THE BALANCE OF WHAT IS INCLUDED ON THE FACE OF MEASURES AND WHAT IS PROVIDED FOR IN REGULATIONS

1. The balance between primary and subordinate legislation[1] is an issue that has caused concern since the end of the 19th century. By 1891 the statutory rules and orders (the predecessors of statutory instruments) were more than twice as extensive as the statutes enacted by Parliament. Despite concerns being expressed in the years which followed[2] there was an exponential growth in subordinate legislation "fuelled by two World Wars and the Welfare State"[3]. By 2001 the published statutory instruments were more than six times as extensive as the Acts of Parliament. In 2009, 3499 statutory instruments were made in the United Kingdom; this includes 301 statutory instruments made by the Welsh Ministers.

2. A wide range of matters are dealt with in subordinate legislation in the UK. They range from relatively minor matters like the setting of fees to all sorts of technical matters. Other items of subordinate legislation make provision about extremely important matters in some detail for example the Job Seekers Allowance Regulations 1996 (SI/ 1996/207). As one commentator has observed "it is true to say that today hardly any Acts of social significance is passed that does not confer significant powers to amplify its provisions."[4] It is not uncommon for Acts of Parliament to be little more than 'skeleton' or 'framework Acts setting the general structure of the law but leaving all matters

[1] The terms "secondary legislation", "subordinate legislation" and "delegated legislation" are used interchangeably in this paper to express the same concept.
[2] For example, the Report of the Committee on Ministers Powers (1932) Cmnd.4060.
[3] Wade and Forsyth, *Administrative Law*, 9th edition, Oxford University Press, p.859.
[4] *Craies on Legislation*, 8th edition, Thomson, Sweet & Maxwell, editor Daniel Greenberg, p 100..

of detail to be provided by regulations or orders. And as well as 'skeleton' or 'framework' Acts many other acts depend on subordinate legislation in order to give the provisions in primary legislation substance.[5]

3. The Measures made by the Assembly contain examples of 'skeleton' or 'framework' type of provision and provision conferring subordinate legislative powers that deal with important points of detail that give substance to the overall effect. Assembly Members are rightly concerned to ensure that executive powers to make subordinate legislation are appropriate in the first place and where they are given that they are properly controlled. The Welsh Assembly Government takes the view that legislative powers should only be conferred when the public policy considerations require them and, when they are conferred, they should be subject to an appropriate degree of scrutiny by the Assembly.

4. The issues around the balance of primary and delegated legislation were considered in the Report of Hansard Society Commission on the Legislative Process, chaired by the Rt Hon. Lord Rippon of Hexham PC, QC[6]. Numerous criticisms were made in evidence to the Commission about the use of delegated legislation. These included – (a) the increased power it gave to Ministers, (b) the lack of Parliamentary time for scrutiny of delegated legislation and

[5] Craies gives the example of part 2 of the Nationality Immigration and Asylum Act 2002. A number of key provisions of that part operate by reference to the concept of a "dependent". But the definition of that concept in section 20 provides in that "for the purposes of this part a person is a "dependent on" of asylum seeker if (and only if) that person – (a) is in the United Kingdom, and (b) is within a prescribed class." ("Prescribed" meaning prescribed by Secretary of State by Order or Regulations" – Section 39.1). So, it will be impossible to know the effect of Part 2 in relation to many cases without recourse to the subordinate legislation.

[6] November 1992 published by the Hansard Society for Parliamentary Government.

inadequate Parliamentary scrutiny, (c) the difficulty of campaigning against Bills that include extensive delegation of powers, (d) the fact that statutory instruments cannot be amended, (e) the danger of the drafters of Bills thinking they could rely on Regulations to put matters right if there was a flaw in the Bill, (f) fact that the drafting of statutory instruments were sometimes delayed until too near the time they had to be applied, (g) the uncertainty of leaving things to regulations and waiting for them to be made, (h) the difficulty of discovering the law on any matter if it is buried in the number of statutory instruments, (i) the difficulty for Parliament and other bodies of appreciating the full effect of a Bill before the relevant delegated legislation is available.

