:

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<sup>313</sup> RoP, paragraph [174 and 176], 22 April 2010, Legislation Committee No. 2

<sup>314</sup> RoP, paragraph [93], 29 April 2010, Legislation Committee No. 2

<sup>315</sup> RoP, paragraph [120], 29 April 2010, Legislation Committee No. 2

<sup>316</sup> RoP, paragraph [121], 29 April 2010, Legislation Committee No. 2

“... in relation to abolishing Welsh language schemes and setting a framework of language standards for service provision .... Rather than taking the revolutionary step of abolishing Welsh language schemes—and swallowing up organisations’ time and energy in doing so—would it not be better to adopt an evolutionary approach and turn the core elements of Welsh language schemes, which are already part and parcel of large sections of the public domain and the third sector, into a set of rights, and by simplifying or expanding other elements? Doing this, in tandem with bolstering the regulatory and promotional element, would be a massive boon and would represent a natural development within a system and process that everyone involved in this field already understands.”<sup>317</sup>

322. As already touched on in Chapter 3, several consultees were critical that the only right which they felt the proposed Measure created was a right included in Part 4; namely, the right given to persons in receipt of a compliance notice issued by the Commissioner to challenge such a notice. Cymdeithas yr Iaith Gymraeg made this point:

“The only right in the proposed Measure is the right for companies/bodies to challenge standards (c.53). Why is there no similar right for the individual.”<sup>318</sup>

323. Cymdeithas yr Iaith Gymraeg expanded on this point:

“This Measure does not create rights in the way that is traditional in British law, by imposing a duty so that the individual can challenge it through the courts, nor in the general international way of establishing common rights that consider the reasonableness and proportionality of those rights.

The Assembly government argues that the standards placed upon bodies will ‘lead to rights’ – an argument that is totally misleading in legal terms.”<sup>319</sup>

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<sup>317</sup> Written Evidence, MI 54

<sup>318</sup> Written Evidence, MI 47

<sup>319</sup> *ibid*

and added:

“... The ability to place consistent duties across the sectors is the main advantage of standards as opposed to language schemes. Nevertheless, without basic rights, there is a danger that the standards could be just as unclear and ineffective as languages schemes from the individual’s point of view.

... The standards regime is dependent upon the goodwill of one politician and one commissioner but, with rights, the legal responsibilities would be continuous upon any government or commissioner to realise people’s basic rights forever. Individuals have no more power under this Measure than under the Welsh Language Act of 1993 ...

... Standards without the clarity of rights behind them will not ensure clear rights for people or better provision of Welsh language services because they may vary from body to body and area to area ... like Welsh language schemes.”<sup>320</sup>

324. When questioned, they re-iterated their view that the standards mechanism did not create rights:

“Setting standards is not akin to giving a right—it is a matter of focus. Duty focuses on the provider; a right focuses on the user. Empowering the user is important. Implicit in the concept of a right is redress if that right is denied. Under the proposed Measure, if a body does not comply with the standard, then the commissioner can penalise it, but there is no way for the individual whose rights have been denied to get redress.”<sup>321</sup>

### *Specific issues*

325. Some respondents identified what they considered to be problems relating to the clarity of particular sections or aspects of the standards proposals.

326. The Confederation of Passenger Transport Wales asked for clarification on “the regulatory implications of the proposed Measure

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<sup>320</sup> Written Evidence, MI 47

<sup>321</sup> RoP, paragraph [74], 27 May 2010, Legislation Committee No. 2

on public transport operators who provide cross border services between Wales and England.”<sup>322</sup>

327. The Mobile Broadband Group noted that the definition of telecommunication services “results in an extremely wide-ranging potential scope of application”.<sup>323</sup>

328. As regards the promotion of the Welsh language, the Welsh Local Government Association said:

“It is also unclear why the Welsh Assembly Government and local authorities have been singled out to deliver on this responsibility. Surely this is an obligation to be placed on every consumer-facing publicly funded body in Wales? There are certainly other organisations (e.g. within the health sector) which should be responsible for promoting the use of Welsh.”<sup>324</sup>

329. Consumer Focus Wales commented on record keeping standards:

“We would also like to see some clarity on the record-keeping standards for organisations in Schedules 7 and 8. At present, it is not clear whether all organisations in those Schedules will have a responsibility to undertake record keeping as well as service delivery. In our discussions with civil servants, they were not able to clarify that for us. For all organisations in Schedules 7 and 8, we feel that it is vital that a record-keeping standard is placed on them, because unless you are monitoring and evaluating complaints data, and also how often people use your service, you cannot assess how effective it is and how it might need to be adapted.”<sup>325</sup>

### **Evidence from the Minister**

330. With regard to the purpose of the standards mechanism contained in Part 4 of the proposed Measure, the Minister said:

“Welsh language schemes have proven to be very beneficial and effective in improving the services available to Welsh-language customers, but we need to move on. We need greater clarity in terms of service provision and to ensure a level playing field in

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<sup>322</sup> Written Evidence, MI 38

<sup>323</sup> Written Evidence, MI 31

<sup>324</sup> Written Evidence, MI 23

<sup>325</sup> RoP, paragraph [306], 10 June 2010, Legislation Committee No. 2

certain sectors. Language schemes are individual schemes, and though many of them have similar structures and patterns, they are not always consistent, even within the same sectors. Therefore, the purpose of setting standards is to provide greater clarity for the organisations and for the customers, and a level playing field.”<sup>326</sup>

331. At our request, we also received letters from the Minister about the standards provisions in the proposed Measure including, towards the end of our scrutiny work, some examples of what standards might look like in practice for illustrative purposes.<sup>327</sup>

332. When questioned about whether there is a precedent from anywhere else in the world for the approach being adopted, the Minister said:

“... I know that regulations have been made in Ireland on signage, recorded announcements and the stationery used by public bodies. In Canada, the Official Languages Act 1969 places duties on organisations to provide services in both official languages. The situation is different in almost every country we looked at. The standard system will allow for Welsh language duties to be developed that are tailored to the situation here in Wales.”<sup>328</sup>

333. While noting that it “is difficult to precisely predict the impact of the proposed Measure”<sup>329</sup>, the Minister said that:

“... the system of standards will lead to more clarity with regard to the duties placed on people. This, in turn, will make it easier to dispose of cases of alleged non-compliance. Having said that, the increased clarity will make it easier for organisations to know what they should be doing, and the codes of practice that the commissioner can publish will help them plan how to do so.”<sup>330</sup>

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<sup>326</sup> RoP, paragraph [103], 17 March 2010, Legislation Committee No. 2

<sup>327</sup> Letter from Alun Ffred Jones AM, the Minister for Heritage, 23 April 2010; Letter from Alun Ffred Jones AM, the Minister for Heritage, 14 June 2010

<sup>328</sup> RoP, paragraph [112], 17 March 2010, Legislation Committee No. 2

<sup>329</sup> RoP, paragraph [112], 17 June 2010, Legislation Committee No. 2

<sup>330</sup> *ibid*

334. The Minister summarised what he felt to be the difference between the existing Welsh language schemes and the proposed standards in this way:

“The substantive difference between schemes and standards is that standards would be specific duties as opposed to qualified commitments negotiated on an individual basis. This will lead to rights in the provision of services. Standards will lead to greater clarity and consistency in the services that we can expect to receive in Welsh. They will be able to apply to whole sectors and even, in some cases, all bodies.”<sup>331</sup>

335. The Minister did not share the concerns expressed by some consultees that the imposition of standards would reduce the amount of internal dialogue within organisations and the sense of ownership engendered as a result. He said:

“With regard to the argument that organisations have a sense of ownership of their schemes, the aim of the proposed Measure, through the introduction of standards that create specific duties, is to provide rights for Welsh speakers to receive services in Welsh and to ensure that those rights are clearly understood. The proposed new system, based around standards, will create enforceable duties as opposed to the qualified commitments contained in schemes. I expect that organisations will need to adopt some kind of action plan to meet the required standards. The proposed Measure provides the flexibility to require organisations to have such plans.”<sup>332</sup>

336. He added:

“Before any standards can be imposed, there will be extensive dialogue and consultation with those bodies ... what we are doing is building on the success of the language schemes, and the standards will grow out of those schemes and the requirements within them.”<sup>333</sup>

337. With regard to the question of whether the standards mechanism might impose less of a bureaucratic burden than that which exists at present, the Minister stated that:

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<sup>331</sup> RoP, paragraph [230], 17 June 2010, Legislation Committee No. 2

<sup>332</sup> RoP, paragraph [127], 17 June 2010, Legislation Committee No. 2

<sup>333</sup> RoP, paragraph [135], 17 June 2010, Legislation Committee No. 2

“When the standards are in place across various sectors, it will be a simpler process. If a new body comes into being, you do not have to create a new scheme for it. It will be able to adopt the standards that apply to that particular sector. That is one example of how it will be simplified. Moreover, there will be no need to renew whole schemes, although some bodies may have aims and targets to increase their standards or to add standards to those that are applied.”<sup>334</sup>

338. The Minister also added the following observations:

“At present, individual discussions must happen with the approximately 500 bodies that have language schemes. Those schemes are supposed to be renewed every three years, so the current process is quite labour-intensive. We hope that the discussion leading to the creation of the standards will happen only once and the standards will then be in place. Therefore, everyone will be able to understand them, they will be clear and everyone will be able to get on with the work of providing services in the hope of expanding the use of those services in Welsh.”<sup>335</sup>

339. With regard to the issue of the trade-off between the promotion of consistency in service provision within sectors and the differing linguistic situation in different parts of Wales, the Minister stated the following:

“If you were to turn to private business and take a sector such as energy for example, you would see that standards have to be consistent across such a sector to ensure fairness for all in that field. That is one of the aims of this proposed Measure, namely to ensure consistent standards across a service so that the customer knows that, wherever he or she goes, that particular service can be received in Welsh.

On local government ... one would anticipate that some consistent standards would be totally central to public services. A simple example would be to respond to a customer’s letter in the language used in the original correspondence. You would

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<sup>334</sup> RoP, paragraph [126], 17 March 2010, Legislation Committee No. 2

<sup>335</sup> RoP, paragraph [137], 17 June 2010, Legislation Committee No. 2

expect every local authority to achieve that standard and to comply with it.

