Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
17 November 2014

Meeting time:
13.30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

For further information please contact:
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Agenda

1 Introduction, apologies, substitutions and declarations of interest

2 Evidence in relation to the Making Laws Inquiry (Pages 1 - 42)

(Indicative time 1.30pm)

Theodore Huckle QC, Counsel General

CLA(4)-28-14 - Paper 1 - Written evidence from the Welsh Government
CLA(4)-28-14 - Research Service Briefing
CLA(4)-28-14 -Briefing Statement

3 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Page 43)

CLA(4)-28-14 - Paper 2 - Statutory Instruments with clear reports

Negative Resolution Instruments

CLA463 - The Agricultural Subsidies and Grants Schemes (Appeals) (Wales) (Amendment) Regulations 2014
Negative procedure; Date made: 4 November 2014; Date laid: 7 November 2014; Coming into force date: 1 December 2014

CLA464 - The Rating List (Valuation Date) (Wales) Order 2014
Negative procedure; Date made: 5 November 2014; Date laid: 7 November 2014; Coming into force date: 1 December 2014

4 Papers to note (Pages 44 - 49)

CLA(4)-28-14 - Paper 3 - Written Statement in relation to the Social Services and Well-being (Wales) Act 2014

CLA(4)-28-14 - Paper 4 - Section 109 Order: Correspondence from SD Alliance

CLA(4)-28-14 - Paper 5 - Section 109 Order: Sustainable Futures Commissioner

5 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

(xi) any matter relating to the internal business of the Committee, or of the Assembly is to be discussed

Paper on Subordinate Legislation (Pages 50 - 54)
CLA(4)28-14 - Paper 6 - Paper on Subordinate Legislation

Final Report of the Well-being of Future Generations (Wales) Bill (Pages 55 - 81)
CLA(4)-28-14 - Paper 7- Final Report

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: LF/FM/0609/14

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff

30th June 2014

Dear David

Thank you for your letter dated April 2014 inviting written evidence to the Constitutional and Legislative Affairs Committee Inquiry into making laws in the Fourth Assembly.

I attach a response on behalf of the Welsh Government which I trust you will find helpful.

Yours sincerely

CARWYN JONES

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CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE: MAKING LAWS IN THE FOURTH ASSEMBLY

Response of the Welsh Government

This is the Welsh Government's response to the invitation to submit written evidence to the Constitutional and Legislative Affairs Committee's inquiry into making laws in the Fourth Assembly.

The Welsh Government notes the terms of reference set out in the Committee's letter of April 2014 and welcomes this opportunity to contribute to the inquiry. We are committed to producing high quality bilingual legislation which:

- endures;
- does not require frequent amending;
- avoids the courts having to decide what it means;
- gives effect to government policies;
- reduces compliance costs for users; and
- limits the scope for avoidance.

The Welsh Government is proud of its achievements in promoting an ambitious Legislative Programme during the Fourth Assembly. Legislation passed by the National Assembly has, and will have considerable benefit for the people of Wales. This ranges from wholesale reform of social services in Wales to changes in organ donation systems that should save many lives. Most recently the Housing (Wales) Bill, which we hope will shortly be passed, will among other matters introduce a radical new system of regulating private sector rented housing and improve and recast the law on homelessness.

Although we are not quite comparing like with like, it is notable that so far in this Assembly the number of pages of primary legislation passed is approximately 700 pages (including the Housing Bill). By July 2010 the comparable figure (in relation to Measures) was 239. In general, and including the larger Measures passed later in the Third Assembly, on average the legislative output of the Government has doubled during this Assembly.

Developing law is something that is easier said than done, even for governments and legislatures with centuries of experience and an abundance of expertise. In Wales it is still something that is relatively new to both the Welsh Government as the promoter of the majority of legislation, and to the National Assembly as a fully fledged legislature. Despite the achievements to date, the Welsh Government's highest organisational priority is to ensure that it is able to deliver well thought-out and well drafted legislation that meets the policy aspirations of Ministers for consideration by the Assembly.

Our response is set out in 4 Parts and an Annex of accompanying notes, as follows:

Part 1 Legislation development (general)

Part 2 Procedural matters and scrutiny

Part 3 Legislative drafting practices

Part 4 "Statute book" and accessibility

Annex

Document: Office of the Legislative Counsel, Legislative Drafting Guidelines

PART 1

Legislation development (general)

Policy development

1. The Welsh Government recognises that before embarking on the process of developing legislation, it is important to have clearly defined policy objectives and a strong evidence base to underpin them. It is essential that all those involved in developing legislation understand in some detail, firstly, how existing systems (where relevant) operate both in law and in practice and, secondly, exactly what change is desired and for what purpose and outcome. Policy development benefits from the discipline of involving lawyers, legislative counsel and economic and financial experts to challenge the proposals in order to ensure that they are robust. Challenge is important not only when the legislation is scrutinised by the legislature, but also by Ministers, civil servants and members of the public.

2. An essential part of the process is identifying whether legislation is required at all. Legislation is not always the most effective or appropriate way to implement policy and the need for it should be tested thoroughly during the policy development cycle. Informed consideration of the options available to deal with an identified problem may lead to the conclusion that legislation is unnecessary perhaps because existing powers may be used or a different approach could be taken through enhanced enforcement or changes in guidance or codes of practice. Legislation is an option to be brought forward only after comprehensive consideration of all the available options. Part of this process involves identifying potential conflicts or inconsistencies with other policies or other pieces of legislation also being developed by the Welsh Government, or indeed other governments and legislatures, and should be done as early as possible.

3. The policy development cycle approach of the Welsh Government applies to all proposals for legislation. This involves a five stage process of (1) evaluating the current position, (2) considering the case for change, (3) identifying options for change, (4) choosing a preferred option and (5) implementing the change. It includes:
    - identifying the social, economic and environmental objectives of the policy and the outcomes;
    - using evidence to develop a series of options;
    - identifying the different impacts that the policy might have;
    - assessing whether the policy will result in benefits that are sustainable;
    - economic appraisal;
    - programme and project management; and
    - monitoring and evaluation.

4. The rigorous process involved in the development of effective policies, and where relevant supporting primary legislation should not be underestimated. This is one reason why the Welsh Government has developed a comprehensive legislative development training programme and adopted a flexible resourcing policy for key work areas.

Consultation

5. The Welsh Government is committed to developing and implementing policy and legislation in an open way; a process assisted by engaging and consulting on a policy proposal both within Government and externally. This includes consultation with the UK Government, not least because of the complexity of the devolution settlement. The purpose of external engagement and consultation is to make information available to the public, listen to a wide range of interests, obtain more and better information from affected parties, and to be more responsive to what is heard. Consultation does not necessarily of course lead to consensus, but it is a process that permits a two-way flow of ideas and information between members of society and the Welsh Government. Experience suggests that formal consultations are always best complemented by more informal engagement, including discussions with stakeholders at meetings, seminars and workshops to ensure as wide a range of stakeholder views and opinions can be sought.