5. It is accepted that these criticisms may also be levelled at powers to make subordinate legislation in Assembly Measures and these points must be accepted as disadvantages of subordinate legislation. However, the report also gave great weight to evidence about the advantages in leaving more detail to subordinate legislation. The following matters were noted as advantages – (a) keeping primary legislation uncluttered, (b) the fact that subordinate legislation is not subject to the same constraints as Parliamentary timetable as is primary legislation and therefore there could be more time for consultation, (c) the greater flexibility it permits (because it does not involve passing a Bill through Parliament) in updating the law to match changed circumstances and in correcting or amending it in the light of experience. The report concluded that on balance the main advantages of making greater use of subordinate legislation outweigh the very real disadvantages. In particular, the report emphasised the merit of keeping Bills as clear, simple and short as possible. The Commission

thought that this not only makes Acts easier for the user to follow, but it helps Parliament to focus on the essential points, and on policy and principle, in its debates on Bills. Above all, the report found advantages – for the Government and for those affected by legislation – in keeping the legislative process flexible so that legislation can be kept as up-to-date as possible. If significant changes in the way the law is to work – in the light of experience of how it is operating, or following changed circumstances – can only be made through an Act of Parliament then given the pressures on the Parliamentary timetable such changes may have to wait several years before a Bill can be introduced. The report noted that it is much easier to bring in amending statutory instruments with less delay. The report also said that less rigidity in procedures and timing should also facilitate improved consultations.

6. The advantages and disadvantages of subordinate legislation noted in respect of Parliamentary law making apply to a great extent to the situation in Wales too, since the system of Welsh devolution is modelled on the Westminster Parliamentary system. But the question of whether there is any justification in maintaining the distinction between primary and secondary legislation in the laws made in Wales is a fair one to ask[7]. In an ideal world all Welsh legislation on a particular topic would be in one document scrutinised and approved by the Assembly; however, this kind of approach is not possible in its fullness in Wales for the same reasons that it is not possible for the United Kingdom. The space

[7] Lord Justice John Thomas addressed the balance between primary and secondary legislation in Assembly Measures in his St David's Day lecture 2010 for Wales Governance Centre ("Our Changing Government Structures: Clarity and Confidence.") Lord Justice Thomas said in the lecture that "there is …. little reason for maintaining the distinction between primary and secondary legislation in the scheme of devolution for a small country such as Wales overlaying with complex government structures at United Kingdom and EU level.".

in the Assembly's work programme for primary legislation is limited. In addition to the Government's business, time must also be found for Measures proposed by backbench Assembly Members and Assembly Committees. Each year Ministers in the Welsh Assembly Government Cabinet must bid for space in the Government's programme and they have no guarantee that a slot will be found. This means that opportunities to legislate must be seized when they arise in order to ensure that public policy can be advanced and the law remain updated. Power to legislate by subordinate legislation may afford greater opportunity to undertake full consultation with the people likely to be affected by the legislation and can be justified as long as appropriate arrangements are made for Assembly scrutiny of any subsequent legislation. There are also some matters that will always be dealt with more appropriately in subordinate legislation because of their technical or minor nature or because there is limited scope for change (as in the case of implementation of EU law); for example, much Assembly time will be wasted and very little public benefit will be gained if complex technical provisions on water quality - which are currently derived from the UK's EU obligations and contained in regulations - are made subject to the full rigour of Assembly scrutiny in three stages under the Standing Orders for making Measures. Placing all provisions that a reader needs to know in one document is an unachievable ideal in the arrangements for making legislation. The real solution to the problem of access to the law lies in improved arrangements for consolidation of existing law whether primary or secondary, and effective on-line access to up to date consolidated versions of legislation that applies in relation to Wales. The Assembly could do much to assist

consolidation by ensuring that special procedures are in place in its Standing Orders for consolidation of the law.

7. When decisions are made about what to include on the face of a Measure and what to leave to subordinate legislation Ministers, policy officials and drafters are aware that they are striking a balance between the advantages and the disadvantages. The following factors are taken into account in deciding whether to make a provision in primary or secondary legislation –

   (a) the provisions may need adjusting more often but it would be sensible for the Assembly to legislate for by Measure;

   (b) there may be provision which is better made after some experience of administering the new Measure which is not essential to have as soon as it begins to operate;

   (c) the use of delegated powers in a particular area may be well precedented and uncontroversial;

   (d) there may be transitional and technical matters which would not be appropriate to deal with by primary legislation.

   A factor in the other direction is that the detailed provisions are so much of the essence of the Measure that the Assembly ought to consider them along with the rest of the Measure.