On public interaction, it is obvious that there are different practices in different parts of Wales due to the linguistic nature of those areas. One would expect variation as a result and would expect the commissioner to be able to vary the standards, and that although he will have a list of standards that are relevant to local authorities, that those standards will not be consistent in every area. This is a difficult area and we have not yet covered all relevant ground in the discussion of standards, but one would expect a difference of that sort between areas in terms of some of the standards.”<sup>336</sup>

340. One of the Minister’s officials added the following with regard to this trade-off:

“The standards will lead to more consistency. They will not mean that things will be completely consistent all the time, for example, if you were to compare places such as Gwynedd and Monmouthshire. The duties that you place on an organisation have to be reasonable and proportionate. As the Minister said, with many activities such as correspondence, signage and the production of simple forms for the public, you could perhaps expect the standards to be consistent across Wales, but in terms of services that are provided face to face, you could expect a certain amount of variance.”<sup>337</sup>

341. Nevertheless, the Minister elaborated further about whether there could be certain minimum standards of universal application:

“It is possible that there will be variations. However, I would expect there to be consistency within sectors. Where it is possible to identify a function that is performed similarly by all organisations, there could be a universal standard. However, the system can recognise the linguistic variations that exist within Wales. For example, it may be that the same standards apply rigidly with regard to correspondence and signage, but

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<sup>336</sup> RoP, paragraphs [156-81, 17 March 2010, Legislation Committee No. 2

<sup>337</sup> RoP, paragraph [159], 17 March 2010, Legislation Committee No. 2

more flexibly regarding face-to-face, oral contact in different parts of Wales.”<sup>338</sup>

342. He added:

“There will not be a single standard that applies to all organisations, otherwise that would be on the face of the proposed Measure. We think that this flexible approach will mean that, within certain sectors, there will be consistency of provision, but where it is needed, there can be greater flexibility.”<sup>339</sup>

343. When questioned about the suggestion by some consultees that there should be a requirement to consult the public as part of a standards investigation under section 61, the Minister replied:

“It was considered advisable not to compel the commissioner to consult interested parties at this stage in the preparation of standards, because, in some instances, it might be totally impractical to expect him or her to do so. There will be a number of opportunities during the process when persons will be able to contribute their views on any proposal. Obviously, it is right and proper that the organisations affected by the duties are consulted fully.”<sup>340</sup>

344. An official accompanying the Minister official added:

“It is appropriate for the commissioner to have discretion with regard to consulting any other person who might have an interest in the matter. For instance, the commissioner may feel that the public need not be consulted with regard to record-keeping standards. The commissioner may feel that ensuring that organisations keep a record with regard to complying with the standards and the number of complaints is an administrative matter. So, there is discretion for the commissioner to think ‘This is a matter between me and the organisations involved. Maybe I do not need to consult too

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<sup>338</sup> RoP, paragraph [145], 17 June 2010, Legislation Committee No. 2

<sup>339</sup> RoP, paragraph [153], 17 June 2010, Legislation Committee No. 2

<sup>340</sup> RoP, paragraph [225], 17 June 2010, Legislation Committee No. 2

widely on this one.’ However, he or she can if it is considered appropriate to do so.”<sup>341</sup>

345. The Minister also commented on voluntary language schemes:

“The proposed new system will not prevent those who do not fall under the standards from carrying on with their voluntary schemes or policies. We would still encourage businesses that are not covered by the proposed legislation to provide services in Welsh. Voluntary schemes are exactly that: voluntary. Where there is no statutory requirement to have a scheme, there are no means of enforcement. Those organisations that have voluntary schemes clearly see value in them and can continue with them. I would expect the commissioner to endorse and support that.”<sup>342</sup>

346. Some consultees recommended, as one way of increasing the flexibility of the standards mechanism, that Schedule 9 to the proposed Measure should be amended to allow for the creation by Welsh Ministers of service delivery standards which did not make reference to every activity listed in the schedule. One of the Minister’s officials explained why such a change was not necessary:

“Section 41 places a duty on Welsh Ministers to ensure that any regulations that they make under section 38 provide for standards in terms of service provision that relate to all of the activities listed in Schedule 9 to be applicable to a person, but only if that person carries out those activities ... The purpose of that is to ensure that Ministers do not fail to provide comprehensive standards that could be imposed on a person. Therefore, it is a way to ensure that Ministers include everything that could be included in the standards.

Following this process, there is no requirement for the commissioner to use all of those standards with every organisation. There will be an element of discretion for the commissioner. The Minister has to provide a full set of tools for

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<sup>341</sup> RoP, paragraph [226], 17 June 2010, Legislation Committee No. 2

<sup>342</sup> RoP, paragraph [127], 17 June 2010, Legislation Committee No. 2

the commissioner. The commissioner can then decide which of those tools to use with a specific organisation.”<sup>343</sup>

347. With regard to the idea of a Charter Mark, as proposed by E.ON UK, the Minister offered the following comments:

“I welcome that creative idea, but the proposed Measure has been developed on the basis of standards being imposed. However, there is nothing to prevent a standard from being drawn up that, should the commissioner consider it appropriate to recommend it, would be based on a benchmark of some sort whereby organisations will agree plans about how they will achieve a given target. So, there is flexibility within the proposed Measure, and I welcome E.ON’s interest and imagination.”<sup>344</sup>

348. When asked about the possibility of removing LPG suppliers from the proposed Measure, the Minister noted the following:

“It is important that the proposed Measure reflects the whole competence as laid out in matters 20.1 of Schedule 5 to the Government of Wales Act 2006. It will be for the commissioner to consider whether standards are required for such companies as part of his or her standards investigation. The fact that it is included does not mean that any standards will be imposed.”<sup>345</sup>

349. The Minister also provided us with a copy of a letter he had sent to Camgas on this issue.<sup>346</sup>

350. In response to a question about the potential scope of the application of standards as a result of the reference in Schedule 7 to ‘persons who provide the public with telecommunication services’, and in particular the suggestion that this reference could encompass Skype, Facebook, Twitter and Yahoo, the Minister stated the following:

“I have no intention of issuing ... duties. Whether those companies fall within the definition that was linked to the type of technology that runs those sites is a technical question that will need to be checked. Interestingly, Facebook already hosts

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<sup>343</sup> RoP, paragraphs [185 - 6], 17 June 2010, Legislation Committee No. 2

<sup>344</sup> RoP, paragraph [139], 17 June 2010, Legislation Committee No. 2

<sup>345</sup> RoP, paragraph [161], 17 June 2010, Legislation Committee No. 2

<sup>346</sup> Letter from Alun Ffred Jones AM, Minister of Heritage, 11 May 2010 (enclosing a copy of a letter he had sent to Cambrian Gas Ltd on the same date).

activities through the medium of Welsh. However, there is no intention that they should have a duty placed on them.”<sup>347</sup>

351. An official accompanying the Minister added the following remarks:

“As the Minister says, it is not the intention to see companies such as Skype being placed under duties for the voice-over-internet protocol. I am not entirely sure how you could make that clearer in the proposed Measure. Schedule 7 transfers to the proposed Measure the competence provided by the LCO for the Assembly, and Schedule 8 then attempts to focus in on the types of organisations that standards could be imposed on in the provision of public telecommunications services.”<sup>348</sup>

352. The Minister clarified the position further by letter. He said:

“Although our intention is to focus on mobile phone and landline services, the Government believes that the Measure, in Schedules 5 and 7, should reflect the full breadth of the Assembly’s legislative competence in terms of the persons in respect of whom duties may be imposed under matter 20.1 of Schedule 5 to the Government of Wales Act 2006.

Additionally, we believe that it is important that the Measure should provide adequate future-proofing in an area of technology that is continually evolving, and for those reasons have included the wording as it currently appears in the proposed Measure. In so doing, the Measure is sufficiently flexible to enable standards to respond swiftly to changing service delivery mechanisms, within the scope of the Assembly’s competence.”<sup>349</sup>

353. With regard to the application of promotion standards only to Welsh Ministers, County Borough Councils and County Councils, an official accompanying the Minister noted the following:

“Standards on promotion are an interesting group. The proposed Measure explains that those could be imposed only on the Welsh Assembly Government and local authorities

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<sup>347</sup> RoP, paragraph [207], 17 June 2010, Legislation Committee No. 2

<sup>348</sup> RoP, paragraph [210], 17 June 2010, Legislation Committee No. 2

<sup>349</sup> Letter from Alun Ffred Jones AM, the Minister for Heritage, 30 June 2010

because those are organisations that could play a role in promoting the use of the Welsh language more widely.”<sup>350</sup>

354. The Minister expressed a willingness to consider expanding the range of organisations to which promotional standards could be applied:

“The intention was that this particular standard would be pertinent to organisations that are in a position to have a broad influence on local communities, and that is why we only made reference to those two sectors. I am happy to consider other sectors or bodies if the committee feels that that would be beneficial.”<sup>351</sup>

355. As regards, record keeping standards, an official accompanying the Minister said:

“Under the proposed Measure, it would be possible to place duties with regard to record keeping on all organisations that receive a compliance notice, be they in Schedules 5 and 6 or 7 and 8. This duty could be placed upon all organisations that will have standards placed upon them, and therefore we would expect the commissioner to do so, so that he or she could monitor compliance with the standards.”<sup>352</sup>

## **Our view**

356. We have already commented in our discussion in Chapter 3 on the general principles about the extent to which the proposed Measure provides greater clarity and consistency for Welsh speakers in terms of the services they can expect to receive in Welsh.

357. We note that some consultees have been critical of the failure of the proposed Measure to specify any clear rights to Welsh language services; in particular, in relation to certain basic core rights in respect of at least certain Welsh language services which Welsh-speaking citizens should be able to enjoy, regardless of where in Wales they might live. We have some sympathy for such arguments, particularly

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<sup>350</sup> RoP, paragraph [142], 17 March 2010, Legislation Committee No. 2

<sup>351</sup> RoP, paragraph [201], 17 June 2010, Legislation Committee No. 2

<sup>352</sup> RoP, paragraph [199], 17 June 2010, Legislation Committee No. 2

in the context of the reference in the One Wales Agreement to “*linguistic rights* in the provision of services” (emphasis added).

358. However, we recognise that, in spite of the desirability of greater clarity and consistency in Welsh language service provision, and in spite of the considerable progress made under the 1993 Act, there are still considerable differences in the demand for, and the capacity to provide Welsh language services in different parts of Wales and across and within different sectors. We also recognise in this context, absolute consistency in Welsh language service provision may not be possible, unless basic commitments are set at very low levels.

359. In our view, the key issue is how to reconcile guaranteed and generalised levels of service provision with the local diversity that exists in Wales in a way that improves the current position.

360. While Part 4 of the proposed Measure creates a methodology for the creation of standards, it makes no provision with respect to the content of any standards (aside from Schedule 9, which lists activities to which, under section 41(2), service delivery standards created by regulations under section 38 by Welsh Ministers must make reference).

361. We have already acknowledged that the standards mechanism has the potential to deliver improvements in service provision (see paragraph 114). However, we are unable to conclude definitively whether it will actually deliver such changes in the absence of any substantive provisions on the face of the proposed Measure regarding the contents of the standards.

362. In our view, it is partly for this reason that many consultees have asked for further clarification from Welsh Ministers with respect to the actual content of standards, perhaps through the circulation of draft standards which would provide clear examples of the different sorts of standards contemplated under the proposed Measure. **We recommend that the Minister provides such clarification through the preparation and publication of draft standards of the different sorts contemplated under the proposed Measure.**

363. We have also said it is too early to state whether the move from language schemes to standards will provide for a more streamlined, administratively simpler and therefore effective framework for the delivery of Welsh language services.

364. We note that the flexibility inherent in the standards mechanism could lead to a significant range of different standards. We also note that the Minister has recognised that persons to whom standards will apply will still probably have to draw up action plans to implement the standards in their organisations. We also note that in the process of setting standards, there will, as the Minister also notes, be considerable opportunity for consultation with persons to whom standards will apply. We are concerned that the process of agreeing standards together with the potential need to develop an implementation plan could therefore, if anything, increase the administrative burdens for some organisations. **We recommend that the Minister considers ways in which this potential burden can be minimised, without affecting the need for appropriate consultation.**

365. We note that the Minister indicated that Welsh Ministers would specify standards following recommendations from the Commissioner.<sup>353</sup> However, there is no indication in Chapter 2 of Part 4 of the proposed Measure that this is the case. We consider it to be important that the proposed Measure should explain clearly the purpose of standards and how the process for making standards is intended to operate, and therefore **we recommend that it be amended in this way and in accordance with the Minister's evidence.**

366. We note the Minister's evidence that in general, standards will only be developed by Ministers in response to a standards investigation initiated by the Commissioner, and that in any such investigation, persons potentially subject to standards will be required to be consulted. In our view, however, it is still possible for Welsh Ministers to make standards under section 25 without consulting either with the Commissioner or with persons to whom they might ultimately be applied, as it would appear that Welsh Ministers may make standards in the absence of a standards investigation. In addition, we consider that the regulations prepared by Welsh Ministers on standards under section 25 should be the subject of consultation and we see no reason why such a requirement should not be explicitly provided for on the face of the proposed Measure. Accordingly, **we recommend that section 25 be amended on this basis.** In addition,

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<sup>353</sup> For example, RoP, paragraph [129], 17 June 2010, Legislation Committee No. 2

for similar reasons, we believe that there should be a duty to consult organisations on regulations that provide for standards to be specifically applicable to them under section 38. Therefore, **we recommend that section 38 is amended on this basis.**

367. Linked to our recommendations in respect of sections 25 and 38 and the need for consultation, we have considered the perception shared by many consultees about the limited role for the citizen in the process of creating standards. It has been noted, for example, that under section 61 of the proposed Measure, with respect to the carrying out of a standards investigation by the Commissioner, the Commissioner is required to consult persons to whom the standards may ultimately apply, as well as the Advisory Panel, but is not required to consult anyone else, including the public.

