

Committee on Statutory Instruments Draft Report

CSI2

Title: The Welsh Language Commissioner (Appointment) Regulations 2011

Procedure: Affirmative

The Welsh Language (Wales) Measure 2011 (“the Measure”) creates the office of Welsh Language Commissioner (“the Commissioner”). Section 2 of the Measure provides that the Commissioner is appointed by the First Minister. In appointing the Commissioner, the First Minister is under a duty to comply with regulations that make provision about the appointment (referred to in the Measure as “appointment regulations”). The Welsh Ministers make these regulations to comply with their duty to make appointment regulations. These regulations make provision about convening a selection panel and its membership. These regulations also make provision about the principles to be followed by the First Minister in appointing the Commissioner and the Welsh language knowledge and proficiency that a person appointed as Commissioner must have.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument at this stage.

Merits Scrutiny

Under Standing Orders 21.3¹ the Assembly is invited to pay special attention to the following points in relation to the instrument:-

- i) These regulations are the first to be made under the Measure. The appointment arrangements for the Commissioner were considered in the third Assembly by both the Constitutional Affairs Committee and Legislation Committee 2 as part of their stage 1 scrutiny of the Measure. Both Committees drew attention to the proposed appointment arrangements and raised concerns over the perceived independence of the Commissioner. In particular, Legislation Committee No.2 in their scrutiny of the Measure raised concerns over the appointment of the Commissioner by the First Minister and recommended that the National Assembly for Wales have responsibility for the Commissioner’s appointment.
- ii) The Constitutional Affairs Committee’s report said:

“58. We do not believe it is part of our remit to comment on whether the appointment arrangements in this case strike the

¹ SO 21.3(ii) “that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.”

right balance between political direction and independence. However, we believe that the issue will be a key factor in establishing the credibility of the Commissioner in due course. We believe it is an area where Members of the National Assembly should have the opportunity to consider and decide whether the arrangements that are finally proposed get this balance right. For this reason we believe that the relevant appointment regulations should be made by the affirmative resolution procedure.”

- iii) Whilst Legislation Committee No.2’s recommendation was not accepted by the Welsh Government, it subsequently brought forward amendments to the proposed Measure so that the regulations governing the Commissioner’s appointment are now to be made by affirmative resolution of the Assembly. Regulation 2(d) also makes provision for an Assembly Member to be nominated by a relevant committee of the National Assembly to sit on the selection panel, although it is not clear how this will work in practice.
- iv) The Regulations define a “relevant committee” as “a committee of the National Assembly for Wales invited by the Welsh Ministers to make a nomination.” The Regulations do not provide any guidance as to which committee Ministers may invite to nominate a member of the panel and practical difficulties could arise if the invitation is made at a time when no committee is in a position to make a nomination (e.g. because of a recess. Members may therefore wish to seek an explanation from Ministers as to how they intend to apply this provision in practice.
- v) The Committee may wish to note that Schedule 1, paragraph 3(1) (b) of the Measure states that the First Minister must take into account the recommendations of the selection panel.

Legal Advisers

Committee on Statutory Instruments

June 2011

The Government has responded as follows:

Merits Response – The Welsh Language Commissioner (Appointment) Regulations 2011

The Welsh Government have listened to the concerns raised by Assembly Members regarding the appointment of the Welsh Language Commissioner and the legislative procedure that the regulations should follow. These Regulations will proceed via the Affirmative Resolution Procedure and

provide an opportunity for the National Assembly to play a role in the process that leads to the appointment of the Commissioner by the First Minister.

This Government's intention would be to invite the Assembly Committee with responsibility for scrutiny of issues relating to the Welsh language to nominate an Assembly Member to sit on the selection panel. However, in anticipation of a situation where no such Committee is in existence regulation 2(d) is drafted to provide a degree of flexibility for Welsh Ministers to invite another Committee to nominate an Assembly Member.

In most cases, the need to appoint a Commissioner and the consequent need to convene a selection panel will be known in advance. As such, this Government will take steps to correspond with the Committee during the Assembly term. However, in some circumstances it may be necessary to write to the Committee during a recess period.