8. The balance between primary and secondary legislation is to a large extent a reflection of the age in which we live. Indeed "the more complex the world becomes, the more complex becomes the form of regulation required to control activities in accordance with social and political policy, the less suited that

regulation becomes to primary legislation and the more necessary it becomes to confer and exercise enabling powers"[8]. The fact of the matter is that if there were no facility for making subordinate legislation on important as well as trivial matters, many important areas of public policy could not be advanced in a timely way or perhaps even at all.

9. But having said that, the Government fully appreciates its responsibility to ensure that there is an appropriate balance between primary and secondary legislation. As with all balancing exercises there will be disagreement sometimes and different decisions on the same subject matter may be reached in different contexts. The NHS Redress (Wales) Measure 2008 is an example of a framework Measure where in different circumstances the Government would have preferred to include more detail on the face of the Measure. As the Subordinate Legislation Committee accepted in its report on the Measure[9], there were valid reasons why a framework Measure was justified in that case at that time. [10] In her evidence to the Committee, the Minister for Health and Social Services accepted that the powers to be conferred on the Welsh Ministers were very broad, but was of the view that this should not be regarded as a precedent. The Minister stressed that each case needed to be looked at individually.

[8] *Craies*, 8th edtion, p.14.
[9] http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-legislation-dissolved/bus-committees-third-sleg-home/bus-committes-third-sleg-current_inquiries.htm
[10] The justification for the framework approach was explained in paragraph 5.2 of the Explanatory Memorandum laid with the proposed Measure:

"The detail of the policy in relation to NHS Redress is currently under development and NHS bodies and other interested parties are playing an active role in identifying what needs to change in the current processes and what arrangements need to be put in place for the future. A steering group, chaired by a Trust Chief Executive, has been established to oversee this work which will continue for some time before, during and after the introduction of the Measure. It is felt that such a process will be vital to the future success of any arrangements. For this reason, the regulation making powers set out in the Measure are widely drawn to enable the results of this work to be taken into account in the drafting of the regulations. Because of the timescales involved in this work, the draft regulations will not be considered alongside the draft Measure."

10. The Government thinks that the balance between primary and secondary legislation in each of the Measures was justified in the circumstances which applied at the time they were introduced. In all decisions taken by the Government about the balance between primary and secondary legislation the over-riding concern is to advance the public interest. Whenever subordinate legislation powers are thought necessary the Government considers very carefully whether or not they are appropriate at all and in all cases the Government will seek to ensure that an appropriate level of scrutiny by the Assembly is applied to the exercise of the power.

EXTENT TO WHICH MEASURES ARE DRAFTED IN CLEAR LANGUAGE AND PROVIDE LEGAL CLARITY

11. All Government proposed measures are drafted by, or under the supervision of, drafters in the Office of the Welsh Legislative Counsel. The fundamental aim of the drafter "is as easy to describe as it is difficult to achieve: to produce legislation which is as clear and simple as possible, while achieving a reasonable level of certainty."[11]. The need for clarity is an overarching principle that Welsh Legislative Counsel apply to their drafting and drafts must also be effective; that is, they must achieve the policy objectives underlying the legislation.

12. Clarity is about making it as easy as possible for readers to understand what is being said and it is the means by which drafts can be made effective. An

[11] Craies on Legislation, 8th edition, Daniel Greenberg (ed) p.307.

effective draft is certain in its effect, accurate and delivers ministerial policy objectives. This does not mean that in an effective draft every possible interpretation no matter how fanciful is to be responded to with clarifying words. The level of certainty is to be targeted at the "fair minded and reasonable reader"[12]. of the text and not the reader searching for perverse interpretations.

13. In order to be effective, drafters aim to produce a draft that is easy for the reader to understand. As a minimum a draft needs to be easily understood by a reader who understands the law covering the subject matter of the draft and any general law applicable (such as the Interpretation Act 1978). Even if a draft is clear enough to be effective, it may still be possible to make it easier to understand. The interests of the reader need to be considered by the drafter, bearing in mind that there is usually a wide range of different kinds of reader. These are the people who will be using the Measure when enacted and their requirements maybe different depending on who they are. What one set of readers finds easy may be difficult for another and competing interests need to be balanced and given due weight in the drafting.