368. While we recognise that the public may not have any particular interest in certain technical aspects of certain standards which may be the subject of a standards investigation, we are not convinced that this justifies leaving the matter of consultation with the public solely to the discretion of the Commissioner in all standards investigations, particularly when Welsh users may have a very significant interest in many standards investigations. We are therefore of the view that it would be better for section 61 to presume that the Commissioner should indeed consult the public, and **we recommend that section 61(2) be amended to provide that in carrying out a standards investigation, the Commissioner must also consult the public.**

369. With regard to the application of the standards mechanism beyond the public sector, we have already commented in our consideration of the general principles, that the present regime should be extended in principle to private sector organisations that carry out quasi-public service functions.

370. We are, however, of the opinion that the concerns of organisations which are to be subject to the new regime should be carefully considered. We also believe that the standards mechanism does contain significant provisions for the participation of organisations in the setting of standards of relevance to them, through for example the requirement under section 61 that the Commissioner consult with them in any standards Investigation, and we note that organisations have a right to appeal to the Tribunal

should they be of the view that the imposition of any standard would not be reasonable or proportionate.

371. We note the significant evidence we heard about the positive steps that many organisations, which are not presently subject to the 1993 Act's provisions, have taken in relation to the provision of Welsh language services under voluntary language schemes. While, as noted, we support the extension of the regulatory regime to some private sector organisations with quasi-public service functions, we believe that the preparation of voluntary schemes should still be encouraged, and we note that there does not appear to be any mechanism under the proposed Measure which facilitates this. We were also impressed by the idea of a Charter Mark which could be developed for organisations which are not subject to the standards mechanism. **We therefore recommend that the Minister considers how provision may be made for the creation of a Charter Mark which would bear some form of official approval, perhaps from the Commissioner.**

372. We have heard evidence on the position in which LPG providers find themselves, in which all of their main competitors would appear to be free from the application of the proposed Measure because the National Assembly's legislative competence does not extend to these competitors. We consider that this is at odds with the aim of ensuring a level playing field within sectors. Although the imposition of any standards on them could be appealed on the basis that such imposition was neither reasonable or proportionate, we are of the view that the best way of dealing with their situation would simply be to exclude them from the application of the proposed Measure until such time as their competitors come within the scope of the legislative competence of the National Assembly. **We therefore recommend that Schedule 8 be amended to clarify that the standards will not apply to LPG providers.**

373. As regards the definition of the telecommunications sector, we have noted and accept the Minister's reassurances and position on this issue.

374. With regard to the application of promotion standards only to Welsh Ministers, County Borough Councils and County Councils, the Minister, while explaining the rationale for this limited scope of application, also expressed a willingness to consider expanding the

range of organisations to which promotional standards could be applied.

375. Whilst it is understandable that health services bodies, police authorities and other bodies with specific functions should not be included, it is not clear why the line has been drawn at principal local authorities to the exclusion of town and community councils.

376. It is also unclear why the proposed Measure should exclude bodies for which the use of language is a central function. We can see no reason why the proposed Measure should prevent the imposition of promotion standards on bodies such as the Arts Council of Wales, the National Library of Wales, Sianel 4 Cymru and the Welsh Books Council. **We recommend that the proposed Measure be amended to permit the imposition of promotion standards on such bodies.** More generally, **we recommend that the Minister reconsiders the bodies to which promotion standards should apply and brings forward amendments as he sees appropriate.**

377. As regards record keeping standards, we have noted the views of the Minister. **It is our view that it would be beneficial for clear record keeping standards to be applied to all organisations for the purpose of checking the success or otherwise of any standard set.** **We recommend that the Minister considers bringing forward an appropriate amendment to make this a statutory requirement.**

## 8. Part 5: Enforcement of standards

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### Background

378. Part 5 (sections 70 – 99) of the proposed Measure establishes the procedure for the Commissioner to investigate a failure to comply with standards.

379. The Explanatory Memorandum to the proposed Measure noted that in terms of enforcement,

“... the 1993 Act only provides for a single formal mechanism for investigating alleged breaches of schemes [made under the 1993 Act] and does not provide for any graduated alternatives. A single mechanism may not be appropriate in all cases, and may not achieve the right results for all in each case. In addition, the [Welsh Language] Board lacks the power under the 1993 Act to require persons to provide it with evidence and information that will assist it with its investigations.”<sup>354</sup>

380. The Explanatory Memorandum summarised the Welsh Government’s aims in regard to enforcement as being “to develop a more effective enforcement regime in relation to any duties that will be imposed” under the proposed Measure.<sup>355</sup>

### Evidence from consultees

381. Emyr Lewis noted that there was an obvious relationship between the nature and content of the standards created under Part 4 and the ease with which they can be enforced; to this end, standards need to be sufficiently clear.<sup>356</sup>

382. The Wales Governance Centre expressed the concern that the possible variety of standards could present problems in establishing an effective enforcement regime:

“The nature of the standards must be clear so that they can be enforced. At the same time they must be reasonable and proportionate depending on the nature of particular bodies otherwise they might be considered to be illegal, because they

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<sup>354</sup> EM, paragraph 3.6

<sup>355</sup> EM, paragraph 3.10

<sup>356</sup> Written Evidence, MI 9

are unreasonable. To meet this requirement, it may prove difficult to establish an overall effective enforcement regime when there could be a variety of standards applicable.”<sup>357</sup>

383. Several consultees were concerned about what they perceived to be a relatively limited role for the citizen in the process of enforcement of standards. Emyr Lewis noted,

“The citizen can complain about failure to comply with a compliance notice, and can give evidence, but beyond that, the citizen has no more involvement in the process.

... consideration should be given to providing some kind of remedy to the citizen who has suffered following the failure of a public authority to comply with language standards within certain contexts, for example, primary health care, social care or access to Welsh-medium education.”<sup>358</sup>

384. Emyr Lewis made these points with respect to what he considered to be the insufficient involvement of the citizen in the enforcement process:

“Where does the citizen fit in? Citizens can make a complaint to the commissioner if the terms of the compliance notices, as they are called, namely the language schemes, are breached. The commissioner can carry out an inquiry, prepare a report and make recommendations. If a great many other conditions have been fulfilled, the commissioner can impose sanctions on the public body. However, as far as I can see, there is nothing in this proposed Measure that would enable the citizen, apart from someone giving evidence, to participate further. This proposed Measure is so complex and these provisions are so onerous, my concern is that ordinary Welsh speakers—those who want to use the Welsh language and those who want to learn the Welsh language—will feel that it is a bureaucratic jungle. Furthermore, involvement will stop at the point where a complaint is lodged. I am concerned that that will be

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<sup>357</sup> Written Evidence, MI 27

<sup>358</sup> Written Evidence, MI 9

something of a turn-off to the citizen in respect of this proposed Measure.”<sup>359</sup>

385. When asked what he thought the solution was to the issue he had raised, Emyr Lewis stated the following:

“Something far simpler, in my opinion ... I would like to see some way of providing redress to an individual who has suffered—the individual must have suffered and some means of redress must be ensured in that context, be that an order to provide a service for the benefit of the individual, which would be enforceable through the courts, if necessary, or financial redress under the appropriate circumstances. That is one way of bringing the citizen further into this and ensuring that you provide rights.”<sup>360</sup>

386. In response to further questioning on this issue, Emyr Lewis made these additional points:

“... at present, the citizen has the right to make a complaint. The citizen might feel better knowing that the commissioner has the right to give the public body a hard time and to impose sanctions or to fine it. That might be sufficient reparation for some people. I do not think that that creates rights as such. If the intention is to create rights, there needs to be some kind of outcome that compensates the wronged citizen. It has to be emphasised that this applies only if someone has failed to comply in a way that has caused suffering, and someone who claims in unreasonable or disproportionate circumstances would not have any right under what I am suggesting.”<sup>361</sup>

387. Mentrau Iaith Cymru voiced similar concerns to Emyr Lewis and said:

“The proposed Measure feels as though it inclines away from the citizen—the citizen is not central to it. One specific example is an organisation that comes within the commissioner’s remit for not achieving the standards, or whatever. At several points, that organisation is able to appeal the decision if it does not agree with it. However, I do not see

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<sup>359</sup> RoP, paragraph [60], 22 April 2010, Legislation Committee No. 2

<sup>360</sup> RoP, paragraph [62], 22 April 2010, Legislation Committee No. 2

<sup>361</sup> RoP, paragraph [114], 22 April 2010, Legislation Committee No. 2

an individual's right to appeal if he or she does not agree with a decision made by the commissioner in respect of an organisation, or a decision made in a tribunal—or anywhere along that route. The individual cannot speak up again to say that they are not happy with what is going on. There are plenty of opportunities along that route for an organisation to complain, but the same is not true of the citizen.”<sup>362</sup>

388. The Welsh Language Board also raised similar concerns:

“... the standards do not lead to those legal rights ... there is an element of empowerment, which is different, but empowerment does not give a legal power in of itself. What it perhaps does is to make someone feel better in challenging, although it does not necessarily give them the means to challenge. One thing that we have noted with regard to the proposed Measure is that it does not give an individual the right to go directly to the courts.”<sup>363</sup>

389. Consumer Focus Wales noted that citizen participation could be enhanced by ensuring that feedback is provided by the Commissioner to complainants at all stages of the complaint, noting that under the proposed Measure, such feedback tends to be limited to final decisions. They made specific reference to section 81 of the proposed Measure, which gives the power to the Commissioner to publicise a failure by a body to comply with the standard, or to require the body itself to publish the finding.<sup>364</sup> Consumer Focus Wales suggested that the citizen be given “feedback at all stages” and that “the duty to maintain contact with the complainant at all stages should be stipulated in the Measure.”<sup>365</sup>

390. Some consultees noted what they perceived to be the need for the enforcement process to be flexible. Careers Wales North East said

“It is to be hoped that the system of enforcement would be one of persuasion in the first instance, that it took note of the practicalities of offering bilingual services particularly in

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<sup>362</sup> RoP, paragraph [272], 27 May 2010, Legislation Committee No. 2

<sup>363</sup> RoP, paragraph [132], 29 April 2010, Legislation Committee No. 2

<sup>364</sup> Under section 72 of the proposed Measure, where an investigation by the Commissioner has resulted from a complaint by a member of the public, that person must also be given by the Commissioner a copy of the Commissioner's investigation report and decision notice

<sup>365</sup> Written Evidence, MI 37

difficult financial times. The measure sounds quite draconian as it is not clear as to how exactly it would operate.”<sup>366</sup>

391. The Association of Chief Police Officers in Wales hoped that the enforcement mechanism would be consistent with other ones of a similar nature:

“ . . . enforcement of Welsh Language legislation should have parity with enforcement of the raft of other equalities legislation in Wales.”<sup>367</sup>

392. Several consultees made reference to the civil penalties which could ultimately be imposed in the event of non-compliance with standards. Some consultees felt that the imposition of civil penalties was appropriate. BT in Wales noted:

“Enforcement and penalties are an important part of ensuring fair play. We cannot guarantee fair play without ensuring not only that the standards set are appropriate, but that everyone adheres to them. BT is a law-abiding company, and if the penalties were inadequate, it would not like to see other companies deciding to do less and to accept the penalties rather than comply.”<sup>368</sup>

393. Nevertheless, they went on to express some concern about the imposition of monetary penalties:

“This demonstrates the danger of enforcement in the private sector. Once you start going down the route of enforcement, you start talking about sanctions, and, to be effective, sanctions will need to be substantial. This is a good example of why enforcement is not a good idea.”<sup>369</sup>

394. National Rail Enquiries considered that the private sector should be excepted from the application of civil penalties:

“Any fine or penalty on a commercial organisation for not supplying a service that is commercially unattractive would not

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<sup>366</sup> Written Evidence, MI 20

<sup>367</sup> Written Evidence, MI 21

<sup>368</sup> RoP, paragraph [217], 13 May 2010, Legislation Committee No. 2

<sup>369</sup> RoP, paragraph [220], 13 May 2010, Legislation Committee No. 2

be helpful. As I said, any fines or penalties that have to be paid would detract from our investment elsewhere.”<sup>370</sup>

395. Several consultees noted that the potential impact of a maximum civil penalty of £5,000 for non-compliance could differ dramatically, depending on the size and resources of the organisation in question. The UK Competitive Telecommunications Association said:

“Again, you have the question of the complexity of the sector. What counts as a serious fine for a very small operator might be trifling for a bigger operator, and what might be a serious fine for a bigger operator might be quite devastating for a small operator.”<sup>371</sup>

396. The Federation of Small Businesses Wales, noted the significant impact that the maximum civil penalty of £5,000 could have on small businesses, as compared to large businesses:

“. . . on the ability to appeal and challenge, I would say that the same is true for small businesses. It may not be as easy, financially or practically, for a small business to go through that process as it would be for a business with more resources. For a microbusiness with an average turnover in Wales, £5,000 would be quite a large sum.”<sup>372</sup>

397. It was not simply private sector organisations for whom a civil penalty of £5,000 could be a significant burden. Simon White, of One Voice Wales, noted the following about the possible impact of such a civil penalty on community councils:

“The important point is that it needs to be proportionate and reasonable. If you have a situation where a maximum fine of £5,000 is given to a community council that has set a precept of less than £10,000—and half of the community councils in Wales have a precept of £10,000 or less—clearly, it would be a very significant issue. Hopefully, we will never get to that situation, but it is important that the scale at which community

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<sup>370</sup> RoP, paragraph [326], 27 May 2010, Legislation Committee No. 2

<sup>371</sup> RoP, paragraph [223], 13 May 2010, Legislation Committee No. 2

<sup>372</sup> RoP, paragraph [270], 10 June 2010, Legislation Committee No. 2

and town councils operate is capable of being reflected in the proposed Measure as it is finally applied.”<sup>373</sup>

398. The Royal Mail Group noted that some organisations may prefer to pay the civil penalty than to implement their obligations:

“As a matter of interest, when we read about the enforcement details, we were not clear about whether the figure of £5,000 would be a one-off cost to an organisation for non-compliance. One needs to be careful that an organisation might not decide that it would be better off paying the fine rather than complying, unless it is a recurring, everyday cost. That is not clear at all in the proposed Measure, or at least we could not see it when we looked at it. So, if there is to be enforcement, we will comply with it, but we do not have a particularly strong view about whether it is a good or bad enforcement process.”<sup>374</sup>

399. Scottish Power, made a similar point:

“In general, we believe that the penalties should be set high enough to discourage companies from ignoring any legislation and ensure that they comply, but they should probably not be at such a high level that they put off some organisations from continuing to trade in Wales, which would be the case if they were set excessively high. They would also need to relate to the degree of seriousness of the breach. There should be some discussion about what is considered to be a breach, the quantum of breaches and their seriousness.”<sup>375</sup>

### **Evidence from the Minister**

400. With regard to the concerns expressed by some consultees in relation to the perceived limited role of the citizen in the enforcement of standards, the Minister offered a variety of explanations. One was based on the assertion that the standards mechanism created “composite rights”—rights that “are to be enjoyed by and are enforced on behalf of an entire community”—and that therefore an individual enforcement mechanism would not be appropriate:

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<sup>373</sup> RoP, paragraph [65], 20 May 2010, Legislation Committee No. 2

<sup>374</sup> RoP, paragraph [199], 29 April 2010, Legislation Committee No. 2

<sup>375</sup> RoP, paragraph [282], 29 April 2010, Legislation Committee No. 2

“There are two different ways of approaching this situation. By establishing duties or standards that are safeguarded by a commissioner, we are trying to put in place a system of rights; those rights are to be enjoyed by and are enforced on behalf of an entire community—in this instance, Welsh speakers. That is, these are composite rights, not individual rights to those who want to challenge these issues in the courts and those who are able to do that. By placing duties on bodies to provide services to individuals, the duty lies with the commissioner who is acting on behalf of that group of people. It is the commissioner who is then to take action if an individual feels that that service was not offered to him or to her.”<sup>376</sup>

401. A second justification appeared to be based on the desirability of allowing for flexible responses to failures to implement standards, which, the Minister seemed to suggest, might better be facilitated through the Commissioner:

“Through this proposed Measure, we will impose duties, which must be proportionate, on relevant bodies and then the individual will have the right to receive the service. If they do not receive the service as agreed by the commissioner through the standards, they will have somewhere to go, that is, to the commissioner. The commissioner will then determine the appropriate action for the organisation or person to take as compensation for the transgression. That could be to change their way of working though policy guidance and development, or, ultimately, if the organisation wanted the negative attention, it could be penalised.”<sup>377</sup>

402. The Minister made reference to the burdens that might be imposed on individuals (who have allegedly suffered a failure to enjoy benefits guaranteed by standards) if they were required to take enforcement action themselves:

“Anyone can make that complaint to the commissioner. If we were to do it in another way, and leave it all down to the individual, some might feel unable to pursue a challenge in a tribunal or court of law. That is not how we want to view this process, as we want to establish collective rights. I believe that

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<sup>376</sup> RoP, paragraph [263], 17 June 2010, Legislation Committee No. 2

<sup>377</sup> RoP, paragraph [266], 17 June 2010, Legislation Committee No. 2

that is the appropriate way to proceed and it is the option that best suits the majority of our citizens.”<sup>378</sup>

403. He added:

“Even if individuals were to challenge something under a different regime, an organisation could decide to tough it out by thinking that it does not mean anything to it, because it is big and powerful enough to ignore it and pay whatever compensation is required. That does not improve the situation, however, as the organisation could carry on exactly as before. I believe that the system in the proposed Measure lends much more strength to the case of someone who wants to use a service through the medium of Welsh.”<sup>379</sup>

404. In response to a question as to whether, for example, a single person was found to have committed five separate breaches, a maximum civil penalty of £25,000 could be imposed, the Minister noted that the Commissioner “will have all sorts of means at his or her disposal to deal with any complaints or non-compliance with standards.”<sup>380</sup> The Minister added:

“We would expect to see a gradual and sensible process taking place before we get to the point where a penalty is imposed. That could be anything from a phone call to explain what has happened in any given situation to a full inquiry. Ultimately, £5,000 is the maximum that can be imposed for non-compliance.”<sup>381</sup>

405. The Minister’s legal adviser added the following with respect to the issue of the potential size of the civil penalty which could be imposed on any one person:

“If there were five separate issues of non-compliance or five separate breaches, then it would be possible to place a civil penalty of up to £5,000 in each case. However, before the commissioner imposes civil penalties, the proposed Measure

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<sup>378</sup> RoP, paragraph [264], 17 June 2010, Legislation Committee No. 2

<sup>379</sup> RoP, paragraph [267], 17 June 2010, Legislation Committee No. 2

<sup>380</sup> RoP, paragraph [237], 17 June 2010, Legislation Committee No. 2

<sup>381</sup> RoP, paragraph [237], 17 June 2010, Legislation Committee No. 2

requires him or her to consider the seriousness of the breach and the circumstances of the individual.”<sup>382</sup>

406. Another of the Minister’s officials also noted the following:

“It is important to remember that, under section 97, the commissioner is required to publish an enforcement policy document that lays out how he or she intends to use the range of enforcement tools available, to be approved by Ministers. So, for example, if the document stated, ‘I intend to impose a penalty of £5,000 each time an organisation does not comply’, Ministers might have something to say. Therefore, that provides some sort of check and balance to ensure that these methods are used in a reasonable and proportionate way.”<sup>383</sup>

407. At our request, the Minister subsequently wrote to us to provide further clarification on this point.<sup>384</sup>

408. With regard to the suggestion that a variety of standards could cause problems in establishing an enforcement regime that would be considered fair, effective and intelligible to everyone across the different sectors, the Minister stated the following:

“The system that ensures compliance with those duties will be the same and consistent for everyone. Therefore, there is consistency within that process, although the duties can differ from organisation to organisation.”<sup>385</sup>

## **Our view**

409. We recognise that the enforcement of standards will be facilitated by the clarity and precision with which the standards are drawn. However, we do not consider that the variety of standards (as opposed to their clarity) would necessarily present problems in the enforcement of standards. **We are broadly content with the enforcement regime system set out in Part 5 of the proposed Measure, save for our specific comments set out below.**

410. With regard to the involvement of the citizen in the enforcement process, we note that there is provision for citizen involvement in that

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<sup>382</sup> RoP, paragraph [2421], 17 June 2010, Legislation Committee No. 2

<sup>383</sup> RoP, paragraph [244], 17 June 2010, Legislation Committee No. 2

<sup>384</sup> Letter from Alun Ffred Jones AM, the Minister for Heritage, 30 June 2010

<sup>385</sup> RoP, paragraph [248], 17 June 2010, Legislation Committee No. 2

process under sections 72 (determination of investigation), 84 (consultation before final determination) and 94 (consideration of whether to investigate if conduct complained about). We are therefore of the view that the proposed Measure does provide for some ongoing involvement of the citizen in the investigation process by the Commissioner.

411. However, we are unsure of whether the overall role of the citizen in the process of enforcement is sufficient, and we share the view that aside from bringing a complaint to the Commissioner, the citizen has very limited powers to ensure enforcement measures are taken. In our view, the concerns expressed by several consultees that there is insufficient provision for citizen involvement in the complaints process are well-founded.

412. We are therefore concerned that the level of citizen involvement is not as great as it could be and should be strengthened.

413. We note the contrast between section 100 of the proposed Measure, which provides for individuals to apply to the Commissioner to investigate an alleged interference with a right to communicate in Welsh, and section 70, which makes no similar provision in relation to investigations into failures to comply with standards. **We recommend that section 70 be amended to highlight the capacity of individuals to initiate the process of investigations and for the Commissioner to be required to explain a decision not to investigate, similar to the requirement in section 103(6).**

414. Provision could also be made for the complainant to appeal to the Tribunal against decisions by the Commissioner. Accordingly, **we also recommend that the Minister considers other ways that highlight the role of members of the public in achieving the aims of the proposed Measure and brings forward appropriate amendments.**

415. With regard to the maximum civil penalty of £5,000, we note that the civil penalty may, as was recognised by the Minister's officials, be imposed several times on the same organisation, for each separate finding of a failure to observe a standard. We are also sensitive to the differential impact that a civil penalty of this amount would have, depending on the size and resources of the organisation in question. However, we note that the civil penalty is a maximum, and that a

lesser civil penalty could be imposed, or none whatsoever, depending on the circumstances.