6. Such engagement and consultation not only improves understanding of a situation but can also assist to avoid piecemeal reform of one part of a system which may be interconnected with others.

7. The ultimate test for any piece of legislation is that it does what it was intended to do and benefits the people. Post-legislative scrutiny is an important matter for the Welsh Government which notes the recommendations of the Law Commission of England and Wales in a report published in October 2006:
   - the approach to post legislative scrutiny should be evolutionary (consistent with the way in which the system of government has developed);
   - it should build upon what is already in place; and
   - more systematic post-legislative scrutiny may take different forms.

Management of the legislative programme

8. As First Minister I oversee decisions on the content and management of the Welsh Government's Legislative Programme, supported by the Legislative Programme Board (a group consisting of senior officials including the Permanent Secretary, Directors General, the Director of Governance, the Director of Legal Services and First Legislative Counsel). Day to day management of the Programme is undertaken by a dedicated team (the Legislative Programme Unit (LPU)), which produces detailed timetables for each phase of development and scrutiny of each bill in the Programme. These timetables are reviewed routinely by LPU, and by the Office of the Legislative Counsel (OLC), the office tasked with drafting the Government's legislation.

9. Timetabling the Legislative Programme takes into account a number of factors such as the size and complexity of a bill, its urgency, drafting legislation in both English and Welsh, and the time available for Assembly scrutiny both in committee and plenary. This is an art not a science and must be subject to regular review in order to ensure that the deadlines set are met. This is, however, a process that works well and brings discipline to the legislative development process.

10. Progress on individual bills is also monitored through governance arrangements involving project boards reporting to the Senior Responsible Officer ("SRO") appointed for each bill. Project boards and SROs undertake assessments on progress and other risk factors and report regularly to the Legislative Programme Board. Additionally, Departments have internal governance arrangements for the purposes of reporting to the Minister in charge of a bill.

Capacity to legislate

11. Since receipt of primary legislative powers much has been done to improve the Government's capacity to legislate. OLC, for example, has doubled in size over this period and is continuing to expand with further recruitment having commenced recently. The office has been restructured to enable recruitment of experienced Parliamentary Counsel. More generally, the Welsh civil service has placed considerable emphasis on developing the legislation skills of officials. The Legislative Programme Board has put in place an extensive legislative improvement programme and probably the most thorough legislation education programme in the United Kingdom.

12. A concern for the Welsh Government is the time available for Members to properly scrutinise bills, something that is in the best interests of all concerned. This is particularly the case in so far as Committee time is concerned, especially where bills are introduced shortly after one another and fall under the scrutiny remit of the same subject Committee. Effective and appropriate scrutiny by Members is a key part of the legislative process, providing the necessary challenge and consideration of changes in law.

13. The Government is mindful of Business Committee's concerns on this point, and has increased the information provided on the introduction of current and future Bills to assist with that Committee's planning. There is an effective working relationship between LPU and Assembly Commission officials which allows for forward planning to be undertaken, as much as is possible, and we are committed to working together wherever possible to ensure scrutiny outcomes are not compromised. However, it is not always appropriate for the Government to defer introduction of Bills to allow a Committee to conclude its considerations of an earlier Bill or another inquiry it is undertaking. This is an area Members may want to consider further.

Non-government bills and amendments

14. The role and place of Member Bills in the democratic process is an important one. But it is recognised that developing effective and workable legislation is an exacting process and can be particularly problematic for Members who do not have access to the machinery of government and its policy development, legal and drafting expertise. Policy expertise in particular is crucial because of the need to understand how proposals would work in practice and how they would impact on other areas of government. If there are problems in relation to either then the legislation could be difficult or impossible to implement.

15. There have been occasions where Bills have been developed independently of existing laws and systems, presumably as it can be a more straightforward way of setting out the policy the Member wishes to pursue. As a case in point the Government sought to make significant changes during the amending Stages to the Regulated Mobile Homes Sites Bill (later the Mobile Homes (Wales) Act 2013) mainly because it created a new system of regulation that seemed to be intended to sit alongside an existing system – something which could have created confusion and added bureaucracy. For similar reasons the Government engaged with the Member in Charge of the Bill relating to recovery of medical costs for asbestos diseases, so it was drafted using a different approach to that initially envisaged, prior to it being introduced. On other occasions Member Bills (and indeed Measures) have sought, in our view, to be overly prescriptive in the way they set out matters on the face of the Bill when they have not been subject to a comprehensive policy development phase and full consultation. Flexibility is required in such circumstances; the Playing Fields Measure was recast partly for this reason. Significant amendment was also required to the Domestic Fire Safety Measure for policy and drafting reasons.

16. To date no Member Bills have been passed without significant amendment (or replacement) by the Government. This is not a criticism. For the reasons set out above, the involvement of the Government of the day is in many respects unavoidable and producing a bill in isolation of the machinery of government will always be particularly difficult.

17. It remains to be seen how Committee Bills will be developed and brought forward, but the Government continues to see a role for itself in using the machinery of government to legislate on matters for which there is full cross party consensus and agreement that there is a need for legislative reform (the Public Audit (Wales) Act 2013 being such an example).

18. Further work is also required to consider what more (if anything) could be done to facilitate non-government amendments that are accepted by the Assembly. It is considerably more difficult for any person who has not been involved in the initial drafting of a bill to draft technically accurate amendments. Further consideration should also be given to reaching a common understanding so far as possible of the legislative competence basis for non-government provisions in Assembly Bills. The issue here is that once passed it is for the Counsel General to consider whether to refer a Bill to the Supreme Court under section 112 of the Government of Wales Act 2006 or to defend such a Bill if referred by a UK Government Law Officer. In addition the points made above about the machinery of government also apply here.

Legislative drafting software

19. OLC have experienced difficulties during this Assembly with the legislative drafting software procured jointly by the Welsh Government and the Assembly Commission in 2010. From OLC's perspective the legislative drafting software was intended to ease the burden of drafting and preparing legislation, but has, in so far as amendments are concerned, proved to have the opposite effect. Using the software in the amending stages is, for various reasons, time consuming and resource intensive.

Legislative Counsel have to spend extensive time ensuring that amendments are produced within a very specific electronic format at the expense of spending enough time ensuring that the content is technically accurate and well drafted.

PART 2

Procedural matters and scrutiny

Scrutiny

20. When considering the appropriate level of scrutiny for bills, while certain standards in relation to transparency and consultation must be followed in all cases, in the Government's view much depends on the specific circumstances of each bill proposal. There are undoubtedly circumstances in which it would be appropriate to publish a draft bill prior to introduction, or to allow for more time for Stage 1 scrutiny, or indeed to proceed to a Report Stage. This could be the case, for example, in circumstances where a bill is particularly complex, and has a more significant impact on the public, or where a bill makes extensive reform and is very lengthy. Conversely however, there will be occasions where time may be of the essence or where a bill's provisions are uncontroversial. In such circumstances further consultation or scrutiny would either be inappropriate, disproportionate or not possible.