14. It should also be borne in mind that simplicity and clarity - while related - are not the same thing. Clarity requires both simplicity and precision. This point is made by G.C. Thornton in his book 'Legislative Drafting'(4th edition). He points out that the demands of simplicity and precision call for compromise between them. What is simple will often be precise and what is precise will

[12] See the discussion of changes in drafting style at paragraph 11.4 of the Report of the Renton Committee on the Preparation of Legislation "(Cmnd.6053).

often be simple, but one does not follow from the other. On the one hand an over emphasis on simplicity will lead to imprecision and doubt about the effect of the law. While on the other hand a law drafted in "blind pursuit of precision will inevitable lead to complexity; and complexity is a definite step along the way to obscurity".[13] The drafting carried out by Welsh Legislative Counsel takes account of the tension between complexity of material and simplicity of expression and the government's view is that a reasonable balance has been achieved in the drafting of Measures so far. We think Welsh Legislative Counsel have achieved a high degree of clarity in their Measure drafting given the complexity of the policies they implement.

15. There are a number of things which contribute to achieving clarity. The use of plain language is vital and matters such as structure and organisation material are important too. The ease with which draft legislation can be easily understood is also affected by policy and handling considerations (for further explanation about this see paragraph 32 below). Another crucial consideration is the time available for drafting. Drafts are produced under tight time constraints and depend on policy input from a wide range of interests which may impact on drafting at late stages in the preparation of a Measure. Work on improving clarity takes time, and sometimes this will not be available. The aim of drafters is to make a draft as easy to understand as it is possible to make it in the time available.

[13] G.E.Thornton *Legislative Drafting* (4th edition) p. 52.

16. The view of the Welsh Assembly Government's drafters is that it is not sensible to rigidly apply a set of rules to legislative drafting. Different contexts will call for different approaches. What is important is that the overall aim should be clarity for the reader. This is best achieved by the flexible application of different techniques according to the particular drafting task. What follows in this part of the paper is a discussion of some of the drafting techniques uses by Welsh legislative Counsel to achieve clarity. This is not an exhaustive examination of the techniques deployed Further information can be provided if necessary. It should also be noted that practice has developed over time.[14]

Plain Language

17. All Government Measures are drafted in modern standard Welsh and English, reflecting ordinary general usage for formal written communication. Plain language drafting in English is well established and there is a wealth of literature on the subject to inform the quality of drafting. The type of Welsh used to draft legislation is standard formal written Welsh. Unlike English, there was no precedent for a Welsh legislative linguistic register before the National Assembly came into being and started legislating bilingually in 1999. The legislative linguistic register has been developed since then and continues to develop. The aim is to produce a text which any Welsh-speaker who reads Welsh could understand.

[14] For example, in the first Measure, the NHS Redress (Wales) Measure 2008, the device "Subject to…" is used frequently before the main proposition. This is used much less frequently now (see paragraph 23 of this paper).

18. Where practicable, the principles of Cymraeg Clir (plain Welsh)[15] are applied. The language needs to be understandable to speakers in all parts of Wales and so the use of dialect and colloquialisms is generally avoided. However, there are rare instances where there is not an acceptable word for the whole of Wales and in those cases regional alternatives are used in Welsh legislative drafting; for example,. Rheoliadau Gwrychoedd neu Berthi Uchel (Ffioedd) (Cymru) 2004[16] (The High Hedges (Fees) (Wales) Regulations 2004) where both 'gwrychoedd' and 'perthi' are used for 'hedges'[17]. No alternatives have appeared in Measures so far, although the issue has arisen. There are two Welsh words for milk: 'llaeth' and 'llefrith'. In section 1(1)(b) of the Red Meat (Wales) Measure 2010 only 'llaeth' is used. The reasoning being that although there are two words in use, one is dominant and would be understood in all parts of Wales. In this case it was not thought worth disrupting the flow of text, which inevitably follows when mentioning alternative words. This demonstrates need for the flexible application of drafting techniques to produce the best result.