416. We believe that the matters set out in section 82(2) to which the Commissioner must have regard in determining the level of any civil penalty will ensure that any penalty imposed will be reasonable and proportionate. We also note the possibility of an appeal to the Tribunal. **We are therefore satisfied with the proposals with regard to civil penalties.**

## 9. Part 6: Freedom to use Welsh

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### Background

417. Part 6 (sections 100 – 108) of the proposed Measure gives the Commissioner the power to investigate certain alleged interferences with the freedom of persons in Wales to use Welsh with one another.<sup>386</sup>

418. Part 6 also places a duty on the Commissioner to report annually to the Welsh Ministers about the adequacy and effectiveness of the law in protecting this freedom.<sup>387</sup>

419. In addition, the Commissioner may also produce and publish reports on particular investigations undertaken<sup>388</sup>.

### Evidence from consultees

420. A number of organisations agreed in principle with the Welsh Government's aims and were generally supportive of the Minister's objectives to ensure a person's freedom to use Welsh.

421. Careers Wales North East<sup>389</sup> and Careers Wales North West<sup>390</sup> both stated that "there is no justification for people to interfere with people's freedom to use Welsh" and agreed that such a provision in the proposed Measure was necessary. The Wales Council for Voluntary Action also agreed with the provisions about the freedom to use Welsh"<sup>391</sup>.

422. The Welsh Local Government Association was also clearly in favour of the inclusion of provisions relating to the freedom to use Welsh in legislation:

"The WLGA agrees with the proposals in the Measure which gives the Commissioner a responsibility to prepare an annual report on the effectiveness of the law in protecting the freedom of persons in Wales to use the Welsh language to communicate

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<sup>386</sup> EM, Part 3, Explanatory Notes

<sup>387</sup> *ibid*

<sup>388</sup> *Ibid*

<sup>389</sup> Written Evidence, MI 20

<sup>390</sup> Written Evidence, MI 43

<sup>391</sup> Written Evidence, MI 265

with one another and to investigate alleged interferences with this right.”<sup>392</sup>

423. The Association of Chief Police Officers in Wales also welcomed “developments to ensure a transparent and consistent approach to responding to concerns that people are unable to use Welsh in the work place or when receiving services.”<sup>393</sup>

424. In supporting the Welsh Government’s objectives, Dwr Cymru Welsh Water strongly felt that this part of the proposed Measure would bring noticeable benefits to Welsh speakers:

“The introduction of this process should make it easier for members of the public to complain if they have a genuine grievance.”<sup>394</sup>

425. Others, while supporting the notion that the use of Welsh by Welsh-speakers in the workplace should not be interfered with, expressed concern about what might be called unanticipated consequences of the proposal, SWALEC said it:

“... is very happy to ensure that members of staff are allowed to use Welsh in the workplace, however if an individual insisted for example on the right to speak Welsh in a meeting which would entail bringing in interpreters/translation of documents SSE would be extremely concerned.”<sup>395</sup>

426. British Gas added that they support “the principle that people in the workplace should have the freedom to use the Welsh language with each other”, but that they “would like to understand whether or not this will confer any specific obligation on its business.”<sup>396</sup>

427. Although generally supportive of the entitlement of Welsh speakers to speak Welsh in the workplace, some organisations were concerned that this section introduced a heavy handed legal mechanism to deal with what was essentially an uncommon and easily dealt with situation in practice.

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<sup>392</sup> Written Evidence, MI 23

<sup>393</sup> Written Evidence, MI 21

<sup>394</sup> Written Evidence, MI 11

<sup>395</sup> Written Evidence, MI 8 (SSE, formerly Scottish and Southern Energy, operates in Wales under its SWALEC brand).

<sup>396</sup> Written Evidence, MI 22

428. CBI Wales saw little value to this aspect of the proposed Measure and stated that:

“Part 6 is a large sledgehammer to nearly crack a small nut. I am not aware of any evidence that interference with the ability of people to speak Welsh in the workplace is a major issue. We have the example at Thomas Cook, but the fact that we are still talking about that five or six years on and that nothing else has cropped up in the meantime to replace it tells us all what we need to know, to be frank. The Thomas Cook example was dealt with. It was a clumsy application by a local branch manager that was dealt with reasonably swiftly and sensibly by the company at head office level.

It took a huge amount of damage to its brand in the press, and we are still talking about it now. So why on earth would companies want to put themselves through that in the future? Yet, there are situations involving workforces where not everyone speaks Welsh, where you need to have the right to insist that people have to converse in English. I just think that that is common sense. My reading of Part 6 is that it does not confer an absolute right on individuals to use Welsh in the workplace. However, clearly it gives the commissioner the power to investigate and to issue a critical report. Frankly, the media will do that, generally; if it is a very large company, the media will jump on that and do it for the commissioner. So, I do not really see that Part 6 serves any useful purpose.”<sup>397</sup>

429. The Royal Mail Group agreed with CBI Wales’s position:

“People are absolutely entitled to use their language of choice in the workplace. We lean to the view held by the Confederation of British Industry, namely that this is rather a big weapon for a moderately small problem. In a sense, the fact that when an issue arises it becomes such a big news story so quickly demonstrates that point. Not only does it become a big news story fast, but as far as we can establish, nothing has ever occurred, other than that the ridiculous policy that created the problem in the first place is reversed. You then ask yourself

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<sup>397</sup> RoP, paragraphs [278-279], 10 June 2010, Legislation Committee No. 2

why there is all this effort on legislation when this has never been a problem beyond the first event.”<sup>398</sup>

430. They added that:

“The evidence of the few high-profile instances of this shows that the court of public opinion offers the first source of justice for that situation, and policies generally get changed because of it. We have never faced that, and common sense and pragmatism in the workplace prevails.”<sup>399</sup>

431. Mentrau Iaith Cymru however disagreed with this view. They stressed that a provision to ensure that an individual had the freedom to use Welsh was a necessary aspect of the proposed Measure, as it is not currently guaranteed in all circumstances:

“... in the real world, although there is freedom to speak Welsh, there are still places where people are not allowed to speak Welsh and are told off for doing so if they are in a workplace and so on, and they may possibly be punished. We do not know how often this occurs in workplaces when we are not told about it. It is a brave person who stands up and tells their boss that they have a right to speak Welsh and that they are going to complain. Hopefully, because of the proposed Measure, that process will be more open and it will be easier for individuals to approach the commissioner and do something about it.”<sup>400</sup>

432. Other respondents felt that this aspect of the proposed Measure did not go far enough. Cymdeithas yr Iaith Gymraeg felt that the provisions lacked proper enforcement powers that would effectively implement the Welsh Government’s objectives:

“The clauses that deal with the freedom to use the Welsh language are not worth retaining unless the Commissioner has powers of enforcement or punishment, where appropriate, in order to ensure the rights of individuals to use Welsh in their everyday lives.”<sup>401</sup>

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<sup>398</sup> RoP, paragraph [218], 29 April 2010, Legislation Committee No. 2

<sup>399</sup> RoP, paragraph [219], 29 April 2010, Legislation Committee No. 2

<sup>400</sup> RoP, paragraph [293], 27 May 2010, Legislation Committee No. 2

<sup>401</sup> Written Evidence, MI 47

433. These views were echoed by the Wales Governance Centre who questioned:

“... whether there needs to be legislation governing the exercise of a “freedom” in circumstances where there is no machinery provided for enforcing breaches of such freedom.”<sup>402</sup>

434. Mentrau Iaith Cymru raised concerns about the effectiveness of including a freedom to use Welsh, and argued in favour of a right to speak Welsh instead:

“The Measure does not give individuals the right to speak Welsh.

We welcome the freedom to use Welsh, but we feel that the right to speak Welsh should be the basis for this freedom. We suggest that the Measure should state that the people of Wales have the right to use Welsh as far as that is ‘reasonable and proportionate’.”<sup>403</sup>

435. UCAC also perceived the proposed Measure to be deficient in this regard:

“We deplore the fact that the Measure has not taken advantage of the opportunity to ... note that using the Welsh language is a human right.”<sup>404</sup>

436. A former member of the Commission for Racial Equality implied that perhaps the proper way of addressing some of the issues which gave rise to the proposal in the first place was potentially through existing equality law:

“I direct my comments specifically to the question of the ‘right’ of Welsh-speakers to use their language in the workplace. I use the word ‘right’ intentionally as I do not understand what is the meaning or legal force of the word ‘freedom’, as is currently used in the proposed Measure ... Much firmer understanding of equality laws are required before this matter is taken forward.”<sup>405</sup>

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<sup>402</sup> Written Evidence, MI 27

<sup>403</sup> Written Evidence, MI 53

<sup>404</sup> Written Evidence, MI 52

<sup>405</sup> Written Evidence, MI 40

437. In addition to these concerns, a number of organisations felt that this part of the proposed Measure was ambiguous and lacked clarity. Many organisations and individuals felt unable to comment on these provisions due to the lack of information available. A member of the public, while approving the objective about investigating alleged interferences with the freedom to use Welsh, stated:

“I don’t understand exactly “what next”, and if such interference occurred, what power would there be to rectify the situation.”<sup>406</sup>

438. When questioned about the Minister’s interpretation<sup>407</sup> of the freedom to speak Welsh provisions in the proposed Welsh (rather than the right to do so), Emyr Lewis stated that “I am not sure that I understand what the Minister had in mind”<sup>408</sup>. When questioned, Professor Colin Williams referred to Part 6 as “utter nonsense.”<sup>409</sup>

439. Bridgend County Borough Council identified the perceived lack of clarity as to what the ‘freedom’ implied as being the core difficulty in understanding this aspect of the proposed Measure:

“The Measure as it stands does not clearly define what is meant by the ‘freedom to use Welsh’ and does not offer a robust means by which that freedom can be upheld.”<sup>410</sup>

440. Carmarthenshire County Council also emphasised how important it was for the proposed Measure “to be clear ... in order to ensure legal support for any instances of interfering with people’s freedom to use Welsh”<sup>411</sup>.

441. One Voice Wales welcomed what it saw as “a laudable objective” but also stressed the need for “further clarification ... on what it would mean in practice.”<sup>412</sup> Anglesey County Council also stated that they would “welcome further details regarding this objective before commenting.”<sup>413</sup>

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<sup>406</sup> Written Evidence, MI 18

<sup>407</sup> RoP, paragraph [201], 17 March 2010, Legislation Committee No. 2

<sup>408</sup> RoP, paragraph [125], 22 April 2010, Legislation Committee No. 2

<sup>409</sup> RoP, paragraph [257], 22 April 2010, Legislation Committee No. 2

<sup>410</sup> Written Evidence, MI 26

<sup>411</sup> Written Evidence, MI 49

<sup>412</sup> Written Evidence, MI 245

<sup>413</sup> Written Evidence, MI 55

442. A number of organisations suggested that Part 6 of the proposed Measure was not required at all and that it should be removed completely from the proposed Measure.