21. The use of a Report stage is a matter for the Member in Charge of the Bill to propose and should be considered on a case by case basis. The Report Stage was particularly important during the passage of the Bill which became the Mobile Homes (Wales) Act 2013 due to the extensive recasting (and indeed expansion) of the Bill at Stage 2. The Report Stage afforded proper consideration of the large amount of amendments that had been tabled at Stages 2 and 3, which had essentially transformed the Bill as introduced and ensured there was a period of reflection on the Bill. It was also an essential stage of the passage of the Social Services and Well-being (Wales) Act 2014 given the size and complexity of the Bill and the number of amendments tabled.

22. The extent to which Bills may be expedited through scrutiny on the other hand is a matter first of all for section 111 of the Government of Wales Act 2006 and the National Assembly's Standing Orders. This Assembly's Standing Orders make clear provision for a 'fast track' procedure of curtailed scrutiny for bills where the need arises and Business Committee consider appropriate. The Government is of the view that there will be times when it will be appropriate or necessary for bills to be fast-tracked. The National Health Service (Finance) (Wales) Act 2014, for example, was required to be in force for the start of the next financial year (2014/15), to avoid up to a year's delay in commencement if that date was missed, as the Bill implemented the recommendations made in a report by the Wales Audit Office in July 2012. The fast track process was agreed by the National Assembly for Wales and enabled the Bill to go through the legislative process in the shortest possible time meaning that the very tight timescale for the Bill could be met. The Government considered that the policy within this Bill was one which had been extensively debated and considered by three Assembly committees prior to introduction. There had, therefore, been scrutiny and examination of the policy before the legislation was proposed. It is also worth noting that this Bill was on a single, very narrow, policy. Had this not been the case, we may not have proposed a curtailed scrutiny process.

23. Expediting bills through scrutiny, or 'fast-tracking', is different to the Government proposing a bill be considered by the Assembly as a Government Emergency Bill. In the case of the Agricultural Sector (Wales) Bill, the arguments to protect agricultural workers urgently against action taken by the UK Government were set out before the National Assembly in detail. Although this Bill progressed through the Assembly as an Emergency Bill it did so on a longer timetable than that provided for in Standing Orders and the Member in Charge did appear before the relevant committees. The Minister was able to provide evidence of the need for urgency and respond to questions in committee as well as Plenary.

24. Looking ahead, the Government envisages that it may also be appropriate to deal with certain financial or tax revenue issues through an alternative scrutiny process, and this should also be the case in order to facilitate consolidation and the development of a Welsh 'Statute Book'.

The balance between what is included in primary and subordinate legislation.

25. An issue that has been of considerable interest to Members while scrutinising bills is the balance between what is included on the face of a bill and what is appropriate to be brought forward as subordinate legislation. Assembly Members are rightly concerned to ensure that executive powers to make subordinate legislation are appropriately given in the first place and, where they are given, they should be properly scrutinised. The Welsh Government seeks to follow the standard approach adopted by Parliament and is mindful of the Committee's recommendations on the matter and the importance of moving away from framework bills.

26. There are a number of reasons why legislation is split between primary legislation and subordinate legislation. There is first of all merit in keeping bills as clear, simple and short as possible, in other words keeping them less cluttered by detail.

27. There is also significantly greater flexibility in making subordinate legislation as it is not subject to the same timetable constraints as Assembly Bills and it enables the law to be updated to match changing circumstances or for the law to be corrected or amended in the light of experience.

28. If this process works well, it would help the Assembly to focus on the essential points, policy and principle, in its scrutiny.

29. In response to the Assembly's previous concerns that the use of affirmative and negative Assembly procedures was not sufficiently transparent or evident, the Counsel General issued guidance in January 2012 (see Note 1 in the Annex) which set out the factors that the Government should take into account when proposing a procedure. These guidelines recognise that in each case there is a balance to be struck between scrutiny by the Assembly, consumption of Assembly (or Committee) time (something that will become increasingly important as time goes on), the significance of the provisions in question, and the making of legislation in the most efficacious manner. Although the guidance is clear about the circumstances under which the Government would use a particular procedure, Members still seek to influence the use of the procedures

and routinely object to the position the Government has taken (seeking the affirmative procedure when the Government proposes the negative procedure, and a ‘super’ affirmative procedure – even when it is unclear what this means in the particular context – when the Government proposes the affirmative procedure).

30. Generally speaking the Government considers that the correct balance has been struck during this Assembly, though remains conscious of the criticism it has received at times in this respect. During the course of the Social Services and Well-being (Wales) Act’s passage through the National Assembly, the Government received criticism in relation to a power conferred on the Welsh Ministers to make regulations to determine whether a person is entitled to social services. It was suggested that the Government was somehow reducing Assembly Members' ability to influence such matters, but this was not correct. The Act in fact expanded the National Assembly's influence by providing for greater transparency and accountability in relation to such matters. Previously, an adult's entitlement to social services was dependent on various approvals and directions given by the Secretary of State in the exercise of his or her powers under the National Assistance Act 1948. Those approvals and directions (made in 1993) were not subject to any form of Parliamentary procedure, nor are they easily available to the public. A child's entitlement to social services, specifically, was dependent on discretionary decisions taken by local authorities in the exercise of their target duty under section 17 of the Children Act 1989. In exercising their discretion, local authorities had to have regard to guidance made by the Welsh Ministers. The guidance had not been subject to any form of Assembly procedure, nor was it easily accessible. The Social Services and Well-being (Wales) Act 2014 sweeps away these arrangements and replaces them with a system under which eligibility criteria will be published in regulations that will be subject to the ‘super’ affirmative procedure.

31. Similar points could be made about other provisions of the Act too. For example, the Welsh Ministers previously held a significant degree of influence over local authorities' exercise of their social services functions by means of general directions. Again those directions were not subject to any form of Assembly procedure. These provisions were replaced with a system under which this influence will be exercised by means of published Codes. The Act places a duty on the Welsh Ministers to consult on draft Codes before they must be laid before the National Assembly. If the Assembly resolves that they should not be made, the Welsh Ministers will not be able to issue those Codes. So, once again, the Act provides for greater control by the legislature over the executive.

PART 3

Drafting practices

General

32. The drafting accuracy and completeness of a bill upon introduction is reliant upon three factors. The first is the time available both to develop the policy which is to be reflected in the bill (including adequate time for comprehensive, quality policy and legal instructions to be prepared), and to complete the meticulous process of drafting accurate and accessible legislation in two languages. The second factor is the expertise of those involved, not only the drafters of the legislation but also other members of Bill Teams. The third factor is the procedures established to ensure there are sufficient quality assurance checks of legislation so as to ensure it is accurate and no mistakes have been made.