19. Legislation is a relatively new domain for the Welsh language and much of the content of legislation is technical in nature. As a result, some of the phrases and terms used may be unfamiliar to some Welsh-speakers. That is inevitable. The use of neologisms for legislative drafting in Welsh is minimal, but sometimes necessary. This is sometimes manifested in appropriating a word already in existence but which has fallen out of favour in modern Welsh and

[15] For further details about Cymraeg Clir see http://www.bangor.ac.uk/ar/cb/cymraeg_clir.php .
[16] SI 2004/3241 (W.283).
[17] Many Welsh speakers would use "clawdd" for "hedge". "Clawdd" is a word understood in all parts of Wales, but with different meanings. The word is commonly understood in formal Welsh to be the mound or embankment on which a hedge sits.

lending it a new meaning. The word ‘mangre’ (with the appropriate mutation in context to ‘fangre’) is used in section 41 of the Children and Families (Wales) Measure 2010 to convey the meaning of ‘premises’. The word ‘premises’ was a longstanding problem for legislation in Welsh until the word ‘mangre’ (a place or location) was appropriated for the drafting of statutory instruments some years ago and given a specific meaning. Similarly, in section 36 of the Proposed Welsh Language Measure, the word ‘neilltuedig’ (already in existence with the meaning ‘set apart’ or ‘reserved’) was appropriated for the English ‘qualifying’ as in ‘qualifying person’ and ‘qualifying service delivery standard’.The word normally used for ‘qualifying’ is ‘cymwys’ but the decision was taken to appropriate another word because ‘cymwys’ also means ‘applicable’ and ‘penodol gymwys’ was already in use in the Measure for ‘specifically applicable’ and ‘cymwysadwy’ in use for ‘potentially applicable’.In coining new terms, best terminological practice is observed. The Welsh Assembly Government can avail itself of the services of the Welsh Language Board’s Terminology Standardization Committee for advice.

20. The drafting of Measures can be characterised by – (a) the use of simple familiar words rather than complex expressions and unusual words (subject to the points made in paragraph 19 on neologisms); (b) the absence of archaic words (such as thereby, thereafter, thereto, hereby, hitherto, hereafter etc); (c) the avoidance of jargon, especially Government shorthand expressions and acronyms; (d) the use of short sentences or “sense-bites” (see paragraph 22 below).

21. The drafting of Measures has also been responsive to the views of Assembly Members on traditional drafting techniques that they have considered to be confusing for lay readers of legislative text. A common issue in legislative drafting is the need to specify a list of things that is included within some general words. The issue then arises as to whether the list is an exclusive list or merely a list of examples. A very common modern technique in UK legislative drafting is to say "including, *in particular*,…". The "in particular" indicating that the list is not exhaustive. The Assembly Committee consideration of the Carers LCO suggested that this common drafting technique was not understood, especially by readers without legal training. The practice of Welsh Legislative Counsel is to use plain language alternatives in Measures such as "includes (but is not limited to)" or "includes (among other things)".

Structure and organisation of text

22. A great deal of effort is put into achieving good sentence structure. Large blocks of unbroken text are difficult to understand so Welsh Legislative Counsel avoid subsections or undivided sections of more than six unbroken lines. Sometimes, however, a single complex proposition may be best expressed in a single sentence with appropriate paragraphing rather than a series of short sentences in successive subsections. A characteristic of provisions in Government Measures is the presentation of material in short

"sense-bites" , where each sense-bite is contained in a separate phrase or paragraph which grammatically forms part of a single long sentence[18].

23. A common feature of statutory instrument drafting, past practice in primary legislation and much general legal drafting is that sentences often start with a qualification or exception of the main proposition being advanced. If a sentence starts with "Subject to subsection (4)…" the reader is immediately distracted by the qualification rather than being directed to the main proposition the drafter is trying to convey. Generally it is better for the reader to understand the main proposition and to be warned about any qualification or exception to that proposition afterwards. This is the general approach taken in Government Measures. As with many drafting techniques there may be circumstances in which it is best not deployed. In cases where the exception is so fundamental to the effect of the proposition that it would be misleading to allow the reader to absorb the proposition without first being aware of its relationship with the other inconsistent proposition[19].

24. The practice of Welsh Legislative Counsel is to avoid inserting words between the subject and the main verb in a legislative sentence. For example-

"the Welsh Ministers may issue a licence to the applicant if the required conditions are met."

not

"the Welsh Ministers may, if the required conditions are met, issue a licence to the applicant."

[18] For further information about "sense-bites" see Butt & Castle *Modern Legal Drafting*,2nd edition, Cambridge University Press, p.181.
[19] *Craies*, 8th Edition, p.317.