443. Emyr Lewis opposed Part 6 on grounds that uncertainty as to its meaning may have unintended consequences even for Welsh-speakers themselves:

“I fear that these provisions suggest regulation of the circumstances in which people can speak Welsh together. For that reason, I would prefer to see this Part being dropped from the Measure.”<sup>414</sup>

444. During questioning he said:

“I do not think that it is appropriate at all for any official or Government to intervene in that kind of discourse. That kind of thing must be resolved on the ground within the community and society. My concern about what is intended is that it appears to be a first step—that is not the intention, but that is how it appears—towards deciding on the situations in which it is, and in which it is not, appropriate for people who wish to speak Welsh to each other to do so. I do not want us to start down that road.”<sup>415</sup>

445. The Welsh Language Board agreed with Emyr Lewis, adding that:

“The commissioner could pick up this matter through his or her general responsibilities in any case, therefore perhaps there is no need to give so much attention to it within what is an already lengthy proposed Measure.”<sup>416</sup>

446. They also emphasised their view that this section doesn’t meet its stated objective of protecting the freedom of Welsh speakers in the workplace:

“This has arisen directly from the case relating to Thomas Cook in the past. We are not sure that what is contained within the proposed Measure will meet those requirements in future. Certainly, when this type of case arises, it gets attention in the

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<sup>414</sup> Written Evidence, MI 9

<sup>415</sup> RoP, paragraph [117], 22 April 2010, Legislation Committee No. 2

<sup>416</sup> RoP, paragraph [134], 29 April 2010, Legislation Committee No. 2

media. That is what changes the situation and generates change in the workplace. I am not sure that this proposed Measure meets that requirement directly.”<sup>417</sup>

447. Cymdeithas yr Iaith Gymraeg felt that Part 6 of the proposed Measure was “almost worthless.”<sup>418</sup> They stated that:

“It is very significant to us ... that there is a part that tries to address the freedom to use the Welsh language in the workplace, because it acknowledges that this situation is problematic. However, the problem is that Part 6 in its current form would not address the issue at all, or offer a process or consequences to redress the situation. It is crucial to remember that the Thomas Cook case was not an exception. The truth of the matter is that if the commissioner had the power to implement the outcome of an inquiry, and if an individual had the right to challenge a situation in the workplace, part 6 could be extremely powerful in securing justice for Welsh speakers. It is truly a lost opportunity.”<sup>419</sup>

448. Celebrating our Language agreed with the views of Cymdeithas yr Iaith Gymraeg. They told us that:

“... it acknowledges that there is a problem but it has created a solution by means of a worthless clause to create the freedom to use Welsh.”<sup>420</sup>

449. The Royal Mail Group<sup>421</sup> and Scottish Power<sup>422</sup> also stated explicitly under questioning that Part 6 should be removed in full from the proposed Measure, as did CBI Wales, who felt that this Part of the proposed Measure was not required as it didn’t serve “any useful purpose”<sup>423</sup>.

### **Evidence from the Minister**

450. In his evidence, the Minister explained that the inclusion of Part 6 in the proposed Measure was required to deal with situations “where

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<sup>417</sup> RoP, paragraph [136], 29 April 2010, Legislation Committee No. 2

<sup>418</sup> RoP, paragraph [124], 27 May 2010, Legislation Committee No. 2

<sup>419</sup> *ibid*

<sup>420</sup> RoP, paragraph [220], 27 May 2010, Legislation Committee No. 2

<sup>421</sup> RoP, paragraph [221], 29 April 2010, Legislation Committee No. 2

<sup>422</sup> RoP, paragraphs [307-8], 29 April 2010, Legislation Committee No. 2

<sup>423</sup> RoP, paragraph [279], 10 June 2010, Legislation Committee No. 2

someone has felt that their freedom to speak Welsh has been restricted”<sup>424</sup>. If such a situation occurred, the Minister explained that:

“The commissioner will have the right to investigate such cases and to produce a public report, in the hope that that will be sufficient to ensure that that right exists everywhere.”<sup>425</sup>

451. Under questioning, the Minister’s official outlined the specific situations which would constitute an interference with an individual’s freedom to use Welsh as stated in the proposed Measure:

“It is important to realise that this relates to the freedom of two people who wish to speak Welsh with one another to do so. It does not necessarily relate to a person’s relationship with a public body, or to a situation where someone wants to receive a service from a public body. For example, perhaps two friends who are at a leisure centre want to speak Welsh with one another, but then someone interferes with that freedom ...

...

It could be a manager in a workplace asking two people to stop speaking Welsh to each other on the spot. It could be colleagues bullying two people because they are speaking Welsh—provoking them by saying that it is an absurd language and imitating them. It could be a manager telling two people not to speak Welsh in the future. It could also be a manager moving two people who like to speak Welsh with each other to opposite ends of the office to prevent them from speaking Welsh, and that type of thing.”<sup>426</sup>

452. In responding to concerns from consultees about Part 6, the Minister defended what he perceived as “the middle way” to deal with situations “where a person feels that his or her freedom to speak Welsh has been impeded.”<sup>427</sup>

453. The Minister explained:

“We have stated that we would review the process if we felt that this system was not working or was ineffective. That is the

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<sup>424</sup> RoP, paragraph [221], 17 March 2010, Legislation Committee No. 2

<sup>425</sup> RoP, paragraph [201], 17 March 2010, Legislation Committee No. 2

<sup>426</sup> RoP, paragraphs [203 and 211], 17 March 2010, Legislation Committee No. 2

<sup>427</sup> RoP, paragraph [251], 17 June 2010, Legislation Committee No. 2

exact opposite of what [the CBI] said, namely that we were using a sledgehammer to crack a nut. It is a proportionate way of dealing with a situation that does not appear to be common.”<sup>428</sup>

454. The Minister also dismissed calls from consultees that Part 6 of the proposed Measure should be removed entirely<sup>429</sup> and disagreed with the assertion of Cymdeithas yr Iaith Gymraeg that these sections were not worth retaining.<sup>430</sup>

455. In addressing the concerns of consultees however, the Minister acknowledged that it would “be wise” to monitor the implementation of this Part in practice to “see whether what we have suggested is effective or relevant.”<sup>431</sup> The Minister added that:

“If it is irrelevant, no use will be made of it and if it is inadequate, that will become apparent and future Governments will be in a position to decide whether legislation is required in the area.”<sup>432</sup>

## **Our view**

456. We note the evidence received from organisations who believe that the freedom to use Welsh is an important and worthwhile provision in the proposed Measure. Although we acknowledge that such instances are relatively uncommon, we accept that situations occur where people are not allowed to speak Welsh with one another and that safeguards should be put in place to prevent such situations happening.

457. We note the concerns of certain consultees who believe that the powers given to the Commissioner are not effective or strong enough to provide the individual affected with an adequate resolution in cases where their freedom to use Welsh has been interfered with. However, given that the Commissioner is given wide ranging powers under section 3 of the proposed Measure, we are not persuaded by the arguments of consultees that the Commissioner’s enforcement and investigatory functions should be extended. **We believe that adequate**

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<sup>428</sup> RoP, paragraph [252], 17 June 2010, Legislation Committee No. 2

<sup>429</sup> RoP, paragraph [257], 17 June 2010, Legislation Committee No. 2

<sup>430</sup> RoP, paragraph [255], 17 June 2010, Legislation Committee No. 2

<sup>431</sup> RoP, paragraph [257], 17 June 2010, Legislation Committee No. 2

<sup>432</sup> *ibid*

**provisions already exist in other sections of the proposed Measure, namely under section 3, that will allow the Commissioner to deal with a grievance relating to a person's freedom to use Welsh.**

458. We note and accept the evidence received from organisations and individuals who feel that Part 6 of the proposed Measure is unclear, complex and cumbersome. We also accept the suggestion that instances where an individual's freedom to use Welsh is interfered with is better dealt with by current equalities legislation. **For the sake of clarity and accuracy therefore, and in addition to the powers available to the Commissioner, we believe that any instances concerning an individual's freedom to use Welsh should be dealt with by current race relations and equality legislation.**

459. Despite assurances from the Minister to monitor carefully this provision once implemented, we believe that **if the Minister accepts our recommendation to include a clear statement regarding the official status of the Welsh language in Part 1 of the proposed Measure, then a subsequent provision to protect a person's freedom would not be necessary. Such a statement would automatically safeguard an individual's freedom to use Welsh in practice. If such changes are made to the proposed Measure, we believe that Part 6 should be removed in its entirety.**

## 10. Part 7: Welsh Language Tribunal

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### Background

460. Part 7 of the proposed Measure (sections 109 -124) establishes a Welsh Language Tribunal and makes associated provision. The Tribunal is to consist of a President, legally-qualified members and lay members, and they are to be appointed by Welsh Ministers. Paragraph 8.47 of the Explanatory Memorandum says that to minimise costs, it is proposed that the secretariat function of Tribunal be undertaken by Welsh Ministers.

### Evidence from consultees

461. Not many consultees expressed a specific view on the creation of the Welsh Language Tribunal.

462. The Wales Governance Centre said:

“It is agreed that it is helpful to establish a Welsh Language Tribunal to give an independent assessment of the Commissioner’s decisions on the enforcement of the prescribed standards.”<sup>433</sup>

463. As with the Welsh Language Commissioner, there was some concern as to whether the Tribunal should be appointed by Welsh Ministers. Emyr Lewis favoured appointment by the National Assembly noting that arguments for doing so were if anything stronger, in light of its judicial function.<sup>434</sup> The Children’s Commissioner for Wales also suggested that the National Assembly should appoint the Tribunal.<sup>435</sup>

464. The Mobile Broadband Group noted that because the Tribunal:

“ . . . forms a key element of government policy, it must demonstrably be acting independently of the WAG. At Schedule 11, Part 2, section 9 (2), the Proposed Measure should specifically mention that one of the principles to be followed in drawing up the appointment Regulations is that the

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<sup>433</sup> Written Evidence, MI 27

<sup>434</sup> Written Evidence, MI 9

<sup>435</sup> Written Evidence, MI 266

Tribunal must be independent of government (and, clearly, the WLC)<sup>436</sup>

465. BT in Wales however felt that:

“I do not think that there is any reason to think that it would not be independent. The proposed Measure sets out a system quite similar to other tribunals.”<sup>437</sup>

466. The Law Society pointed out that the Wales Committee of the Administrative Justice and Tribunals council had recently published a review of tribunals operating in Wales<sup>438</sup> and recommended that this should be born in mind when establishing the Tribunal.<sup>439</sup>

### **Evidence from the Minister**

467. The Minister did not accept that the Tribunal would lack sufficient independence from Welsh Ministers (or the Commissioner). He said:

“There are other examples of tribunals and I have not heard that sort of criticism made of other tribunals. They will be appointed along similar lines and using similar procedures to those other tribunals.”<sup>440</sup>

468. We also asked why the secretariat function of the Tribunal would be undertaken by Ministers on grounds of cost. He told us:

“The hope is that this tribunal will sit very infrequently. Since it is not sensible to set up an expensive structure in the expectation that it will sit every week or month or whatever, it is better at this stage to accommodate that through existing procedures. However, if that proves to be insufficient or compromised in some way, we can look at new arrangements in future.”<sup>441</sup>

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<sup>436</sup> Written Evidence, MI 31

<sup>437</sup> RoP, paragraph [227], 13 May 2010, Legislation Committee No. 2

<sup>438</sup> Available at: <http://www.ajtc.gov.uk/welsh/publications.htm>),

<sup>439</sup> Written Evidence, MI 10

<sup>440</sup> RoP, paragraph [213], 17 March 2010, Legislation Committee No. 2

<sup>441</sup> RoP, paragraph [215], 17 March 2010, Legislation Committee No. 2

## **Our view**

**469. We accept the Minister's arguments regarding the administrative arrangements for the Tribunal.**

470. As regards the appointment of the Tribunal, In line with our recommendation on the appointment of the Welsh Language Commissioner and his or her Advisory Panel, we consider that members of the Tribunal **should be nominated by Welsh Ministers and approved by the National Assembly. Accordingly, we recommend that the Minister brings forward an amendment to that effect.**

## 11. Part 9: Welsh Language Board, Welsh Language Schemes etc.

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### Background

471. Part 9 of the proposed Measure (sections 134 – 138) makes provision about the replacement of both the Welsh Language Board and the Welsh language scheme arrangements provided for in the 1993 Act, and the repeal of the relevant provisions.

472. Sections 134 to 136 make provision about a three-stage transition from the current regime (as set out in the 1993 Act) to the new regime as provided for in the proposed Measure.