33. There will inevitably be tensions between the amount of time considered necessary to ensure that the quality of legislation is not compromised while meeting the political demands to progress legislation so that desired reform is implemented as soon as possible. However, the introduction of a bill is one step in a long process of development, challenge and scrutiny with consideration of the detail of bills continuing throughout that process. As the Welsh Government has previously stated, amendments to bills at Stages 2 and 3 of the scrutiny process should be regarded as a sign that the development process is working and that various issues continue to be taken into account until a bill is passed.

34. Expertise and quality assurance checks are essential. It requires specialist expertise and a system of checks involving those with such expertise. Within Government this primarily involves officials from central service departments: the Legal Services Department, OLC, the Office of the Counsel General, jurilinguists and the LPU. Each has different but complementary roles and responsibilities that are intended to ensure that the content of bills has been subject to robust challenge and is as well thought out and well drafted as possible. The system that has developed is based on best practice in other jurisdictions.

35. More generally there is much that can be learnt from the legislative development systems of other jurisdiction both within the UK and across the Commonwealth. Officials from the Welsh Government have been members of the Commonwealth Association of Legislative Counsel since the beginning of the Third Assembly and it was through contacts made in that organisation (and the assistance of the Foreign Office) that four days of valuable meetings were arranged for the Counsel General with politicians and officials from the New South Wales and New Zealand Governments in 2012.

36. The Counsel General has a statutory function under section 112 of the Government of Wales Act 2006 to consider whether to refer a bill to the Supreme Court to determine a question of legislative competence but also has a vital role to play in ensuring that Acts of the Assembly are accessible and comply with the rule of law.

37. In so far as the expertise of officials is concerned, a significant development during the Fourth Assembly has been the restructuring and expansion of OLC, the Government's specialist legislative drafting office. The UK Government's drafting office, the Office of the Parliamentary Counsel (OPC), has been in existence since 1869. The Office of the Legislative Counsel in Belfast was formed upon partition in 1920 and an Office of the Scottish Parliamentary Counsel also existed for many years under the guise of the, pre-devolution, Lord Advocate's Department. OLC in Wales, by contrast has been started from scratch, albeit with assistance from OPC. Whilst still in its infancy in comparison to other parts of the UK the work of OLC was commended in the report of the similar Committee inquiry into Assembly Measures and early in this Assembly it also received the praise of Supreme Court Judge Lord Hope who remarked during the Local Government Byelaws Bill case that the Bill was "very well drafted", and noted that the Welsh drafters were "using their own lines, but applying the same standards" as Parliamentary Counsel.

38. It had become clear, notwithstanding this, that a combination of increased demand due to the size of the Legislative Programme, and less support from OPC, meant that the office had to expand. This was not as straightforward as it may appear due to the specialist nature of legislative drafting and the very limited pool of experienced drafters available across the UK. The Office was, therefore, restructured primarily so as to enable recruitment of experienced Parliamentary Counsel. Although still a small office, OLC has now doubled in size and currently has three members with many years' experience of working at OPC and another who has been recruited from the Office of the Scottish Parliamentary Counsel. This has been added to the experience that had already been developed by 'home grown' drafters. OLC has also retained the services of a consultant legislative drafter with over 30 years of experience of drafting Westminster Bills for OPC. OLC strives to achieve the same standards as those set by OPC, an Office that has been highly respected both within government and globally for many years. There are arrangements in place for OLC to receive occasional technical assistance from OPC on a case-by-case basis, though this is now something that happens considerably less frequently.

Bilingual legislation/deddfwriaeth ddwyieithog

39. The fact that the National Assembly legislates in both the English and Welsh language is a huge achievement, and one which is generally under- appreciated. The implications that this has for the process of drafting and scrutinising legislation are not widely understood. Drafting legislation bilingually first of all means that all Assembly Bills are twice the size of an equivalent bill drafted in other jurisdictions (in the United Kingdom at least), and means that further checks and balances are required within the system to ensure that the drafting of both languages is accurate and equivalent. This is achieved through the joint efforts of Legislative Counsel and a specialist team of jurilinguists who produce the first draft of the text in the second language, before continuing to work with Legislative Counsel to perfect and edit the text and ensure that both texts have the same legal effect. The task of producing legislation that is drafted in a modern fashion and in plain language applies equally, of course, to both of these languages. Drafting legislation is a task that is famously complex, and drafting it in two languages is even more challenging.

There is considerable scope for error, in particular when drafting and amending large bills. The Social Services and Well-being (Wales) Act 2014 is 378 pages long in total (189 pages in each language). Producing bilingual primary legislation at that scale is a big task.

40. While the need to draft in both languages brings its risks, both in terms of the resource involved and the potential for discrepancies between languages, it also brings with it an unique opportunity to improve the standard of both languages. This is because in producing a second language text, bills are subject to an additional editorial process which has the potential to assist the clarity of the law. This is for a number of reasons but the most significant are that in producing a second text, the original text must be fully understood. Any ambiguity should therefore be identified as part of that process. In addition, due to the differing syntax of the English and Welsh languages the drafter who considers the structure and clarity of the text in the second language will often be able to re-visit and improve the text of the first language drafted. It also provides an opportunity for further thought to be given to the terminology used to describe key concepts.

41. The fact that Welsh legislation is bilingual should in itself also be an aid to accessibility; giving the reader the choice of reading the law in the language he or she is most comfortable. Readers of European legislation (for example) will be aware that the ability to read a complex provision in another language can sometimes aid the reader's understanding.

Plain language

42. Legislation should be drafted in modern standard Welsh and English and generally speaking should reflect ordinary usage. This means that a drafter of legislation should, in general:

    - use simple and familiar words rather than complex expressions and unusual words;
    - avoid using foreign words;
    - avoid using archaic words;
    - avoid using jargon, especially governmental shorthand expressions and unexplained acronyms; and
    - avoid including too many different ideas in each sentence (see further Note 1 in the annex).

43. Sometimes it is not possible or sensible to express complex concepts in language that is easy for any person to understand. Technical expressions may be appropriate where such terms are well understood by the main audience of the legislation. This may also be the case if any attempt to render their meaning in everyday language would lead to long-winded provisions that are difficult to understand or uncertain in effect. In pursuing plain language drafting, it is essential however that there should not be any loss of precision or of any necessary detail. The Welsh Government endorses the New South Wales Parliamentary Counsel's Office's policy on plain language. That Office first of all makes clear that plain language is not simple language; plain language is clear,

intelligible English. It is not simplistic English. It does not involve any loss of precision.