25. Sentences are that are difficult to understand often have too many clauses or subordinate clauses, or they have groups of words in positions that inhibit comprehension or create ambiguity. The position of conditions in a sentence can effect its clarity.[20] If there are several conditions or exceptions, it is usually better to state the main proposition first and list the conditions or exceptions afterwards. For example –

"a person is entitled to the grant if the person –

(a) is ordinary resident in Wales,

(b) is attending an educational institution full-time, and

(c) has attained the age of 18."

Not

"if a person is ordinarily resident in Wales, is attending an education institution full-time, and has attained the age of 18, that person is entitled to a grant."

26. Placing multiple conditions at the start of the sentence often leads to a "sandwich" sentence. The following structure is a sandwich –

"If an inspector reasonably believes that –

(a) a premises falling within this part are unfit for human occupation,

(b) they are nevertheless occupied, and

(c) the life or health of the occupant is at risk,

the inspector may serve a notice under the section.

[20] For a detailed exposition of the issues and the background research see the paper presented by Dr. Duncan Berry to the Commonwealth Association of Legislative Counsel Conference 2007 "Reducing Complexity in Legislative Sentences", published in the January 2009 edition of "The Loophole" (the Journal of the Commonwealth Association of Legislative Counsel) http://www.opc.gov.au/calc/loophole.htm) .

27. This structure can impede understanding, especially if the main opposition appears at the end and contains a lengthy amount of further material. There are a few examples of these kinds of provision in Government Measures but their use is rare. There are no examples with complicated main propositions appearing at the end.

28. Government Measures have also deployed tables as an alternative to the traditional legislative sentence. A table is a useful aid to understanding where there are a number to cases to which a single rule applies. Placing the material in table avoids the need to repeat the rule in respect of each case and the structure of the material allows the reader to visualise the concept being conveyed. For an example of a table being used to convey a legislative proposition see section 3 of the Learner Travel (Wales) Measure 2008.

References and amendments to other legislation

29. Drafting by reference to other legislation can make legislation difficult to understand. When there is a reference to other legislation the reader needs to refer to multiple documents in order to understand what is being said. Drafting by reference to other legislation is something that Welsh Legislative Counsel try to avoid. But in some circumstances the alternative to legislation by reference could cause more confusion and complexity.

30. An example of this can be found in section 10 of the Proposed Waste (Wales) Measure. This provision applies the powers to make provision about civil sanctions in the Regulatory Enforcement and Sanctions Act 2008 (‘the 2008

Act') to provision made by regulations under the Measure. An alternative way of dealing with this would have been to set out in full on the face of the Measure the range of civil sanctions provisions that could be made by regulations. This would have greatly increased the size of the Measure, possibly doubling or trebling the length of the legislation. However, the increased length of the legislation that would have resulted was not the only reason why it was decided instead to legislate by reference to 2008 Act. The policy of the Welsh Ministers in relation to the power to make regulations prohibiting disposal of waste in landfill is to make provision by amending the existing Environmental Permitting Regulations made under the Pollution Prevention and Control Act 1999. Regulations under that Act may already include provision about civil sanctions by virtue of 2008 Act. In the circumstances it seemed more sensible to ensure that all provisions about civil sanctions in the Environmental Permitting Regulations - once made - would be based directly, or indirectly through the Measure, on text of the 2008 Act. So the reasons of brevity and to ensure a clearer line of authority on the remaining powers for future regulations amending the Environmental Permitting Regulations it was decided that the best method in that case was legislation by reference to other legislation.

31. Measures sometimes amend existing legislation in Acts of Parliament rather than set out free-standing provision in Measures. This has two undesirable effects. First, the substantive provisions in both the English and Welsh texts appear in English (because they amend legislation in made English only). Secondly, it means that the reader needs to refer to more than one document in

order to understand the law. The drafting preference is always to set out free-standing provisions, but other factors may make this undesirable or impractical.

32. Part 1 of the Learning and Skills (Wales) Measure 2009 makes amendments to Part 7 of the Education Act 2002. The Education Act 2002 sets out the regime for the National Curriculum for Wales for children in maintained schools. This part of the Measure introduced local curricula for children at Key Stage 4. The new provisions for local curricula needed to be integrated in some way with the existing duties of governing bodies and local authorities to implement general requirements about the curriculum. There is also considerable merit in keeping all provisions about the school curriculum together as part of a coherent single code. Many legal and professional users access the text use on-line legal resources or paper consolidations of education law in encyclopaedias. In order to achieve these objectives and have free-standing provision in English and Welsh about local curricula, the Measure would have needed to re-enact all of the provisions of Part 7 of the Education Act 2002. This would have meant opening up debate on settled and potentially controversial areas of the existing law on the school curriculum. This would have not have been consistent with the immediate policy objectives which were quite properly focused on the local curriculum for pupils at Key Stage 4 and the local curriculum for students aged 16 to 18. The approach of amending the existing law in this kind of situation avoids debate being drawn into areas where there is no policy proposal for change, and ensures that the scrutiny time available is concentrated on the proposed policy changes. These

considerations impact on drafting choices and in turn they have the effect on clarity, or perhaps more accurately, the accessibility of the law.