473. Sections 137 to 138 and Schedule 12 make supplementary and other provisions relating to sections 134 to 136.

### Evidence from consultees

474. As some of the evidence in previous chapters of this report shows, concerns were expressed about the transition from the Welsh Language Board to a Welsh Language Commissioner and from language schemes to a system of standards.

475. In particular, some consultees felt there was a danger that the expertise in language policy and promotion which has been built up in the Welsh Language Board (which would be abolished under the proposed Measure) would be dissipated or lost.

476. The Welsh Language Board noted:

“It will also be important to demonstrate that the linguistic expertise which currently resides in institutions is not lost.”<sup>442</sup>

477. When questioned, they said:

“It is a very real concern that we are changing several elements of the pattern of language planning in Wales at the same time. ... we are changing the language planning tool and the structure. Organisations have already been in touch with us to ask the following fundamental question: what happens next—is

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<sup>442</sup> Written Evidence, MI 14

there going to be five years of hiatus, and what should we be doing in this period? We need to ensure that this proposed Measure is a bridge, rather than a gulf in linguistic planning for the future, and planning is required for that to happen. It is possible to move towards a stronger situation, but we must not lose five years in the process. Sectoral standards could strengthen the situation in the future, but let us not have that gulf.”<sup>443</sup>

478. They also said:

“... Someone will ask, ‘What is the point of me sticking to my scheme if there is no-one there to challenge me?’, and there may be some years while the standards are developed. So, there is a risk of there being three, four or five years when there will not be as much creative energy as there is at present.”<sup>444</sup>

479. As regards the transition, Emyr Lewis said:

“There are a large number of tiers and stages to the different processes that lead on from initially determining language standards, through to ultimately enforcing them in individual cases. My concern is that these processes will drain the Commissioner’s energy and resources, especially so in the early years, as Welsh Ministers create standards, and as compliance notices are established.

At the same time, appropriate bodies will continue to implement Language Schemes, and they will be monitored by the Commissioner.

... At the same time, the Commissioner will be expected to continue with the work of promoting work and facilitating the use of the Welsh language.”<sup>445</sup>

480. When questioned Emyr Lewis expanded on these comments:

“Putting the new regulatory system in place will take time, especially as it is so complex. It will take years.

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<sup>443</sup> RoP, paragraph [138], 29 April 2010, Legislation Committee No. 2

<sup>444</sup> RoP, paragraph [99], 29 April 2010, Legislation Committee No. 2

<sup>445</sup> Written Evidence, MI 9

In the meantime, language schemes will continue to exist. My concern is that the bodies that are regulated, or some of them, will not take the language schemes seriously, and, therefore, they will not take their duties with regard to the Welsh language seriously, knowing that something else is on the horizon.”<sup>446</sup>

481. The Association of Chief Police Officers in Wales, while in broad agreement with the establishment of the office of Commissioner, expressed concern about the loss of the Welsh Language Board as an entity and offered this observation:

“If it is to be abolished it is important that effective advisory and support processes are in place to assist our work ... There is a need for a central body of expertise to take responsibility for language planning and the provision of guidelines and support resources.”<sup>447</sup>

482. Other consultees commented as follows on the loss of the Welsh Language Board. Careers Wales North West said:

“It is hoped ... that the working relationship that has been developed with the Welsh Language Board will not be diminished in any way ... We are very fortunate and extremely grateful for the joint working relationship which has been developed with the Welsh Language Board in recent years. We have developed a mutual understanding of our organisational aims and constraints and it is hopeful that this can continue under the new structure.”<sup>448</sup>

483. BT in Wales said

“As [there] will be a census in Wales in 2011, BT in Wales firmly believes that any current momentum built up in the promotion of the Welsh language should not be interrupted by the proposed changes to the Welsh Language Board as outlined in the Measure.

BT in Wales recognises the excellent work done by the Welsh Language Board, particularly the work of its Private Sector Unit,

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<sup>446</sup> RoP, paragraphs [110 -1], 22 April 2010, Legislation Committee No. 2

<sup>447</sup> Written Evidence, MI 21

<sup>448</sup> Written Evidence, MI 43

and would strongly recommend that the promotion and advocacy work currently carried out by the Board be continued in the future.”<sup>449</sup>

484. They added:

“We also need to avoid a hiatus given that a census is being held next year. What that census reveals will be crucial. Therefore, promoting the Welsh language over the next few months is crucial, and if there is any hiatus or undermining during this period, that could be damaging, so we must realise how important the promotional role is, particularly at this time.”<sup>450</sup>

485. Mentrau Iaith Cymru did not feel “that there has been enough of a discussion about what will happen after the board is wound up, as regards all its different functions, such as promotion, which is a major part of its work.”<sup>451</sup>

### **Evidence from the Minister**

486. As regards the transition from the Welsh Language Board to the Commissioner, the Minister told us:

“Obviously, we are in discussions with the Welsh Language Board to address these issues. It makes sense for the board to think about the changes that lie ahead and to begin thinking about how to prepare the ground in order to ensure a smooth transition. However, we have not seen any evidence to support the view that organisations would pay less attention to their language schemes and the provision of Welsh-language services during that transitional period. Indeed, we may see more attention being paid to this work as organisations respond to the commissioner’s standards investigations and prepare themselves for the more robust enforcement regime that will be available to the commissioner.”<sup>452</sup>

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<sup>449</sup> Written Evidence, MI 30

<sup>450</sup> RoP, paragraph [158], 13 May 2010, Legislation Committee No. 2

<sup>451</sup> RoP, paragraph [262], 27 May 2010, Legislation Committee No. 2

<sup>452</sup> RoP, paragraph [108], 17 June 2010, Legislation Committee No. 2

## **Our view**

487. We note that many consultees have raised concerns about the transition from the existing system to the new system under the proposed Measure.

488. It is apparent from the evidence we have received that the approach and work of the Welsh Language Board has been strongly supported and well-received by the organisations it has dealt with. In particular we have noted how many organisations have said how good and effective their working relationships with the Welsh Language Board have been, which has been heartening to hear and will clearly have resulted in benefits for the future of the Welsh language.

489. It is therefore vital in our view that the experience, expertise and collective memory of the Welsh Language Board is not lost in the transitional process. In addition, it is equally important that the goodwill towards the Welsh language that has been built up through the development of voluntary language schemes is not lost; that applies equally to those organisations that will become subject to the provisions of the proposed Measure and those that will not.

490. Therefore, **we strongly recommend that the Minister works closely with the Welsh Language Board to plan effectively for the transition to the new system to ensure that the momentum built up in promoting the Welsh language and regulating the provision of Welsh language services is maintained.**

## 12. Financial implications

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### Background

491. Part 2 of the Explanatory Memorandum provides a Regulatory Impact Assessment for the proposed Measure. Paragraphs 8.22 to 8.58 of the Explanatory Memorandum provide an outline of the cost implications for organisations of complying with standards.

### Evidence from consultees

492. There was widespread concern from organisations that the Explanatory Memorandum did not provide an accurate prediction of the costs associated with the proposed Measure.

493. The Law Society stated that:

“The Explanatory Memorandum does not provide any adequate costs analysis of the proposals. Although the costs of individual features are considered, figures are not provided consistently or in every instance, and all are taken to be within the current budget for the Welsh Language Board or are to be subsumed by the Welsh Assembly Government. This is confusing and inadequate. Effectively, there is insufficient information on the costs impact of this legislation.”<sup>453</sup>

494. E.ON UK also felt that the financial implications were difficult to gauge from the information provided:

“Until we understand the exact nature of the Standards to be imposed on our sector under the framework established by the proposed Measure it is not possible to quantify the financial implications.”<sup>454</sup>

495. Good Energy criticised the information included in the Explanatory Memorandum as insufficient:

“The research covered in the Explanatory Memorandum, seems to have only covered small businesses located within Wales, and appears to consider that the smallest energy supplier in

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<sup>453</sup> Written Evidence, MI 10

<sup>454</sup> Written Evidence, MI 17

Wales has a 10% market share, which is incorrect. Therefore the Measure does not appear to have considered the impact on smaller licensed energy suppliers.”<sup>455</sup>

496. Passenger Focus also felt that the costs which were included were not accurate or detailed enough:

“We would note that the cost of implementing our current Welsh Language Scheme is higher than the indicative amount outlined in the Explanatory Memorandum issued with this consultation. The guidance states that for a small organization these costs are "... estimated as not being higher than £1k a year". While we do not keep a detailed account of the costs of implementing our scheme, the cost of translating our latest annual report into Welsh was £1200 so clearly the overall figure is higher than the indicative figure.”<sup>456</sup>

497. The Confederation of Passenger Transport Wales agreed strongly with this view. They felt that the “estimated costs are unrealistically low”<sup>457</sup>. They also added that:

“Our experience shows that these costs are likely to be in excess of the estimates contained in the Explanatory Notes (8.29). At a time of rising costs to the industry - fuel and insurance, for example - these extra costs will evidently have an effect on the core activity of our members, and could well lead to a reduction in services (especially marginal ones) or increased costs.”<sup>458</sup>

498. One Voice Wales also felt that:

“... there is probably an understatement, particularly for councils that have not adopted schemes as yet, which is, as I say, over 500 councils across Wales. The explanatory memorandum talked about a cost of around £1,000 for small, public sector organisations. It may be that councils produce more written information than other public bodies in general, but if you take an eight-page set of full council minutes of approximately 3,000 words being produced 12 times a year

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<sup>455</sup> Written Evidence, MI 25

<sup>456</sup> Written Evidence, MI 35

<sup>457</sup> Written Evidence, MI 38

<sup>458</sup> *ibid*

and you had that translated relatively modestly at a cost of £50 per 1,000 words, then you are talking about £1,800 to produce those minutes bilingually. If you then add on top the cost of the agendas and then other committees' minutes that might also need to be translated, then the translation costs alone could go well above the £1,000 noted in the explanatory memorandum."<sup>459</sup>

499. BT in Wales stated that the information included in the Explanatory Memorandum was potentially inaccurate:

"There is only a framework in the proposed Measure. The memorandum tries to assess how much it will cost. In the memorandum a comparison is made with how much the current legislation costs. For example, it mentions that a large company should not expect to pay more than £200,000—but we know that we already spend a lot more than £200,000 on Welsh-language services."<sup>460</sup>

500. Many organisations were also concerned that the Regulatory Impact Assessment that was included in the Explanatory Memorandum was too broad, and that crucial details had been left out.