44. The second point made by that Office is that their policy in relation to plain English is an on-going process and has its limitations:

> *"it is recognised that the adoption of plain language is an ongoing process and that not every document will necessarily be a perfect embodiment of plain language. It should be appreciated that there are degrees of plain language, while the Office agrees that legislation should be expressed in as plain and formal language as possible, there are a number of on-going factors that contribute to complexity, including the following:*
>
> - *policies that are to be implemented by legislation are often themselves very complex, although even complex policy can be presented in a clear and user-friendly way,*
> - *the drafter has to keep in mind at least three audiences, each with different requirements: Parliament itself, the public or section of the public to whom the legislation is directed and the courts and the legal system,*
> - *the complexity of the surrounding written and unwritten law on a particular subject makes it very difficult and time-consuming to introduce concepts in a different form,*
> - *a plain language document generally takes longer to produce than a document that is not in plain language".*

45. Judgements have to be made, therefore, as to how legislation should be drafted to ensure that the person who will be affected best understands it. A balance has to be struck between drafting provisions that are understandable for expert users and provisions that can be used and applied every day by persons with no legal training. This is ultimately a matter of judgement for the instructing officials and the drafter. The fact that legislation must be technically precise and effective should also of course always be kept in mind. Precision and effectiveness cannot be compromised in the interest of clarity; and over-simplification, therefore, can result in legislation failing to have its intended result.

Overview sections

46. In so far as overview sections are concerned OLC's drafting guidelines provide that:

> *"a section at the beginning of a Bill, or of a Part or a Chapter explaining what is to follow may help the reader to navigate the reader around a larger piece of legislation where the table of contents is too long to give a clear picture. An overview provision may be helpful in shorter pieces of legislation; for example if the substantive provisions are on an obscure topic or potentially difficult for all or part of the likely readership.*
>
> *An overview is, typically, a brief summary of the content of an Act, Part, Chapter, group of sections or Schedule. It may also contain signposts to other relevant provisions. Its purpose is to assist the reader in navigating legislative material. An overview will generally have no*

operative effect of its own, it may be contrasted with a purpose section intended to effect the interpretation of the provision."

47. Overview provisions are used by OLC routinely, though not in all bills. They have been used primarily as a tool for navigating larger bills or bills which contain a strong procedural element (something which is quite common) in order to assist the reader to inform an initial understanding of the effect of the legislation. So, for example, in the Food Hygiene Rating (Wales) Act 2013 the overview section at the beginning is intended to help the reader to overcome the fact that the Act contains a number of procedural provisions which are difficult to set out in order (in other words the chronology of the system itself does not always match the chronology of the key provisions in the legislation itself). Although the National Health Service Finance (Wales) Act 2014 was a very short Act, it was used here to explain the effect of a relatively complex textual amendment made to the National Health Service Act 2006 without requiring the reader to read the amendment in context (i.e. incorporated into the 2006 Act).

48. However, there are drawbacks to overview provisions. The first concerns the argument that as an overview is intended merely to have explanatory effect, it should be contained in the Explanatory Notes to an Act rather in the Act itself. The counter to the argument however, is that many would find it preferable to have a basic explanation incorporated into the main document i.e. the Act rather than having to look for this in a second document. The benefit is that it will assist clarity of the legislation in its own right. As developments in publication technology emerge, and the way in which people read legislation changes, this may in future not be necessary but at present the Welsh Government takes the view that some explanatory material in the main document is beneficial. Another danger is that the provision in the overview section could become inaccurate (or 'toxic') during amending stages either because it is overlooked or as a result of a late amendment during amending stages to a bill. There are also two other avoidable dangers when using overview sections. The first is that unless carefully worded the overview section could be confused with the substantive sections which follow, and the second is that overviews can become too long – which arguably defeats the object.

49. Ideally this would be remedied by reconsidering the use of long titles in legislation and the Welsh Government's preference would be that an overview could replace the long title to a Bill and be incorporated without being part of the operative provisions themselves. This would enable amendments to be made to an overview section as a printing change after substantive amendments have been agreed (in a similar way as amendments are made to section headings).

Drafting techniques

50. The question of what constitutes good practice in drafting technique can be divisible into two parts: a process element and a technical element.

51. Within the Welsh Government, the process element involves ensuring that the drafting of a bill is built on good foundations and that those who are developing a bill understand the role and use of legislation. This means (among other things) avoiding unnecessary legislation, and allowing adequate time to fully explore the

policy issues underpinning a potential bill. This is influenced by both political and organisational matters.

52. Drafting legislation is (or should be) an inherently subjective process, to some extent at least. Drafters need a certain amount of freedom when they work; constraint can limit innovation and remove the flexibility needed to produce what the drafter might consider the best possible draft, in all the circumstances. However, some constraint is useful; adherence to agreed principles of good drafting, and the principle that there are areas where consistency/uniformity is a good thing. Following the recent structural changes in, and expansion of, OLC, the Office is increasingly instigating what might be regarded as best practice by the drafting community:

    - the 'four-eyes' practice (at least two drafters looking at all provisions drafted);
    - the availability of drafters with different backgrounds and levels of experience in order to solve problems, work collegiately, and deliver the drafting of the Legislative Programme;
    - the creation of a body of drafting (and legislation-making) know-how;
    - the training of non-drafters on areas within the Office's expertise;
    - the development of the Office as one of the repositories of knowledge about previous bills.

53. The 'technical' element of legislative drafting is primarily a matter for OLC. Good practice in this respect involves:

    - employing good drafting techniques for producing modern and accessible law;
    - being guided by strong principles of good drafting (or 'good law');
    - the implementation of a comprehensive and ongoing development programme for OLC and others with an interest in legislation;
    - the ability to share knowledge with other drafting offices; and
    - to contribute to the wider body of learning and debate on drafting matters.

54. OLC is also employing best practice in the sense that:

    - it understands, and seeks to apply, the 'good law' principles that have been promoted by the Cabinet Office (see https://www.gov.uk/good-law);
    - it is particularly aware of the drafting issues which are specific to Wales, and seek to address them in its work;
    - where possible, bills are drafted with the long term aim of establishing a statute book for Wales (which in itself falls within one of the principles of 'good law');
    - OLC receives and uses drafting techniques guidance provided by OPC, but is also developing its own drafting techniques based on its own specific needs, and its own views of best drafting practice (see Annex 2);
    - OLC is instigating an internal development programme in anticipation of 3 less experienced lawyers joining the Office shortly; and
    - OLC is engaging with the drafting community at large, in particular with the other UK drafting offices in the form of secondments, meetings, seminars,

and forums (since its inception OLC has also participated in each of the biennial conferences of the Commonwealth Association of Legislative Drafters).

PART 4

"Statute book" and accessibility

Accessibility

55. In seeking to make legislation understandable, as well as considering the accessibility of the language (considered above), the drafter must consider the coherence of the bill as a whole and ensure that the material is organised well:
    - provisions should be arranged in a logical order;
    - general provision should be followed by specific provisions and exceptions;
    - provisions that relate to the same subject should be grouped together;
    - provisions should be arranged in temporal sequence;
    - provisions that are significant should become before provisions of lesser importance;
    - sections should be limited in the number of sub-sections they contain;
    - divisions into parts and the use of headings and sub-headings break up a long document and aids comprehension; and
    - sections should be numbered.