33. Free-standing provision is favoured by the Government where practicable and amendments to other legislation are made only when there are good reasons for doing so.

Conclusion

34. The Welsh Assembly Government considers that the drafting of government Measures demonstrates a high level of clarity and this in turn delivers a reasonable degree of legal certainty. But this is how it seems from the Government's vantage point and we recognise that there is always room for improvement. The true test of clarity for a Government Measure is whether the users of the legislation understand what it says. For this reason, the Government is very keen to see the evidence submitted to the Committee's inquiry, and to hear the Committee's views, in order to consider ways in which we can improve our drafting.

THE EXTENT TO WHICH EXPLANATORY MEMORANDUMS PROVIDE A USEFUL GUIDE TO THE PROPOSED MEASURE

35. The Welsh Assembly Government has listened to the concerns expressed by the Assembly's Legislation Committees, Constitutional Affairs Committee and Finance Committee about the information contained in the Explanatory

Memorandums (including the Regulatory Impact Assessments) produced in support of Government proposed Measures. We acknowledge that more can be done to improve both of these documents.

36. The last three years have been a learning process and we are continually seeking to improve the standard of the documentation that supports Government proposed Measures. As a result, these are being considered as part of the Counsel General's Review of the Welsh Assembly Government's legislative processes. Workstreams to consider what improvements need to be made to these two documents specifically are ongoing. The feedback the Government has received from the Assembly Committees in relation to Explanatory Memorandums will be considered as part of this.

37. As explained in the Counsel General's letter of 15 September 2010 to the Chair of the Constitutional Affairs Committee updating the Chair on his Review, the Counsel General has instructed his officials to produce a model of best practice for Explanatory Memorandums to Measures following comments made by other Committee Chairs about the information contained in them. The Explanatory Memorandum accompanying the Proposed Mental Health (Wales) Measure is one such example and we will be building on this as a template for future Explanatory Memorandums. Once we have a definitive model of best practice, the Counsel General will subsequently write to the Chair of the Constitutional Affairs Committee to communicate what improvements are being made to these documents.

THE EXTENT TO WHICH REGULATORY IMPACT ASSESSMENTS PROVIDE A ROBUST ASSESSMENT OF THE LIKELY IMPACT OF PROPOSED MEASURES

38. The Government recognises that there have been criticisms from the Assembly Legislation Committees and particularly the Finance Committee regarding the lack of financial information contained in the Regulatory Impact Assessments for some of the Government proposed Measures. Two such examples are the Proposed Welsh Language (Wales) Measure and the Proposed Waste (Wales) Measure.

39. In both cases the Finance Committee reported that the lack of financial information contained in the Regulatory Impact Assessments accompanying the Explanatory Memorandum meant that they found it difficult to come to an informed judgement on the financial impact of the Measures. And whilst the Finance Committee accepted that any future regulations falling out of a Measure would be accompanied by a Regulatory Impact Assessment, the Committee believed that there should be sufficient information presented in support of an 'enabling' Measure to allow an informed understanding of its financial implications to be made because, in their view, secondary legislation usually attracts a lower level of scrutiny. The Government will be considering these points as part of the workstream on Regulatory Impact Assessments, which forms part of the Counsel General's Review.

40. It should be noted, however, that the Finance Committee did commend the Government on the careful work that had been undertaken on the costings for the Proposed Mental Health (Wales) Measure. Based on the positive feedback we have received on the Regulatory Impact Assessment accompanying the aforementioned Measure we will be looking to build on this as a model of best practice.

41. Finally, as mentioned above, the Government is looking at improving the standard of the Regulatory Impact Assessments, which form part of the Explanatory Memorandums produced to support Government proposed Measures and this work is being undertaken as part of the Counsel General's Review.