501. Scottish Power stated that:

"We believe that the RIA is a bit too broad-brush; it is applying the same approach to everyone, but our estimated costs ... would be potentially considerably higher than the £200,000 that is proposed for a company of our size. So, once we get to the consultation on the standards, we can give a much better estimate of our costs, but we feel that that is not realistic at the moment."<sup>461</sup>

502. CBI Wales was also critical of the issues considered in the Regulatory Impact Assessment:

"I think that it is simplistic in the extreme. It is, frankly, facile. I am on record in a few of these committees talking about the

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<sup>459</sup> RoP, paragraph [68], 20 May 2010, Legislation Committee No. 2

<sup>460</sup> RoP, paragraph [168], 13 May 2010, Legislation Committee No. 2

<sup>461</sup> RoP, paragraph [168], 29 April 2010, Legislation Committee No. 2

quality of regulatory impact assessments. This is just a finger-in-the-air job.”<sup>462</sup>

503. CBI Wales was also concerned with the lack of information available about the type and cost of the services expected:

“Frustratingly, we still have no visibility of the likely level of services. It is nigh on impossible to give meaningful comment on costs and acceptability until we have some clarity on that.”<sup>463</sup>

504. Other organisations were concerned about the additional costs involved with providing an increase in their bilingual services, particularly given the lack of information available about the type of standards that would be applied in future. The Wales Council for Voluntary Action stated that:

“Some of our members have expressed concern about the potential increase in cost of providing services bilingually when the sector is facing deep and severe funding cuts. Until the standards are established it is very hard for us to offer advice and reassurance.”<sup>464</sup>

505. British Gas felt that the financial impact of the proposed Measure could impact on energy competition in Wales:

“British Gas is concerned that the implementation, management and enforcement costs of compliance could be detrimental to Energy competition in Wales and could result in additional pass-through costs to consumers.”<sup>465</sup>

506. However, Consumer Focus Wales said:

“... it is difficult to assess the types of costs that we are talking about because there is a lack of clarity about what standards will look like. We recognise that. However, we do not believe that any additional costs of making Welsh-language services available to consumers in Wales should be passed on to

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<sup>462</sup> RoP, paragraph [288], 10 June 2010, Legislation Committee No. 2

<sup>463</sup> RoP, paragraph [207], 10 June 2010, Legislation Committee No. 2

<sup>464</sup> Written Evidence, MI 265

<sup>465</sup> Written Evidence, MI 22

consumers. The costs should be absorbed through profits and shareholders.”<sup>466</sup>

507. They added:

“... we do not feel that there is any reason why Welsh-language consumers should be disadvantaged by having to pay a levy to receive services through the medium of Welsh.”<sup>467</sup>

508. ColegauCymru noted that compliance with the new standards mechanism may have some unexpected cost implications which do not arise under the present system of Welsh language schemes:

“Essentially, it appears that, if the iterative process of agreeing a Welsh Language Scheme disappears, the FE colleges will be expected to invest in a degree of self-regulation to achieve the same aims. At present, the Welsh Language Board provides colleges with support and expertise (as well as statutory regulation) each time a Welsh Language Scheme is revised. If the Welsh Language Board or the Commissioner’s office will not provide this support under the Proposed Measure, colleges will need to consider how to source this expertise through different means. There might be costs involved. It is not clear whether these costs are recognised in the Proposed Measure.”<sup>468</sup>

## **Our view**

509. We share the concerns of consultees at the lack of information available in the Explanatory Memorandum on the financial impact of the proposed Measure’s aims and objectives.

510. We are aware that the National Assembly’s Finance Committee is looking at the cost implications of the proposed Measure. However, **we consider it very important that the Welsh Government works openly with all organisations subject to this legislation to ensure that any future regulatory impact assessments that arise as a consequence of this proposed Measure accurately reflect the cost of implementing its provisions.**

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<sup>466</sup> RoP, paragraph [369], 10 June 2010, Legislation Committee No. 2

<sup>467</sup> RoP, paragraph [370], 10 June 2010, Legislation Committee No. 2

<sup>468</sup> Written Evidence, MI 41

## Witnesses

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The following consultees provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at: <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-third-lc2-agendas.htm>

### *17 March*

Alun Ffred Jones AM    The Minister for Heritage, Welsh Government

### *22 April*

Emyr Lewis                      Lawyer and the United Kingdom's representative on the Council of Europe's Committee of Experts investigating the compliance of states with the European Charter for Regional and Minority Languages  
LC2(3)-07-10 ; Paper 1

Professor Colin Williams                      School of Welsh, Cardiff University  
LC2(3)-07-10 ; Paper 2

### *29 April*

Meri Huws                      Chair, the Welsh Language Board

Meirion Prys Jones                      Chief Executive, the Welsh Language Board

Gwyn Jones                      Director of Policy and Terminology, the Welsh Language Board  
LC2(3)-08-10 ; Paper 1

Huw Roberts                      Director of Welsh Affairs, Royal Mail Group

Stuart Taylor                      Head of External Relations Wales, Royal Mail Group  
LC2(3)-08-10 ; Paper 2

Richard Tasker            Head of Direct Debit Operations, Scottish Power  
Eifion Griffiths           Senior Analyst, Network Operations, Scottish Power  
LC2(3)-08-10 ; Paper 3

*13 May*

Kay Powell                The Law Society  
LC2(3)-09-10 ; Paper 1  
Ann Beynon                Chief Executive, BT in Wales  
Elenor Bonner-Evans    BT in Wales  
LC2(3)-09-10 ; Paper 2  
Hamish McLeod           Mobile Broadband Group UK  
LC2(3)-09-10 ; Paper 3  
Domhnall Dodds         Head of Government Affairs, UK Competitive Telecommunications Association  
LC2(3)-09-10 ; Paper 4  
Pat Ardis                  Managing Director, Camgas  
Rob Shuttleworth        Chief Executive, UKLPG  
LC2(3)-09-10 ; Paper 5

*20 May*

Simon White              Chief Executive, One Voice Wales  
LC2(3)-10-10 ; Paper 1  
John Pockett              Confederation of Passenger Transport Wales  
Tony McNiff               Confederation of Passenger Transport Wales  
LC2(3)-10-10 ; Paper 2  
Ben Davies                Arriva Trains Wales  
Michael Vaughan        Arriva Trains Wales  
LC2(3)-10-10 ; Paper 3

*27 May*

Menna Machreth	Chair, The Welsh Language Society
Colin Nosworthy	The Welsh Language Society
Catrin Dafydd	The Welsh Language Society LC2(3)-11-10 ; Paper 1
Alun Owens	Celebrating our Language
Ceri Owen	Celebrating our Language LC2(3)-11-10 ; Paper 2
Iwan Williams	Officer, Mentrau Iaith Cymru
Siân Lewis	Committee Member, Mentrau Iaith Cymru LC2(3)-11-10 ; Paper 3
Derek Parlour	Head of Commercial, National Rail Enquiries LC2(3)-11-10 ; Paper 4

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Graham Benfield	Chief Executive, Wales Council for Voluntary Action
Lynne Reynolds	Policy Officer, Wales Council for Voluntary Action LC2(3)-12-10 ; Paper 1
Rhys Jones	British Gas LC2(3)-12-10 ; Paper 2
Non Rhys	Wales Policy Manager, Federation of Small Businesses Wales LC2(3)-12-10 ; Paper 3
David Rosser	Director, Confederation of British Industry Wales
Rebecca Thomas	Senior Policy Advocate, Consumer Focus Wales
Liz Withers	Principal Policy Advocate, Consumer Focus Wales LC2(3)-12-10 ; Paper 4

*17 June*

Bernat Joan Í Mari      Secretary for Language Policy, The  
Government of Catalonia  
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Alun Ffred Jones AM    The Minister for Heritage, Welsh  
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## List of written evidence

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The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at:

[http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-wl/welsh\\_language\\_measure\\_consultation\\_responses.htm](http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-wl/welsh_language_measure_consultation_responses.htm)

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## **Correspondence from Alun Ffred Jones AM, the Minister for Heritage**

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[Letter from Alun Ffred Jones AM, the Minister for Heritage - Additional Evidence, 14 June 2010](#)

[Letter from Alun Ffred Jones AM, the Minister for Heritage - Additional Evidence, 30 June 2010](#)

[Letter from Alun Ffred Jones AM, the Minister for Heritage - Additional Evidence, 1 July 2010](#)

## **Annex 1: Matters 20.1 and 20.2 of Schedule 5 to the Government of Wales Act 2006**

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### **Matter 20.1**

Promoting or facilitating the use of the Welsh language; and the treatment of the Welsh and English languages on the basis of equality.

This matter does not include the use of the Welsh language in courts.

This matter does not include imposing duties on persons other than the following—

- (a) public authorities;
- (b) persons providing services to the public under an agreement, or in accordance with arrangements, made with a public authority;
- (c) persons providing services to the public established by an enactment;
- (d) persons established by prerogative instrument—
  - (i) to advance learning and knowledge by teaching or research or by developing or awarding qualifications;
  - (ii) to collect, preserve or provide access to recorded knowledge or to objects and things which further understanding;
  - (iii) to support, improve, promote or provide access to heritage, culture, sport or recreational activities;
  - (iv) engaged in promoting a wider knowledge and representing the interests of Wales to other countries;
  - (v) engaged in central banking;
- (e) persons upon whom functions of providing services to the public are conferred or imposed by an enactment;
- (f) persons providing services to the public who receive public money amounting to £400,000 or more in a financial year;
- (g) persons overseeing the regulation of a profession, industry or other similar sphere of activity;

- (h) providers of social housing;
  - (i) persons providing the public with the following kinds of services or with other services which relate to any of those services—
    - (i) gas, water or electricity services (including supply or distribution);
    - (ii) sewerage services (including disposal of sewage);
    - (iii) postal services and post offices;
    - (iv) telecommunications services;
    - (v) education, training (where the provider receives public money for its provision), or career guidance, and services to encourage, enable or assist participation in education, training or career guidance;
    - (vi) bus and railway services;
    - (vii) services to develop or award educational or vocational qualifications;
  - (j) persons opting or agreeing to be subject to the imposition of the duties.

With regard to imposing duties in relation to paragraph (b), this matter only includes duties in respect of services to the public provided under an agreement, or in accordance with arrangements, made with a public authority.

A person who receives public money amounting to £400,000 or more in a financial year does not fall within paragraph (f) unless—

- (a) that person also received public money in a previous financial year, or
- (b) a decision has been made that that person will receive public money in a subsequent financial year.

With regard to imposing duties in relation to paragraph (i)—

- (a) this matter only includes duties in respect of the services and the other related services mentioned, and

(b) in respect of the related services, this matter does not include the provision of related services in a shop, other than post office counter services and the sale of tickets or provision of timetables for bus and railway services.

This matter does not include imposing duties about broadcasting.

This matter does not include imposing duties on a person (other than on a Welsh language authority) unless there is a means for that person to challenge those duties, as they apply to that person, on grounds of reasonableness and proportionality.

## **Matter 20.2**

Provision about or in connection with the freedom of persons wishing to use the Welsh language to do so with one another (including any limitations upon it).

Interpretation of this field

In this field—

“broadcasting” means the commissioning, production, scheduling, transmission or distribution of programmes (including advertisements, subtitles, continuity announcements and teletext), access services, interactivity, online content and other output of a similar nature for television, radio, the internet or other online or wireless platforms;

“bus service” means a scheduled service, by public service vehicle (within the meaning of section 1 of the Public Passenger Vehicles Act 1981(3)), for the carriage of passengers at separate fares, other than a service—

(a) for which the whole capacity of the vehicle has been purchased by a charterer for the charterer’s own use or for resale;

(b) which is a journey or trip organised privately by any person acting independently of the vehicle operator; or

(c) on which the passengers travel together on a journey, with or without breaks and whether or not on the same day, from one or more places to one or more places and back;

“enactment” includes any future enactment;

“shop” means any premises where the sale of goods is the principal trade or business carried on;

“postal services” means the service of conveying letters, parcels, packets or other articles from one place to another by post and the incidental services of receiving, collecting, sorting and delivering such articles;

“public authority” means each public authority within the meaning of section 6 of the Human Rights Act 1998(4);

“public money” means—

(a) moneys made available directly or indirectly by—

(i) the National Assembly for Wales;

(ii) the Welsh Ministers;

(iii) Parliament;

(iv) Ministers of the Crown; or

(v) an institution of the European Communities;

(b) moneys provided by virtue of any enactment;

“telecommunications service” means any service that consists of providing access to, or facilities for making use of, any system which exists (whether wholly or partly in the United Kingdom or elsewhere) for the purpose of facilitating the transmission of communications by any means involving the use of electrical, magnetic or electro-magnetic energy (including the apparatus comprised in the system), but does not include broadcasting, radio, or television;

“Welsh language authority” means a person upon whom an enactment confers or imposes functions of—

(a) imposing or enforcing on other persons duties relating to the Welsh language,

(b) determining the duties relating to the Welsh language that are imposed on other persons, or

(c) deciding challenges to the duties relating to the Welsh language that are imposed on other persons.

## **Annex 2: Written submissions suggesting specific and technical amendments**

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