Consolidation

56. A significant issue impacting greatly on the accessibility of Welsh legislation is the condition of the statute book as a whole. Improving access to legislation and developing a Welsh Statute Book is a longstanding concern. In the words of the Committee itself:

> *"According to several submissions we received, it is sometimes difficult to establish what the law is that applies in Wales. Laws for Wales have been made by the UK Parliament and the National Assembly, and laws made each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens. We recommend that a mechanism be sought to ensure the expeditious publication of up-to-date law applying in Wales, and that a programme of consolidation of law should be undertaken. The Law Commission would have an important role in this process."*

This is a UK wide problem that has a specific Welsh dimension. The number of statutes currently in force in the United Kingdom is vast, approximately 4,000 Acts as well as thousands of pieces of subordinate legislation. Resource considerations and the need to implement policy quickly can also lead to choices being taken to amend existing laws rather than consolidating: amending what is there rather than starting afresh. This means that as the Statute Book is continuously changed according to the policy priority of the day, it lacks a sensible order and provisions are scattered across Acts with little cohesion.

Little emphasis is given to consolidation and historically there has been very little of it in the United Kingdom.

57. Devolution, in particular to Wales, has potential to make the law yet more inaccessible. There is, it could be said, currently inherent complexity to the law applicable to Wales. There are a number of reasons for this.

    - The first is that as well as needing to be compliant with overarching provisions such as EU law and Human Rights, legislation in a devolved area must often be read in conjunction with legislation in areas that are not.
    - The second is that within the competence of the National Assembly for Wales, the vast majority of the existing legislation that applies to Wales actually applies to England and Wales. Most provisions apply equally to England and Wales and only some are separate. New and old Wales-only provisions can only be decoupled with concerted effort. On the other side of the coin, where such decoupling has occurred through Westminster Bills applying to England only, this has often left complex old UK or England and Wales text in place only for Wales.
    - The third reason is the historic mechanism of conferring executive powers on the old Assembly, in part through transfer of functions orders and in part (post devolution) through Westminster Bills. This requires the reader to understand that the text on the face of the legislation does not reflect legal reality. References in Acts to powers conferred on the 'Secretary of State' are often in reality held by the Secretary of State in England while in Wales the power was held at first by the National Assembly for Wales and now by the Welsh Ministers. Similarly, following the coming into force the Government of Wales Act 2006, a number of powers conferred upon the National Assembly on the face of statutes enacted post 1999 are now held by the Welsh Ministers.

58. The Committee will be aware the Counsel General made a commitment early in this Assembly to restate provisions in Assembly Bill where appropriate in order to minimise the practice of amending existing legislation that applies to England and Wales or the United Kingdom as a whole. This (generally speaking) reduces complexity as it means the legislative provisions apply to Wales only. The effect of this also is to ensure that provisions that would have been made in English only (as the existing legislation would be in English only) are also made in Welsh. This has been achieved with few exceptions during this Assembly, and in the case of those exceptions there was little practical alternative (as they involved relatively small Welsh Acts making a relatively small number of amendments for a narrow purpose to large England and Wales Acts).

59. Of the Acts and Bills that have been developed to date in this Assembly only two of them, the Further and Higher Education (Governance and Information) (Wales) Act 2014 and the very short NHS Finance (Wales) Act 2014 are made up (for good reason) solely of amendments to existing Acts of Parliament that apply to Wales and England. In all other cases freestanding Welsh laws have been developed in accordance with the principles the Counsel General outlined to the Assembly two years ago, often restating provisions of existing law as well as reforming the law.

Examples of this practice include:

- the Schools Standards and Organisation (Wales) Act 2013;
- the Local Government (Democracy) (Wales) Act 2013;
- the Human Transplantation (Wales) Act 2013;
- the Social Service and Well-being (Wales) Act 2014;
- the Education (Wales) Act 2014; and
- the Mobile Homes (Wales) Act 2013.

60. This is a relatively obvious thing to do where policy proposals envisage a wholesale redesign of a system (for example, the Social Services and Well-being (Wales) Act 2014), but it is less obvious where the most straightforward and easiest thing to do is amend existing law.

61. As an example, from the perspective of the drafter, it would have been more straightforward had the Human Transplantation (Wales) Act 2013 amended a lengthy section of the Human Tissue Act 2004 (which applied to England, Wales and Northern Ireland) so as to provide for a deemed consent system in Wales. It was decided however, that in order to improve accessibility, the Assembly Bill should carve out the consent system provided in the 2004 Act, suitably amended so that it related only to transplantation and incorporated the necessary amendments to reflect the policy. It also enabled the substantive provisions to be produced bilingually, something which would not have been the case had we amended the 2004 Act. It should be noted however, that restating these provisions in the Assembly Act brought its own complexities, arising from the fact that the organ donation system is a UK wide one and from the fact that the Human Tissue Act 2004 (which sets out the legal framework for consent for the use of body parts) actually applies for 15 different organ use purposes, transplantation being only one of them. It was also complicated because certain provisions, for example in relation to coroners, were not devolved. Certain amendments to the 2004 Act were also unavoidable due to the fact that the existing system is overseen by the Human Tissue Authority, which is a UK body. Provisions related to guidance to be issued by that body, therefore, had to be incorporated into the 2004 Act.

62. The Mobile Homes (Wales) Act 2013, which was eventually 85 pages long, is notable as it consolidated 4 Acts of Parliament ranging back to the 1960s and separated all provisions in relation to residential mobile homes from those which had previously applied to England and Wales. The (Westminster) Mobile Homes Act 2013, which was also a Member Bill, on the other hand amended the earlier legislation and by contrast has left the law considerably less accessible than is the case in Wales.

63. The Welsh Government welcomes that the Committee consultation is also looking at the way in which a bill is structured as a possible measure of good practice in the drafting of bills and would expect to be involved in taking this work forward.

64. Although not outwardly evident, progress has been made through other initiatives designed to assist accessibility. Since 2012 officials from OLC have been working with the National Archive specifically on updating Welsh provisions on legislation.gov.uk (which is now available bilingually and is due to publish all primary legislation in its updates – i.e. amended – by 2015). In addition work is underway, in conjunction with Westlaw, to develop an online encyclopaedia of Welsh laws, which should be launched (as a work in progress) later this year. Discussions have also taken place with the Law Commission and we are hopeful that an announcement can be made shortly in relation to a Law Commission project considering the costs and benefits of consolidating laws and how best to achieve this by forming a more cohesive 'Welsh statute book'.

The impact of the Assembly's conferred powers model of legislative competence on the drafting of Bills

65. The "model" of legislative competence has little or no impact on the drafting of bills. However, the breadth of legislative competence, in other words the extent of the subject devolved, does indeed have an impact on the development and drafting of legislation. This is because there are occasions where not all aspects of the subject matter of a policy proposal are within legislative competence.

66. There is no doubt that the Welsh devolution settlement is a complex one and for those developing legislation the settlement can be confusing as it is not always clear where the boundaries lie. The problems lie with the fact that the extent of the subject areas devolved are narrow and subject to often complex exceptions, while also being constrained by existing functions of a Minister of the Crown. This all adds to the task of developing legislation in Wales.

Documentation that accompanies bills

67. The content and quality of Explanatory Memorandums vary significantly both within Wales and across the wider UK. Length, style and content can and should vary depending on context and the matters covered by the legislation but the key purpose of the Explanatory Memoranda is to explain and support the bill under consideration.

68. Explanatory Memorandums have an important role and provide an opportunity to set out in brief the context, the policy options considered, the reasons for their rejection or adoption, the consultation approaches taken and the direction of travel supported by the bill. The inclusion of the Regulatory Impact Assessment provisions within Explanatory Memorandums allows the financial impacts and consequences to be considered alongside the policy context and, increases the transparency of the legislative approach taken.

69. Explanatory Memorandums are equally important in areas where a bill is amending existing legislation. Primary legislation which amends existing legislation can be impenetrable to the uninitiated lay reader so the Explanatory Memoranda has an important role in helping the lay person to understand the purpose and effect of the legislation.

70. The same can be said for the Regulatory Impact Assessments and Explanatory Notes. The suite of documents which support the bill aids its understanding and have an important role in terms of potential future challenge to the bill. It is imperative that the policy purpose is clear within these documents and that this is within the purpose(s) for which the Assembly may legislate. It is also imperative that all supporting documents issued with the bill are precise and accurate as the Court will often refer to these documents – as it did, for example, in the reference of the Local Government Byelaws (Wales) Bill to the Supreme Court.

71. It is acknowledged that more could be done to assist the users of legislation by improving Explanatory Notes. This is both in terms of the textual content of the notes and the way in which the content of the notes can be read electronically, for example on the legislation.gov.uk website. Work has been undertaken recently by The National Archives and the Parliamentary Counsel Office in Whitehall, looking at this particular issue. As part of that process, the Welsh Government has received the results of research undertaken into the benefits of Explanatory Notes and how they can be improved. The Welsh Government has commenced its own project to consider what improvements can be made within a Welsh context.

ANNEX

Part 1

(none)

Part 2

Note 1:

In so far as the issue of which procedure should apply to subordinate legislation made under Acts of the Assembly is concerned, there are certain factors that may, to a greater or lesser extent depending on the context, tend to suggest the application of the 'draft affirmative' procedure (or require particular justification if a procedure other than 'draft affirmative' procedure is applied). The factors referred to are:

a) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly (e.g. E.g. Henry VIII powers if wider than necessary for purely consequential amendments as a result of the Act or Measure);
b) powers, the main purpose of which is, to enable the Welsh Ministers, the First Minister or the Counsel General to confer further significant powers on themselves;
c) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
d) powers to impose or increase taxation or other significant financial burdens on the public;
e) provision involving substantial government expenditure;
f) powers to create unusual criminal provisions or unusual civil penalties;
g) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;
h) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
i) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).

Factors that may reasonably tend to suggest the application of the 'negative' procedure include, in particular:

a) where the subject matter of the subordinate legislation is relatively minor detail in an overall legislative scheme or is technical;
b) where it may be appropriate to update the subject matter of the subordinate legislation on a regular basis;
c) where it may be appropriate to legislate swiftly (e.g. to avoid infraction proceedings or for the protection of human or animal health or of the environment where in some cases subordinate legislation made for these purposes is not subject to any procedure due to the recognised need to legislate urgently);

d) where the discretion of the Welsh Government over the content of the subordinate legislation is limited (e.g. legislation that gives effect to some provisions of EU law); or
e) where it where it would be appropriate to combine provision to be made under the power with provision that can be made under another power where the latter may be subject to negative procedure.

Part 3

Note 1:

Plain language principles:

- Drafting should be as simple as possible. It should also be precise so that the document has its intended effect. The instrument must be workable but at the same time drafted in language and in a style that ensure that it can be readily understood by its readers. Clarity of drafting should encourage clarity and simplicity of policy.
- Sentences should be short and well structured.
- Sentences should not contain excessive embedded and relative clauses.
- The active rather than the passive voice should be used.
- Archaic language and expression should be avoided.
- Gender specific language should not be used, a practice that has been followed in Wales since the creation of the National Assembly and this being advocated by the (first) Legislation Committee (other UK jurisdictions shortly followed suit).
- The drafting should be consistent. Words should be used in the same sense. If the sense is changed, this should be made clear.
- Overuse of capitals should be avoided.
- Proposition should be expressed in positive rather than negative terms.
- Similar proposition should be expressed in similar language.
- Repetition and unnecessary words should be avoided.
- Excessive cross-references and qualifications should be avoided.
- Expressions in common or everyday use should be used wherever possible.
- Jargon should be avoided; however technical terms will be necessary in legislation that deals with technical subject matter.
- Paragraphs and sub-paragraphs can break up blocks of text but multiple paragraphs and sub-paragraphs, while having the appearance of clarity, can often involve several ideas or concepts and be difficult to understand.

Part 4

(none)

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Constitutional and Legislative Affairs Committee
Statutory Instruments with Clear Reports
17 November 2014

CLA463 - The Agricultural Subsidies and Grants Schemes (Appeals) (Wales) (Amendment) Regulations 2014

Procedure: Negative

These Regulations make further amendments to the Agricultural Subsidies and Grants Schemes (Appeals) (Wales) Regulations 2006 (the "2006 Regulations"). The effect of the amendments made by the Regulations is to update the list of European Union legislation covered by the 2006 Regulations allowing appeals to be made in relation to decisions made in respect of direct payments and rural development schemes made under the new CAP Regulations.

CLA464 - The Rating Lists (Valuation Date) (Wales) Order 2014

Procedure: **Negative**

This Order designates 1 April 2015 as the date by reference to which the rateable value of a non-domestic hereditament is to be determined for the purposes of the local and central non-domestic rating lists which are to be complied on 1 April 2017.

Agenda Item 4

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Launch of the first tranche of consultations in relation to the implementation of Parts 2, 3, 4, 7 and 11 of the Social Services and Well-being (Wales) Act 2014**
DATE	**6th November 2014**
BY	**Professor Mark Drakeford AM, Minister for Health and Social Services**

Earlier this year Gwenda Thomas AM, then Deputy Minister for Social Services, issued a written statement announcing the Welsh Government's approach to implementing the subordinate legislation to be made under the Social Services and Well-being (Wales) Act 2014.

The first tranche of regulations, together with the related codes of practice and statutory guidance to be made under the Act, will be made available for a 12-week public consultation starting on 6 November this year and will cover the following sections of the Act:

- Population assessments under part 2 of the Act and partnership working under part 6
- Social enterprises, co-operatives, user led services and the third sector
- Assessments and eligibility
- Direct Payments
- Adult Protection and Support Orders
- National Independent Safeguarding Boards
- Local Safeguarding Boards
- Ordinary residence and disputes about ordinary residence

These policy areas are embodied within parts 2, 3, 4, 7 and 11 of the Act and are presented in four linked consultation packages. The four consultations can be accessed through the Welsh Government website:

http://wales.gov.uk/consultations/healthsocialcare/?lang=en

Following completion of this extensive consultation and the post-consultation analysis it is my intention that these regulations will be laid before the National Assembly for Wales in May 2015.

A second tranche of regulations and codes of practice, principally in relation to parts 5, 6 and 9 of the Act will be made available for consultation from May 2015 with a view to being laid before the National Assembly for Wales late in 2015. I will be seeking to lay the codes of practice in relation to the first tranche at this time also, to enable them to be seen and agreed as a coherent package.

I will of course ensure Members are kept fully informed of the outcome of the consultation.

Thank you for the opportunity to input views from the SD alliance on the draft Order to amend section 79, GOW Act. Due to the shortness of the response time, we have not had time to fully consult and agree these points with the full membership of the Alliance. These views represent the views of members who were able to respond within this time frame.

COMMENTS ON THE ORDER

1. Section 79 can be seen as a vestige of very limited and largely executive devolution in Wales, where defining the powers and duties of the Welsh executive (whether it be the Assembly in GOWA 1998 or the Welsh Ministers under GOWA 2006 pre-2011 referendum) was considered to be the proper job of the UK Parliament, and not that of the National Assembly.

2. With the continuation of the devolution process, we are now considering the draft of an Order in Council to amend GOWA 2006, so as to bring section 79 of GOWA within the Assembly's competence.

3. Section 79 of GOWA contains the sustainable development duty which applies to Welsh Ministers, i.e. to have a Sustainable Development Scheme (but no duty to implement it). This is a historically significant duty, appreciated widely as a cornerstone of Wales duty on Sustainable Development.

4. The Wellbeing of Future Generations Bill creates a more complex set of obligations and processes which apply to Welsh Ministers and also to public bodies and which give rise to the more extensive duties.

5. How section 79 sits alongside the Bill has been an open question. The Bill does not contain any reference to section 79 GOWA.

6. The Explanatory Memorandum that came with the draft Order in Council (para 19) says that "the amendment to section 79 of the 2006 Act will ensure alignment and consistency between the two pieces of legislation and provide clarity in the statute book."

7. So it is clear that there is an intention to align the two pieces of legislation, but unfortunately it is not clear <u>how</u> this is to be done. There is no draft amendment or amendments to section 79 (which it is stated will be tabled to the WFG Bill) on which we or the committee can comment.

8. This is a very wide enabling power. The instrument as drafted gives carte blanche to the Ministers and could result in a much weaker form of words than exists currently.

9. It does not contain any constraints on the changes which could be made. It does not for instance provide that the section 79 duty can only be strengthened and not diluted. So in future the Assembly or Welsh Ministers could (if this Order were made) repeal section 79 entirely.

10. From one perspective, Section 79 can be seen as a "safety net" – it is the minimum that Welsh Ministers must do in relation to Sustainable Development (SD), and

therefore it may be appropriate to ensure that they cannot promote legislation in the Assembly to remove or weaken that safety net.

11. It would not be appropriate to pass such an open ended order without seeing draft amendments which the Minister intends to table.

12. A potential outcome of amending section 79 is that the provisions of the FG Bill replace the duty to have an SD scheme. Therefore, the existing SD scheme, One Wales One Planet (OWOP), would cease to function.

13. OWOP has gained widespread and cross party support for its ground breaking approach to SD, reflecting ten years experience of developing SD schemes.

14. Specifically we are concerned to ensure the following key elements of OWOP are not lost as a result of this Order.

    1) The comprehensive definition of sustainable development, which incorporates the key concepts of 'living within environmental limits, using a fair share of the Earth's resources' and is set in a specifically Welsh context.

    2) The comprehensive explanation of internationally recognised SD principles

    3) The clear structure of long term visions (goals), key outcomes and measurable and time-bound aims, such as 'reducing greenhouse gas emissions by 3% a year by 2011….'

    4) Independent review of the effectiveness of the Scheme.

Recommendations

We consider that a number of issues in the Order and Explanatory Memorandum should be clarified in order to ensure that the current protections afforded by section 79, GOWA are not weakened or put at risk.

15. Request the Minister lays draft amendments before the committee, prior to the committee passing the Order.

16. The Order should provide that the section 79 duty can only be strengthened and not diluted.

17. Due to the high constitutional significance of this clause, we recommend that the Committee seek to ensure that, in future, section 79 should only be amended by primary legislation, with the full scrutiny of the Assembly.

18. The key elements of OWOP, outlined in paragraph 14, should be incorporated into the FG Bill.

19. The Bill must be absolutely clear that in respect of Welsh Government, the objectives and annual reports (clauses 9 and 13) replace the provisions of section 79 GOWA, in regard to the SD Scheme and the Programme for Government.

20. If it is the intention that the Future Generations report replaces the independent effectiveness review, then the powers and the duties of the Commissioner should be reviewed to ensure this is achieved.

12.11.14

For further information, please contact either of the authors of this response.

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Haf Elgar, FOE Cymru. haf.elgar@foe.co.uk 02920 229634

From: Peter Davies [mailto:peter@pdpartnership.co.uk]
Sent: 11 November 2014 14:18
To: Environment &. Sustainability Committee
Cc: 'Rita Singh'
Subject: RE: Gorchymyn Deddf Llywodraeth Cymru 2006 (Diwygio) 2015 / The Government of Wales Act 2006 (Amendment) Order 2015

With reference to the proposal for an Order under section 109 of the Government of Wales Act 2006 relating to legislative competency to amend section 79 of that Act (sustainable development)

I understand that the order would amend Schedule 7 to the2006 Act so as to confer legislative competence upon the National Assembly for Wales to make modification of, or confer power by subordinate legislation to make modification of, section 79 (sustainable development) of the Government of Wales Act 2006 ("the 2006 Act").

I would fully endorse the importance of this order in order to enable the proper functioning of the Wellbeing of Future Generations Bill and to avoid duplication of processes between the new legislation and the existing duties under section 79.

I have made it clear in my submission on the Wellbeing of Future Generations Bill that the new legislation addresses weaknesses in the existing duty, which have been well documented through previous evaluations and effectiveness reviews.

I would be pleased to provide more detail and write formally in this respect in my Commissioner role in this respect if this is helpful.

Best wishes

Peter

Peter Davies

Comisiynydd Dyfodol Cynaliadwy / Sustainable Futures Commissioner

Cadeirydd Comisiwn Cymru ar y Newid yn yr Hinsawdd / Chairman Climate Change Commission for Wales

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Agenda Item 5.2

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